BEFORE THE SPECIAL PANEL OF THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S DISQUALIFICATION APPLICATION

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I. INTRODUCTION

1. On 30 September 2014, Nuon Chea filed an Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara ("Application")[1] alleging that Judges Nil Nonn, Ya Sokhan and You Ottara ("Cambodian Judges") lack independence; have a personal interest in Case 002/02; and have an appearance of bias. Nuon Chea further seeks the disqualification of Judge Jean-Marc Lavergne (collectively, "Judges") alleging there is an appearance of bias.[2]

2. The Co-Prosecutors respond that this Application should be dismissed outright. Nuon Chea fails to demonstrate either actual bias or reasonable apprehension of bias on the part of the Judges concerned. Much of the Application simply consists of Nuon Chea complaining that he does not agree with the findings of the Trial Chamber in Case 002/01, complaints which he is free to put before the Supreme Court Chamber on appeal, but which are wholly inappropriate in an application for disqualification of judges. Several of Nuon Chea's complaints are simply attempts to re-litigate prior Defence submissions, not open to appeal, that were long-since rejected by the Trial Chamber. The remaining complaints, as demonstrated below, are based on mischaracterisation of facts and misapplication of law. The Application is simply another volley in Nuon Chea's longstanding and illegitimate strategy to undermine the ECCC as an institution rather than confront the overwhelming evidence of his criminal responsibility.

II. APPLICABLE LAW

3. Internal Rule 34(2) provides that "any party may file an application for disqualification of a judge in any case […] concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias."[3] Pursuant to Internal Rule 34(3), such applications "shall clearly indicate the grounds and shall provide supporting evidence."[4]

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1 **E314/4** Decision of the JAC regarding the constitution of the bench following disqualification motions, 4 September 2014.
2 **E314/6** Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara, 29 September 2014 ("Application").
3 Internal Rule 34(2).
4 Internal Rule 34(3).

1. A presumption of impartiality attaches to the Judges regardless of the type of bias alleged

4. The ECCC has adopted international jurisprudence establishing that the starting point for any determination of whether there are grounds to disqualify a judge from a case is the presumption of judicial impartiality.[5] This presumption attaches to the Judges of the ECCC by virtue of their oath of office and the qualifications for their appointment.[6] The moving Party bears the burden of displacing a presumption, which imposes a high threshold.[7]

5. The ECCC has adopted the test used by other international tribunals,[8] under which the requirement of impartiality is violated not only where a Judge is actually biased ('subjective bias'), but also where there exists an appearance of bias ('objective bias').[9]

6. An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[10] The 'reasonable observer' is a hypothetical fair-minded person with sufficient knowledge of all of the relevant circumstances to make a reasonable judgment as to whether the impugned judge might not bring an impartial and unprejudiced mind to the issues arising in the case.[11] As part of this knowledge the reasonable observer is deemed to be aware of the traditions of judicial integrity and impartiality and of the fact that impartiality is one of the duties that Judges swear to uphold.[12] The U.S. Supreme

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5 **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary's application for disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011 (" **E55/4** 2011 Disqualification Decision") at para. 12.

6 Ibid.

7 Ibid.

8 *Prosecutor v. Anto Furundžija,* Case No. IT -95-17/I-A, Judgment (ICTY Appeals Chamber), 21 July 2000 *("Furundžija* Appeal Chamber Judgment") at para. 189.

9 **E55/4** 2011 Disqualification Decision, *supra note 5* at para. 11.

10 *Ibid.;* Furundžija Appeal Chamber Judgment, *supra* note 9 at para. 18*; Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC Doc. No. ICC-02/05-03/09-344-Anx, Decision of the plenary of the judges on the "Deference Request for the Disqualification of a Judge" of 2 April 2012, 5 June 2012 at para. 20.

11 *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, (ICTY Trial Chamber II), 18 May 2000 ("*Talić* Disqualification Decision") at para. 15.

12 *Furundžija* Appeal Chamber Judgment, *supra* note 9 at para. 190.

Court further held that "expressions of impatience, dissatisfaction, annoyance and even anger" do not establish bias or partiality.[13]

2. Judges can properly hear multiple cases raising common factual or legal issues; the potential for future adverse decisions does not give rise to bias

7. International jurisprudence has recognised consistently that a judge is not prohibited from participating in two separate criminal prosecutions that arise from the same series of events, even if the cases address overlapping questions of fact or law.[14] In *Galić*, the ICTY Bureau addressed judges' capabilities to sit on two or more criminal trials arising out of the same events:

> *Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict. Judges who serve as fact-finders may often be exposed to information about the cases before them either in the media or, in some instances, from connected prosecutions. The Bureau is not of the view that Judges should be disqualified simply because of such exposure. [...] The need to present a reasoned judgment explaining the basis of their findings means that Judges at the Tribunal are forced to confine themselves to the evidence in the record in reaching their conclusions.*[15]

8. The Trial Chamber has held that the question that needs to be answered is whether a Judge will be able to adjudicate the issues raised in the case with an impartial and unprejudiced mind.[16] In response to a motion to disqualify a judge in the *Šešelj case*, the ICTY President stated that judges can be expected to adjudicate their case exclusively on the evidence before them, disregarding any allegations made in other cases that may have a prejudicial effect on the accused.[17]

9. Domestic courts, regional courts and international criminal tribunals have adopted the view that the mere "expectation" that a judge may decide issues in a particular case adversely to one of the parties is not a ground for disqualification[18] even where the

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13 *Liteky et al. v. United States,* 510 U.S. 540 (United States Supreme Court) ("*Liteky et al.*") at p. 555-556.

14 **E55/4** 2011 Disqualification Decision, *supra note 5* at para. 15; *See Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF case, (Trial Chamber I), 6 December 2007 at para. 55.

15 *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Galić's Application pursuant to Rule 15(b) (ICTY Bureau), 28 March 2003 at para. 16.

16 **E55/4** 2011 Disqualification Decision, *supra note 5* at para. 15.

17 *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification (President), 16 February 2007, at para. 25.

18 *Re J.R.L.; Ex parte C.J.L.* (1986), High Court of Australia, 161 CRL 352 ("*Re J.R.L.*") at p. 352.

expectation is generated by previous decisions of the judge on issues of fact or law.[19] As set out by the High Court of Australia:

> *It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind.*[20]

10. This passage has been quoted with approval by, *inter alia*, the Constitutional Court of South Africa,[21] the ICTR in *Karemera*[22] and the ICTY in *Delalić et al.* ("*Čelebići*")[23] and *Brđanin and Talić*.[24] In *Karemera*, the ICTR went on to develop this principle further, stating that:

> *[W]hat must be shown is that the rulings are, or would reasonably be perceived as, attributable to a predisposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.*[25]

11. The European Court of Human Rights ("ECHR") has held that "[t]he mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his impartiality."[26] Thus, the issue is not whether judges will be likely to resolve common issues in the same manner as they were decided in the previous decisions, but rather whether they "bring an impartial and unprejudiced mind to the issues in the present case."[27] "A pre-disposition toward a certain resolution, when it is revealed through a judicial opinion, does not amount to bias."[28]

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19 *Ibid.*
20 *Ibid.*
21 *President of the Republic of South Africa v. South Africa Rugby Football Union*, Judgment on Recusal Application, Constitutional Court of South Africa, 1999 (7) BCLR 725 (CC) at para. 46.
22 *Prosecutor v. Edouard Karemera et al.,* Case No. ICTR 98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges (ICTR Bureau), 17 May 2004 ("*Karemera* Disqualification Decision") at para. 10.
23 *Prosecutor v. Zejnil Delalić, Hazim Delić, Esad Landžo and Zdravko Mucić*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001 at para. 707.
24 *Talić* Disqualification Decision, *supra* note 11 at para. 18.
25 *Karemera* Disqualification Decision, *supra* note 22 at para. 13.
26 *Case of Schwarzenberger v. Germany*, Application no. 75737/01, Judgment, European Court of Human Rights, 10 November 2006 ("*Schwarzenberger* Judgment") at para. 42.
27 *Talić* Disqualification Decision, *supra* note 11 at para. 19.
28 **E55/4** 2011 Disqualification Decision, *supra* note 5 at para. 15.

12. The ECHR has also held that judges are permitted to preside over two criminal cases arising from the same set of facts unless earlier judgments contain findings that "actually prejudge the question of the guilt of an accused".[29] To establish grounds for disqualification, such prejudgment would need to have involved a determination "*of all the relevant criteria necessary to constitute a criminal offence* and […] whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[30] Where a court understands that it is not pronouncing on the guilt of an accused, an appearance of bias is not established.[31]

3. A record of prior adverse decisions is insufficient to establish actual or appearance of bias

13. To substantiate an allegation of bias on the basis of a Judge's decision, it must be shown that the rulings are, or would reasonably be perceived to be attributable to a pre-disposition against the applicant, and not genuinely related to the application of law or the assessment of relevant facts.[32] In a disqualification decision at the ICTY it was held that "the presumption of a Judge's impartiality when dealing with evidence from prior proceedings applies regardless of whether the Judge previously made positive or negative assessments of the credibility of that evidence".[33] The fact that the Judge had "previously heard testimony from a witness regarding the same facts in dispute on appeal" and "made an assessment of the credibility of that testimony" is not a sufficient basis to justify disqualification.[34]

4. A judge can hear successive cases involving the same defendant

14. The severance of Case 002 has resulted in a *sui generis* situation. Jurisprudence dealing with judges having heard previous cases on related facts where the current accused person was not present nor represented are inapposite. In those cases the danger is that judges may have settled opinions without having given the accused his right to challenge the evidence and findings. However, Nuon Chea and Khieu Samphan fully

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29 *Poppe v. The Netherlands*, Judgment, ECHR *(32271/04)*, 24 March 2009 ("Poppe Judgment") at para. 26
30 *Ibid.* at para. 28 [emphasis added].
31 *Schwarzenberger* Judgment, supra note 26 at para. 43.
32 **E55/4** 2011 Disqualification, *supra note 5* Decision at para. 13; *Karemera* Disqualification Decision, *supra* note 23 at para. 13; *Re J.R.L., supra* note 18 at 352.
33 *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Drago Nikolić Motion to Disqualify Judge Liu Daqun (President), 20 January 2011 ("*Popović* Disqualification Decision") at paras. 3, 7-8, 10, and 12.
34 *Ibid.*

participated in trial proceedings in case 002/01. They had the opportunity to challenge all the evidence and present their own arguments before any findings were made. Case 002/02 is simply a further trial that arises out of separate sections of the same charging document. The situation is analogous to judges hearing a *voir dire* challenge to the voluntariness of an alleged confession. The fact that a judge at such a hearing finds the confession voluntary would not preclude the same judge from sitting at the trial where she or he determines what weight to give to the confession.

15. Moreover, it is routine practice in domestic courts for the same judge to hear multiple cases against a defendant. In *Liteky et al v. United States*, the Supreme Court held "[i]t has long been regarded as normal and proper for a judge to sit in [...] successive trials involving the same defendant."[35] Thus the prior findings of a judge in a separate, albeit related, case against the same accused do not give rise to an appearance of bias such as to necessitate the disqualification of the judge.[36] In *Illinois v. Jeffrey Vance*, the defendant, charged with possession of an illegal hallucinogen, had previously been convicted of another drug charge by the same trial judge. The court held:

> *It is clear that ordinarily the fact that a judge has ruled adversely to a defendant in either a civil or a criminal case does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party. [...] The fact that a judge believes the evidence in a case establishes the guilt of a defendant beyond a reasonable doubt and so holds is, of course, no indication that the judge is prejudiced against that defendant.*[37]

16. Similarly, it has been held that it is not a ground for disqualification that a judge heard a case after the Appeals Chamber sent it back for a new trial. The United States Court of Appeals for the Ninth Circuit has held that "[t]he fact that the trial judge in the original trial was also the trial judge in the second trial is insufficient to establish bias and prejudice."[38] Again, in *Welch v. The State*, the Supreme Court of Georgia rejected the argument that the trial judge should have been disqualified because he was the trial judge in the defendant's earlier trial in which he had sentenced the defendant to death.[39]

III. ARGUMENT

1. Preliminary matters

35 *Liteky et al., supra* note 13 at p. 551.
36 *Liteky et al., supra* note 13 at p. 551.
37 *People v. Vance*, 76 Ill.2d 171, 28 Ill.Dec. 508, 513, 390 N.E.2d 867, 872 (1979).
38 *Poland v. Stewart*, [1997] 117 F.3d 1094, 97 Cal. Daily Op. Serv. 4854, 97, D.A.R. 7958. at para. 65.
39 *Welch v. The State*, 257 Ga. 197 (1987) 357 S.E.2d 70.

(a) Disguised appeal and issues already settled

17. An application for disqualification is not an appropriate vehicle to re-litigate prior decisions of the Trial Chamber relating to Case 002/01. Throughout the Application, Nuon Chea raises substantive issues that supposedly amount to *indicia* of appearance of bias, such as the Judges' "lack of open-mindedness" towards evidence and submissions offered by the Defence, alleged errors in the Case 002/01 Judgment and the Judges over-reliance on expert testimony.[40] Such issues are either properly raised on appeal, as Nuon Chea has concurrently sought to do through his Notice of Appeal,[41] or amount to mere attempts to re-litigate prior disqualification applications[42] already rejected by the Trial Chamber and not open to further appeal. To raise such issues again before the Special Panel is neither consistent with principles of judicial economy nor the hierarchy of chambers established within the ECCC.

(b) Burden and standard of proof

18. The burden of proof for all disqualification applications rests with the moving Party. It is well-established that there is a high threshold that must be reached in order to rebut the presumption of impartiality.[43] In *Furundžija*, the ICTY Appeals Chamber emphasised that it is for the Appellant to adduce sufficient evidence to satisfy the Chamber that a Judge is not impartial in his case and that "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be firmly established."[44]

19. Nuon Chea correctly states that in order to establish actual bias, the moving party has to rebut the presumption of impartiality attached to a judge.[45] However, he misstates the

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40 For example, see **E314/6** Application, *supra* note 2 at paras. 61-69, 127, 129-133.

41 For example, see **E313/1/1** Notice of Appeal against the Judgment in Case 002/01, 30 September 2014, Grounds 6, 30, 39 and 200.

42 In the **E55/4** 2011 Disqualification Decision, a specially composed bench already held that the involvement of Judges Nil Nonn, Ya Sokhan and Jean-Marc Laverge in the Case 001 trial and judgment did not amount to a disqualifiable predetermination of the guilt of the Accused. Therefore, the Defence's attempt to re-litigate this issue should be prevented, and paragraphs 115-121 of the Defence Application should be disregarded. *See* **E55/4** Disqualification Decision, *supra note 5* at paras. 115-121.

43 **E55/4** 2011 Disqualification Decision, *supra note 5* at para. 12; Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, C11/29, 4 February 2008 at para. 8; *Karemera* Disqualification Decision, *supra* note 22 at para. 10.

44 *Furundžija* Appeal Chamber Judgment, *supra* note 9 at para. 197; see also Mason J, in *Re J.R.L.*, *supra* note 18 at p. 353; followed in *Re Polities*; *Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448.

45 **E314/6** Application, *supra* note 2 at para.19.

law when asserting that the presumption of impartiality does not apply when the allegation is an appearance of bias as opposed to actual bias.[46] Nuon Chea refers to a decision of the SCSL Appeals Chamber which held that "the threshold for an appearance of bias does not require proof of actual bias"[47] and that if there are "some indicia of bias, the logical and reasonable conclusion must be that the judge is disqualified."[48] Contrary to the assertion at paragraph 19 (footnote 24) of the Application, the SCSL Appeals Chamber did not point out that rebuttal of the presumption of impartiality is unnecessary when arguing appearance of bias. To the contrary, the Appeals Chamber evaluated whether the moving party had rebutted the presumption of impartiality and came to the conclusion that no objective *appearance of bias* has been established due to *appellant's failure to rebut the presumption*, thereby accepting that the burden of rebutting the presumption of impartiality applied equally when arguing appearance of bias.[49]

2. Nuon Chea fails to satisfy the threshold to establish actual or apprehension of bias

(a) Nuon Chea fails to establish the personal interest of the National Judges in Case 002/02

20. Nuon Chea argues that the National Judges have "a personal interest" in the case against him,[50] as a result of an allegation that one or more of the National Judges have "direct experience of matters at issue in Case 002",[51] which, he argues, give rise to an unacceptable appearance of bias or actual bias and as such should be disqualified from Case 002/02.[52]

21. Nuon Chea's allegations of the personal bias on the part of the National Judges arise from comments made by former Judge Silvia Cartwright at the Aspen Institute on 7 November 2013 ("Aspen Comments"),[53] in which she stated that:

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46 *Ibid.*
47 *Ibid.*; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF case (Appeals Chamber), 24 January 2008 at paras. 9, 12-13.
48 *Ibid.*
49 **E314/6** Application, *supra* note 2 at para. 14.
50 *Ibid.* at p. 16, section C.
51 *Ibid.* at para. 54.
52 *Ibid.* at paras. 53-60.
53 **E305/12.38R**, 'Trying Atrocity Crimes:The Khmer Rouge Trials, Transitional Justice, and the Rule of Law' 2013 ("Aspen Comments").

a. an unnamed National Judge had been mistakenly arrested as a Lon Nol Soldier in Phnom Penh and later released; worked on a dam site whose head was later allegedly killed at S-21; and was a victim of forced marriage[54]; and

b. that an unnamed National Judge was allegedly made to work in a children's brigade during the DK period[55] (collectively, the "Alleged Victim Experiences").

22. The Co-Prosecutors are unable to respond to the accuracy of the Alleged Victim Experiences identified by Judge Cartwright. Nuon Chea provides no direct evidence to support the allegations made beyond the comments of Judge Cartwright which – as the Co-Prosecutors argue below – amounts to mere speculation that Nuon Chea has taken out of context. No locations or crimes sites have been specified to assess whether any Alleged Victim Experiences occurred at sites within the scope of Case 002/02 (apart from the alleged forced marriage, which is being heard of a nationwide basis). The relevant National Judge(s) have not been identified. Furthermore, the Co-Prosecutors can find no evidence that the Alleged Victim Experiences are reflected in the Case File, from which all evidence to be put before the Chamber in Case 002/02 will be drawn.

23. Even if a judge was a victim of conduct falling inside the scope of Case 002/02, Nuon Chea readily concedes that such experience would not automatically lead to disqualification.[56] In order to demonstrate a lack of open-mindedness by a Judge, it must be shown that he or she had predetermined or prejudged Case 002/02 against Nuon Chea "without reference to an evaluation of the evidence in each individual case"[57] and that such a Judge would have "difficulty in applying the current jurisprudence" [58] within the Trial Chamber. This is not the case here.

24. The Aspen Comments, when reviewed in their surrounding context, neither disclose actual bias through personal interest of the National Judges, nor reasonable apprehension of bias. Judge Cartwright's words merely reflected her personal speculation as to the intimate thoughts and feelings her colleagues on the bench in Case 002/01, and sounds and comments made in the Khmer language – which she states she

54 **E314/6** Application, *supra* note 2 at para 53.
55 *Ibid.*
56 *Ibid.* at para. 54.
57 *Prosecutor v. Vojislav Šešelj,* Case IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President (ICTY Chamber convened by order of the Vice-President), 28 August 2013 at para 13.
58 *Ibid.*

does not understand – during the course of trial proceedings. Judge Cartwright's words were, in fact, "*I can't understand what they are saying*, but *I imagine* its very rude comments about some of the evidence, and you can hear them sort of growling in antagonism to some of the things their hearing."[59] In any event, judges are entitled to find evidence not credible. Displaying such a reaction to evidence would not show bias.

25. Mere reactions from the bench, that may or may not amount to expressions of disagreement or a belief that a Party's evidence is not credible, are not sufficient to meet the high standard of proof required to demonstrate bias. As the United States Supreme Court has held, "expressions of impatience, dissatisfaction, and even anger" will not establish judicial bias.[60]

26. The Defence then argues that the National Judges have expressed *Kyprinaou*-like "indignation" throughout Case 002/001 trial by making "very rude comments"[61] and "growling in antagonism",[62] coupled with the a lack of open-mindedness towards the Defence's evidence and submissions.[63] The comments made by Judge Cartwright are clearly distinguishable from *Kyprianou.*[64] In *Kyprianou* the ECHR Grand Chamber found that the Judges in the Limassol Assize Court (Cyprus) "had taken grave personal offence"[65] and perceived the conduct of Kyprianou – an advocate – as an "affront to their personal dignity",[66] as evidenced by the fact that judges described Kyprianou's conduct as contempt of court, stated that the conduct had been "utterly unacceptable" and only provided Kyprianou with the opportunity to speak for the purposes of the mitigation of sentence and not in response to the charge of contempt.[67] The mere suppositions of Judge Cartwright, even if accurate, are a far cry from the tone and content at issue in *Kyprianou.*

27. Were the National Judges disqualified in these circumstances, there would be few, if any, other Cambodian nationals who would not similarly be disqualified, the effect of which would cloak Nuon Chea with impunity for core international crimes. Cambodia

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59 Aspen Comments, *supra* note 53 at 46:45.
60 *Liteky et al., supra* note 13 at p. 555.
61 Aspen Comments, *supra* note 53 at 46:45.
62 *Ibid.*
63 **E314/6** Application, *supra* note 2 at para. 59.
64 *Kyprianou v. Cyprus*, ECtHR, App. No. 73797/01, 15 Dec 2005.
65 *Ibid.* at para. 77.
66 *Ibid.*
67 *Ibid.* at para. 78.

– as a State Party to the *Geneva Conventions*;[68] the *Genocide Convention;*[69] the *Rome Statute of the International Criminal Court*[70] and the UN/RGC Agreement forming the international legal basis for the establishment of the operation of the ECCC – has an obligation to prosecute and punish those who have committed international crimes including grave breaches of international humanitarian law, genocide, and crimes against humanity.[71] It would appear this is what Nuon Chea seeks to achieve: a judicial statement that no-one among his "beloved Cambodian people and the Khmer children"[72] is fit to judge his criminal conduct, and *de facto* impunity for the crimes for which he is responsible.

(b) An unfounded personal attack on Judge Lavergne fails to establish any bias

28. Nuon Chea alleges that Judge Lavergne failed to act with "judicial moral integrity"[73] and reached a "cowardly conclusion"[74] when he failed to acquit Nuon Chea. He claims that given Judge Lavergne's minority opinion in the Final Witness Decision[75] where he disagreed with his Cambodian colleagues decision not to summon a witness, Heng Samrin, to testify, he was obligated to acquit. The argument is devoid of any intellectual or moral merit. A party cannot ethically seek the disqualification of a judge, alleging bias, merely because they lose a case. The evidence in Case 002/01 was overwhelming. If Nuon Chea truly believed the evidence was insufficient and an acquittal was required, he can challenge his conviction on appeal. The fact Nuon Chea chooses to do so in an application to disqualify a Judge, alleging cowardice, merely shows a lack of confidence in his own arguments.

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68 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in in Armed Forces in the Field, 75 UNTS 31 ("GC I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 ("GC II"); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 ("GC III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 ("GC IV") (collectively, the "Geneva Conventions")

69 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 ("Genocide Convention").

70 Rome Statute of the International Criminal Court, 2187 UNTS 90.

71 GC I, *supra note 68*, Art. 49, GC II, *supra note 68*, Art. 50, GC III, *supra note 68*, Art. 129, GC IV, *supra note 68*. Art. 146; Genocide Convention", *supra note 69*, Art. VI; Rome Statute, *supra note 70*, Preamble, Fifth Recital.

72 **E1/14.1** Transcript, 22 November 2011 at 13.51.17 [Nuon Chea].

73 **E314/6** Application, *supra* note 2 at para. 132.

74 *Ibid.*

75 *Ibid.* at para. 130.

29. Nowhere in the motion or in the trial did the defence for Nuon Chea ever point to any facts that Heng Samrin would testify to that could possibly have led to his acquittal on any of the charges. Rather, the evidence they point to has only added to the already overwhelming evidence of his guilt. The fact that Heng Samrin told author Ben Keirnan that in May 1975, Nuon Chea had told CPK cadre to "scatter" Lon Nol forces merely adds to the evidence of the CPK policy to kill former Lon Nol officers, as in this context, when Nuon Chea said "scatter" it could only have been understood as an order to kill. This was confirmed at trial by expert witness Stephen Heder, who testified that the word "*komchat*" meant, in this context, "get rid of, eliminate".[76] The argument that Heng Samrin would have provided critical character evidence exonerating Nuon Chea is even more ridiculous. The defence never explains what basis they have to expect that Heng Samrin, who Nuon Chea accuses of conspiring with foreign adversaries against him and the rest of the CPK leadership, would provide favourable evidence as to Nuon Chea's character. The argument is transparent gamesmanship.

(c) The Defence fails to satisfy the threshold to establish bias on the grounds of prior adverse decisions

30. The Co-Prosecutors submit that (a) the findings of Judges Nonn, Sokhan and Lavergne in the *Duch* Judgment, and (b) the findings of the Trial Chamber in the Trial Judgment on factual issues potentially relevant to Case 002/02 do not give rise to an appearance of bias with respect to Case 002/02. These grounds are addressed in turn.

(i) Findings of Judges Nonn, Sokhan and Lavergne in Case 001

31. Nuon Chea asserts that certain factual findings of Judges Nonn, Sokhan and Lavergne in the Case 001 Judgment give rise to an appearance of bias relevant to Case 002/02. As a result, he argues, Judges Nonn, Sokhan and Lavergne should be disqualified on the basis that a reasonable observer would not believe that they could decide the same issues impartially in Case 002/02. The Co-Prosecutors submit that the threshold for establishing an appearance of bias has not been met and that Nuon Chea's arguments should be rejected in their entirety.[77] The Trial Chamber has previously denied similar

[76] **E1/224.1** Transcript, 16 July 2013, Stephen Heder, 15.15.32 to 15.19.30.
[77] See para. 6, above.

Applications in relation to the disqualification of the Judges from Case 002 prior to severance.[78]

32. The crux of Nuon Chea's argument rests upon an erroneous interpretation of the term "prejudgment of guilt".[79] The submission that "it is not necessary for a judge to prejudge each and every element of a crime of which the accused is charged"[80] is not established law.[81] In support of their interpretation, the Defence cites *Poppe* and the Dissenting Opinion of Judge Buergenthal during proceedings in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion of the International Court of Justice. Nuon Chea misrepresents the law in *Poppe*,[82] by omitting from his submission that "all the relevant criteria necessary to constitute a criminal offence, and if so, whether the applicant was guilty, beyond reasonable doubt of having committed such an offence" will be required in order to prejudge the guilt of the accused.[83] Furthermore, the Buergenthal Dissenting Opinion in the *Palestinian Wall* case arose in a highly-charged political context as the sole dissenting opinion on a bench of 15 judges.[84] Accordingly, little weight should be given to this dissenting opinion.

33. Nuon Chea attempts to distinguish his argument from his First Disqualification Application,[85] stating that his "new focus" is factual findings made in the Case 001 Trial Judgment.[86] He asserts that factual findings, particularly concerning: (i) executions at S-21; (ii) possibility of release from S-21; (iii) the alleged "smashing policy"; (iv) interrogations; (v) torture; and (vi) execution, indicate that Judges Nonn, Sokhan and Lavergne have predetermined issues which must be established anew in Case 002/02.[87]

34. Nuon Chea incorrectly states that findings made in Case 001 "may indeed go towards establishing an unacceptable appearance of bias even if they do not demonstrate a

78 *See,* **E55/4** 2011 Disqualification Decision, *supra note 5*.
79 **E314/6** Application, *supra* note 2 at para. 30.
80 *Ibid*. at paras. 30, 116.
81 See para. 12, above; *Poppe* Judgment, *supra* note 29 at para. 28.
82 **E314/6** Application, *supra* note 2 at para. 116.
83 *Poppe* Judgment, *supra* note 30 at paras. 26, 28.
84 *See, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("Palestinian Wall"), Diss. Op. of Judge Buergenthal on 'Order of 30 January 2004', 2004 ICJ Rep. 7, 30 Jan 2004 ("Buergenthal Opinion") at paras. 11, 13.
85 **E54** Urgent Application for Disqualification of the Trial Chamber Judges, 24 February 2011 ("First Defence Disqualification Application").
86 **E314/6** Application, *supra* note 2 at para. 119.
87 **E314/6** Application, *supra* note 2 para. 120.

prejudgment of each and every element of a charged crime".[88] It is established in international jurisprudence that a prejudgment of each and every element of a charged crime is required in order to give rise to an unacceptable appearance of bias.[89] The mere fact that Judges Nonn, Sokhan and Lavergne have made prior factual findings on issues potentially relevant to Case 002/02 does not indicate that they will be unable to bring an impartial and unprejudiced mind to the issues in the present case, and is thus insufficient evidence to establish an apprehension of bias.[90]

35. In *Popović*, a factually comparable case, the Accused's motion to disqualify a Judge from the appeal of his conviction was denied.[91] The Accused argued that the Judge, having presided over two prior, albeit factually-related, cases had already made a positive assessment of the credibility of the Prosecution's key witness. This assessment related to *exactly the same facts* on which the Accused had testified in the present case, and such facts had given rise to the Accused's appeal. Hence, the Accused argued, there was a sufficient appearance of bias for disqualification. The ICTY President held that the presumption of a Judge's impartiality when dealing with evidence from prior proceedings will apply, regardless of whether the Judge has previously made positive or negative assessments of the credibility of that evidence. As such, the fact that the Judge had previously assessed the credibility of a witness regarding the same facts in dispute on appeal was not in itself a sufficient basis to require disqualification.[92] On this basis, the Co-Prosecutors submit that any nexus between Judges Nonn, Sokhan and Lavergne's findings in the Case 001 Judgment and facts to be determined in Case 002/02 would not raise an apprehension of bias.

36. Nuon Chea then attempts to re-litigate an argument from his First Disqualification Application, namely, that the *chapeaux* elements for crimes against humanity and grave breaches at S-21 have been established beyond reasonable doubt, and thus amount to a predetermination of issues significant to Case 002/02.[93] Incorporating by reference their previous response, the Co-Prosecutors submit that Nuon Chea has failed to show that

88 *Ibid.* at para 117.
89 *Poppe* Judgement, *supra* note 29 at para. 28.
90 Case of Schwarzenberger Judgment, supra note 26 at para. 42.
91 *Popović* Disqualification Decision, *supra* note 33.
92 *Ibid.* at paras. 3, 7-8, 10, 12 [emphasis added].
93 **E314/6** Application, *supra* note 2 at paras. 119, 121; **E54** First Defence Disqualification Application, *supra* note 84 at paras. 27-29.

"*all the relevant criteria necessary to constitute a criminal offence*"[94] on behalf of the Accused in relation to S-21 has been prejudged.[95] This is conceded in the Application itself, where Nuon Chea argues, "All that remains for the OCP to prove Nuon Chea guilty in Case 002/02 is to link him to this 'system of ill-treatment' of S-21".[96] Leaving aside the fact that the Co-Prosecutors have made no application for judicial notice of adjudicated facts from Case 001 in Case 002/02, without a prejudgment of guilt of the Accused, beyond reasonable doubt, of having committed a criminal offence in relation to S-21,[97] Nuon Chea fails to meet the threshold for an appearance of bias on the part of Judges Nonn, Sokhon and Lavergne.

(ii) Findings of the Trial Chamber in Case 002/01

37. Nuon Chea alleges that the Judges' findings in Case 002/01 regarding, *inter alia*, the structure of the CPK, the existence of a policy to regulate marriage, reference to demographic analysis, and "reliance" on the Case 001 Judgment to define "smash" would lead a reasonable observer to question the Judges' impartiality in Case 002/02.[98] None of these findings amount to a determination of Nuon Chea's individual criminal responsibility on any of the charges in Case 02/02. A reasonable observer, aware of the effects, rationale and consequences of the severance of Case 002, would not apprehend bias on the part of the Judges behalf based on factual findings from Case 002/01 potentially relevant to Case 002/02.

38. *Structure of the CPK:* Nuon Chea alleges that "erroneous" findings and "unreasonable omissions" made by the Trial Chamber in relation to the structure of the CPK demonstrate a lack of open-mindedness on an issue of critical importance. [99] This argument is without basis. The fact that the Chamber, having heard the all evidence and considered the arguments before it, made a finding adverse to the Accused, is not a

94 *Poppe* Judgment, *supra* note 29 at para. 28 [emphasis added].
95 **E55** Co-Prosecutors' Joint Response to Ieng Thirith, Ieng Sary and Nuon Chea's Applications for Disqualification of the Judges, 23 February 2011 at paras. 9-10.
96 **E314/6** Application, *supra* note 2 at para. 121.
97 See para. 12, above; *Poppe* Judgment, *supra* note 29 at para. 28.
98 **E314/6** Application, *supra* note 2 at para. 71.
99 *Ibid.* at paras 78-80.

ground for disqualification.[100] Accordingly, such arguments – however spurious – are properly pleaded on appeal.[101]

39. *Existence of a policy to regulate marriage:* Findings relating to the existence of a policy to regulate forced marriage are contained in a section of the Case 002/01 Judgment titled "Historical Background".[102] The Chamber explained that "the evidence discussed in this section is for the purpose of establishing the historical and factual context of events within the temporal jurisdiction of the ECCC".[103] This is in line with previous clarification from the Chamber :

> *From the outset of Case 002/01, the Chamber informed the parties that they could lead evidence in relation to all five policies as background but that the Chamber would examine the implementation of only those policies relevant to Case 002/01 (*i.e. *forced movement and execution of purported enemies of the regime.*[104]

40. While the Chamber found that the regulation of marriage was a CPK policy, "evidence concerning the nature and implementation of the policy of regulation of marriage, and its extent will be the subject of Case 002/02".[105] The finding of a CPK policy without determining if, when and where it was implemented and whether Nuon Chea is personally responsible for the implementation does not amount to a prejudgment of guilt.

41. *Reference to demographic analyses:* The Trial Judgment makes no factual findings in relation to the demographic analyses of the DK period. The paragraph quoted by Nuon Chea is located within the "General Overview" section of the Trial Judgment, the purpose of which was to address "*address briefly* both the factual allegations charged as crimes against humanity in Case 002/01 and the allegations concerning the larger context of the attack in which these crimes were committed".[106] Nuon Chea's argument overlooks the fact that the number of deaths in relation to specific crime sites will be

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100 See paras. 9, 11, above; *Re J.R.L.* Decision, *supra* note 18 at p. 352.
101 See para. 17, above.
102 **E313** Case 002/01 Judgment, 7 August 2014 ("**E313** Case 002/01 Judgment") at paras. 79, 128-131.
103 *Ibid.* at fn. 195.
104 *Ibid.* at fn 287. The Chamber informed the Parties of the inclusion of the five policies for background and contextual purposes as early as 8 October 2011: see **E124/7** Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (**E124/2**) and Related Motions and Annexes, 8 October 2011 at para. 11. ["[i]t follows that the Chamber during the early trial segments will give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment"].
105 *Ibid.* at para. 130.
106 **E313** Case 002/01 Judgment, *supra* note 102 at para. 168 [emphasis added].

examined in Case 002/02. He will have the opportunity to lead further evidence in relation to this issue. To the reasonable observer, the fact that the Chamber has made reference to demographic analyses of the DK does not disclose apprehension of bias.

42. *Reliance on Case 001 to define "smash"*: References to the term "smash" are located within the "Historical Background" section of the Trial Judgment. The Trial Chamber relied on a multitude of sources for the purposes of defining "smash". The evidence from the Duch Judgment was cited along with a number of witness and expert testimonies heard in Case 002/01.[107] The Trial Chamber has not relied upon the Duch Judgment to establish the elements of crimes or guilt of the Accused. The reference in two footnotes in a 600 page judgment to a prior judgment, along with several evidence references, even if an error, fails to show that the Judges are not able to bring an "impartial and unprejudiced mind" to the trial of Case 02/02.[108]

43. In sum, the core issue is *not* whether the Judges will resolve common issues in Case 002/02 in the same way as they were decided in Case 002/01. The mere chance, or even likelihood, that the Judges will decide issues in Case 002/02 in the same way as in previous judgments is not a ground for disqualification.[109] What must be shown, and Nuon Chea fails to show, is that the Judges, having participated in the previous case, will "bring an impartial and unprejudiced mind to the issues in the present case."[110] As summarised by the Trial Chamber, "[a] pre-disposition toward a certain resolution, when it is revealed through a judicial opinion, does not amount to bias."[111]

(d) The Defence fails to satisfy the threshold to establish bias on the grounds of prior findings on the mode of liability of joint criminal enterprise

44. Nuon Chea asserts that prior findings as to the existence, the establishment and the development of the policies of the Joint Criminal Enterprise ("JCE") charged in Case 002/02 are "critical issues bearing on the alleged guilt" of the accused and that consequently, these factual issues must be established anew in Case 002/02 despite

107 *Ibid.* at para 2014, fn. 326, 330.
108 See para. 6, above.
109 *Re J.R.L.*, *supra* note 18 at p. 352.
110 *Ibid.*
111 **E55/4** 2011 Disqualification Decision, *supra note 5* at para. 15 citing *Karemera* Disqualification Decision, *supra* note 22 at para. 15 ["The possibility that, having previously decided the relevant issues on the merits, Judges Byron and Kam are pre-disposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality"].

having been determined in Case 002/01.[112] He asserts that numerous findings included in the Trial Judgment amount to either predetermination of issues bearing on the alleged guilt of the accused in Case 002/02, or a preformed unfavorable view of the Defence case, which gives rise to an appearance of bias.[113] His submission is that the Judges' alleged predetermination arising from the Case 002/01 Judgment gives rise to an unacceptable appearance of bias and the Judges should therefore be disqualified.[114]

45. The Co-Prosecutors readily acknowledge that the Supreme Court Chamber has determined that it will not be acceptable for the Trial Chamber to import any attribution of criminal responsibility into any future trials, before finality of the Case 002/01 Judgment.[115] The Supreme Court Chamber acknowledged the commonality of certain evidence, but emphasised that such commonality does not extend to findings, and that common factual elements in all cases resulting from Case 002 must be established anew.[116] The Supreme Court Chamber further held that at this time "it can only assume that the Trial Chamber will not make findings in Case 002/01 which would evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent case".[117] The Co-Prosecutors submit, first, that the Trial Chamber refrained from making such findings and that the findings in the Trial Judgement do not attribute criminal responsibility to Nuon Chea in relation to charges to be heard in Case 002/02. As such, no actual or reasonable apprehension of bias based on the Judges' prior findings on the existence and scope of the JCE contained in the Case 002/01 Judgment can be established.

46. In order to establish grounds for disqualification, earlier judgments must contain findings "that actually prejudge the question of the guilt of an accused".[118] Such prejudgment is not simply present if judges have made findings related to issues in an earlier case. In order to establish prejudgment, those findings would need to have involved a determination "of all the relevant criteria necessary to constitute a criminal

112 **E314/6** Application, *supra* note 2 at para. 100.
113 *Ibid.* at para. 93.
114 *Ibid.* at para. 100.
115 **E301/9/1/1/3** Decision on Khieu Samphan's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and the Scope of Case 002/02, 29 July 2014 at para. 85.
116 *Ibid.*
117 *Ibid.*
118 *Poppe* Judgment, *supra* note 29 at para. 26.

offence and [...] whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[119]

(e) The Defence fails to satisfy the threshold to establish bias on the grounds of reliance on expert testimony

47. Nuon Chea argues that the Judges have demonstrated lack of professional integrity by heavily relying on expert testimony.[120] As he concedes, a disqualification procedure is not the place to assess the legal merits of the alleged extensive reliance of expert testimony.[121] Internal Rule 31(b) allows the Chamber to seek expert testimony and to assess the information provided.[122] The mere fact that the Case 002/01 Judgment includes several references to expert testimony is not sufficient to establish an appearance of existing or future bias, as a reasonable observer, properly informed of the applicable rules of procedure and evidence would not be able to apprehend bias.

(f) The Defence fails to satisfy the threshold to establish bias on the grounds of use of language and punctuation

48. Nuon Chea challenges the use, in the Trial Judgment, of "skeptical [*sic*] adjectives", "ironic quotation marks", "selective use of quotation marks to signal skepticism [*sic*] towards evidence", and "pejorative nouns",[123] alleging that the use of these English-language stylistic techniques discloses a reasonable apprehension of bias when addressing issues central to his defence theory, including the threat from internal and external enemies, CPK policies and actions, the actions and politics of the Lon Nol regime and the role of King Father Norodom Sihanouk.[124] The Co-Prosecutors submit that the use of language and punctuation adopted by the Trial Chamber in the Trial Judgment does not convey a lack of open-mindedness towards evidence or submissions, and does not amount to an appearance of bias on the part of the Judges meriting disqualification.[125]

49. The Defence claim to object to language and punctuation, but in reality attempt to challenge the conclusions reached by the Chamber. As discussed in prior sections, the

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119 *Poppe* Judgment, *supra* note 29 at para. 28.
120 **E314/6** Application, *supra* note 2 at para. 129.
121 Ibid.
122 Internal Rule 31 (b).
123 **E314/6** Application, *supra* note 2 at para. 62.
124 *Ibid.* at paras. 62- 67.
125 *Ibid.* at para. 62.

mere fact that the Chamber made factual findings adverse to Nuon Chea in the Trial Judgement does not establish the existence of an appearance of bias, since the Chamber made such findings after applying the law to evidence presented during trial.[126] Such issues are therefore properly raised on appeal, not before the Special Panel, which is not seised of substantive issues concerning the Trial Judgment.

50. The use of scepticism, irony, quotation marks and "pejorative" nouns are common practice in judgments. Judgments often refer to the vocabulary adopted by the Parties in their own submissions. This is also the case for the Trial Judgment. Such stylistic and editorial techniques are either used: (a) to indicate subjective language particular to a Party concerning which the Trial Chamber is refraining from making a factual finding; or (b) as a form of shorthand to reference language reflecting prior factual findings by the Chamber in the Trial Judgement.

51. The use of the language and punctuation techniques is *entirely appropriate* where the Chamber does not wish to endorse or reject the meaning of subjective language in use by the Parties. For example, the Defence challenges the use of quotation marks in relation to the word "enemies."[127] The use of quotation marks in this instance simply indicates that when using the word "enemies," the Chamber is not endorsing, nor is it adopting, the Khmer Rouge's subjective definition of the term. It is not uncommon for a Chamber to utilise quotation marks and other language techniques when it must discuss but wishes to distance itself from a particular mode of argument or description of facts about which it has not made a dispositive factual finding. For example, in a leading Holocaust-denial case on a criminal charge of "spreading false news", the Supreme Court of Canada used quotation marks liberally where terms were found to represent actual or hypothesised perceptions or viewpoints.[128] Similarly, a United States District Court League expressly justified its use of ironic quotation marks (referred to as "scare quotes") when referring to the "standing" of the defendant because the trial judge found the use of this term "was not the best way to describe the argument that defendants make in their motion."[129]

126 *Ibid.*; **E313** Case 002/01 Judgment, *supra* note 102 at fn. 384.
127 *Ibid.* at para. 63; **E313** Case 002/01 Judgment, *supra* note 102 at para. 908.
128 *R v. Zundel*, 1992 2 SCC 731 (Supreme Court of Canada) at pp. 752-753.
129 *United Latin Am. Citizens (Lulac) of Wisconsin v. Deininger*, 12-C-0185 (E.D. Wis. Sept. 17, 2013) at 1 (United States District Court).

52. The use of the language and punctuation techniques is similarly *entirely appropriate* as a form of shorthand to reference language reflecting prior factual findings by the Chamber. For example, the Chamber states in the Trial Judgment that it does not endorse the "meaning indicated by Khmer Rouge usage of" the term "liberate," and the Chamber places the term in quotations to specifically indicate unwillingness to do so.[130] The Chamber's preference not to footnote similar statements upon each use of quotation marks or other language techniques is a routine editorial decision justified by the length and complexity of the Trial Judgment. In sum, the Defence's submissions on the use of language and punctuation disclosing actual or apprehension or bias are frivolous in the context of a disqualification application.

3. The structure and functioning of the Supreme Council of the Magistracy does not disclose actual or apprehension of bias

53. The ECCC is insulated from the broader Cambodian justice system, being neither placed within the hierarchy of the ordinary courts or exercising powers of review over them.[131] ECCC Judges, including National Judges, benefit from functional immunity "legal process" (including disciplinary process) in the exercise of their functions.[132] As such, they are not subject to the ordinary disciplinary process for Cambodian judges in the exercise of their functions at the ECCC.

54. The argument raised by Nuon Chea that "the members of Supreme Council of Magistracy include four executive appointees"[133] is erroneous and unfounded. At the outset, the Defence argument does not take account of amendments to the Law on Organization and Functioning of the Supreme Council of the Magistracy, which were enacted on 16 July 2014, including changes to the composition of the Supreme Council of the Magistracy ("SCM") which have not yet been implemented. For this reason, the Co-Prosecutors respond on the basis of the law as it was enacted on 22 December 1994, as cited by the Defence.

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130 **E313** Case 002/01 Judgment, *supra* note 101 at fn. 384.
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132 UN/RGC Agreement, Art. 20(1).
133 **E314/6** Application, *supra* note 2 at para. 43, fn 69.

55. The SCM has nine members[134], comprising His Majesty the King, as chair, the Minister of Justice, President of the Supreme Court, the Prosecutor-General attached to the Supreme Court, the President of the Appeal Court, the Prosecutor-General attached to the Appeal Court and three other judges elected by the judges, as members. The Minister of Justice is merely one of the members of the SCM and thus has no power whatsoever to appoint the three National Judges as Nuon Chea alleges. On the contrary, only His Majesty the King has the power to appoint all members of the Council of Magistracy by Royal Degree, as guarantor of the independence of judiciary.[135]

56. The SCM makes decisions recommending action to His Majesty the King regarding the appointment, transfer, disruption of (actual) functions, suspension, removal from the ranks or removal of title, for all Cambodian judges and prosecutors.[136] Concerning the matter of disciplinary actions to be taken against the judges and prosecutors, the SCM convenes in the form of a Disciplinary Council, and under the chairmanship of the President of the Supreme Court or the Prosecutor-General attached to the Supreme Court, depending on whether such case of disciplinary action is to be dealt with the judge or prosecutor. The National Judges, in the hypothetical event of their facing disciplinary action in connection with their functions in the ordinary Cambodian courts, would face a panel in which the National Co-Prosecutor plays no part. In such cases, His Majesty the King and the Minister of Justice do not attend the meetings.[137] Decisions of the SCM shall be based on the majority of votes of the members present through secret ballot.[138]

57. The concern that the incumbent judges in the SCM who are appointed as judges at the ECCC may affect decisions or unduly influence other judges at the ECCC is not well founded. By virtue of the various Articles in the Law on the Organization and Functioning of the Supreme Council of Magistracy, it is clear that the formalities and procedures regarding appointment, transfer, disruption of (actual) functions, suspension, removal from the ranks or removal of title and promotion are clearly defined, such that no any member of the SCM may act arbitrarily in breach of principles and measures set out in the law. Moreover, the ECCC Law does not say anything concerning the

134 Art. 2, Law on the Organization and Functioning of Supreme Council of Magistracy, dated 22 December 1994 ("SCM Law").
135 Art. 132 new, The Constitution of the Kingdom of Cambodia, 1993.
136 SCM Law, *supra* note 132, Art. 11.
137 *Ibid.*, Art. 12.
138 *Ibid.*, Art. 9.

incompatibility of ECCC judicial service with the role in the Supreme Council of Magistracy;[139] indeed, dual functions in the domestic and ECCC system for senior Cambodian officials are expressly envisaged in the applicable legal framework, to facilitate skills-transfer and capacity-building within the domestic justice system.

4. The true character of the Application

58. Nuon Chea's claims can only be truly understood in light of his assertions about "distain…for his ideology;[140] about "colonialist and imperialist"[141] countries and "Anglo-French" "quasi-experts";[142] his desire to put his political opponents on trial;[143] and vilify his enemies;[144] and an established record from the outset of the proceedings disclosing his strategy to undermine the ECCC as an institution[145] and to hold no person, Cambodian or international, fit to judge his conduct. This disqualification application is just one more attempt to mislead the public and distract the focus away from his own criminal conduct.

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139 ECCC Law, Art. 10 new, 11 new, and 19.

140 **E314/6** Application, *supra* note 2 at para. 69.

141 *Ibid.* at para. 129.

142 *Ibid.*

143 See e.g. **E146.1** Elephants in the Room, 28 November 2011 at p. 2 ["Where is Henry Kissinger?"]; **E295/6/3** Nuon Chea's Closing Submissions in Case 002/01, 26 September 2013 at paras. 23-26 ("The Standard Total View").

144 See e.g. **E1/14.1** Transcript, 22 November 2011 at 13.59.43, 15.08.57 ["…to liberate my motherland from colonialism and aggression and oppression by the forces, by the thieves who wished to steal our land and wipe Cambodia off the face of the world"].

145 See e.g. **E146.1** Elephants in the Room, 28 November 2011 at p. 3 ["This court *is* the government…This is at best 2/5 of an independent court"]; **E214** Decision on Nuon Chea defence counsel misconduct, 29 June 2012 [and related addenda **E214/2**, **E214/3**, **E214/4** and **E214/5**].

IV. REQUESTED RELIEF

59. For these reasons, the Co-Prosecutors respectfully request the Special Bench to dismiss Nuon Chea's Application in full, and to dispose of the Application on an expedited basis.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
10 October 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		