BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors

Filed to: Supreme Court Chamber **Original Language:** English

Date of document: 25 November 2019

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by Supreme Court Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPLICATION TO DISQUALIFY THE SIX APPEAL JUDGES WHO ADJUDICATED CASE 002/01

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I. INTRODUCTION

1. Khieu Samphan's application to disqualify the six Supreme Court judges who adjudicated his Case 002/01 appeal (the "Contested Judges") from adjudicating his Case 002/02 appeal ("Disqualification Application")[1] does not meet the high threshold necessary to overcome the presumption of judicial impartiality afforded to judges at the ECCC. For the reasons set out by the Co-Prosecutors below, his application should be denied.

II. PROCEDURAL HISTORY

2. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case 002, charging Khieu Samphan with crimes against humanity, genocide, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code.[2]

3. On 22 September 2011, the Trial Chamber severed the Case 002 proceedings in an order[3] that was subsequently annulled by the Supreme Court Chamber ("SCC") on 8 February 2013.[4]

4. On 26 April 2013, the Trial Chamber issued a new severance order, restricting the scope of Case 002/01 to crimes against humanity associated with two phases of forced movement of the population and executions committed at Tuol Po Chrey soon after the evacuation of Phnom Penh.[5] The SCC confirmed this severance order on 23 July 2013.[6]

5. On 4 April 2014, the Trial Chamber defined the scope of Case 002/02 to include genocide against the Vietnamese and Cham; crimes that occurred at the S-21, Kraing Ta Chan, Au Kansang, and Phnom Kraol security centres; crimes that occurred at the worksites of 1st January Dam, Tram Kak Cooperatives, Kampong Chhnang Airport, and Trapeang Thma Dam; forced marriage and rape within the context of forced marriage; and internal purges.[7] The SCC

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1 **F53** Khieu Samphan's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31 October 2019 ("Disqualification Application").

2 **D427** Closing Order, 15 September 2010, para. 1613.

3 **E124** Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, para. 5.

4 **E163/5/1/13** Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013 ("First Severance Appeal Decision"), para. 52.

5 **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, Disposition (p. 70).

6 **E284/4/7** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 (Summary of Reasons), 23 July 2013, paras 6-7, 13; **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013 ("Second Severance Appeal Decision"), para. 76 (full reasons).

7 **E301/9/1** Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, Disposition (p. 21).

confirmed this decision on 29 July 2014.[8]

6. On 23 November 2016, the SCC issued the Case 002/01 Appeal Judgment.[9]

7. On 16 November 2018, the Trial Chamber pronounced the Case 002/02 verdict and sentence, providing an oral summary of the findings and disposition.[10] The authoritative written judgment was issued in the Court's three official languages on 28 March 2019.[11]

8. On 31 October 2019, Khieu Samphan filed his Disqualification Application.[12] On 4 November 2019, the Co-Prosecutors requested additional time to respond.[13] On 15 November 2019, the SCC extended that deadline to 25 November 2019.[14]

III. APPLICABLE LAW

9. The test for interpreting and applying the judicial obligation of impartiality and the right to impartiality was established by the *Furundžija* Appeals Chamber at the ICTY ("the *Furundžija* test"):[15]

> Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles

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8 **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 Scope of Case 002/02, 29 July 2014 ("Third Severance Appeal Decision"), para. 91.

9 **F36** Appeal Judgment, 23 November 2016 ("Case 002/01 AJ"). Judges Kong Srim, Chandra Nihal Jayasinghe, Som Sereyvuth, Agnieszka Klonowiecka-Milart, Mong Monichariya, Florence Ndele Mwachande-Mumba, and Ya Narin comprised the bench.

10 **E1/529.1** Pronouncement of Judgment in Case 002/02, T. 16 November 2018.

11 **E465** Case 002/02 Judgement, 16 November 2018 ("Case 002/02 TJ").

12 **F53** Disqualification Application.

13 **F53/1** Co-Prosecutors' Urgent Request for an Extension of Time to Respond to Khieu Samphan's Recusal Request, 4 November 2011.

14 **F53/3** Decision on the Co-Prosecutors and Civil Party Urgent Requests for Extension of Time to Respond to Khieu Samphan's Disqualification Request, 15 November 2019, para. 13.

15 The *Furundžija* Appeals Chamber considered the potential appearance of bias of the Presiding Judge during the trial, Judge Mumba, due to her involvement with the United Nations Commission on the Status of Women ("the UNCSW") prior to her appointment as a judge at the ICTY. While Judge Mumba was a member of the UNCSW, the organisation condemned the mass and systematic rape that had allegedly occurred during the war in the former Yugoslavia and urged the ICTY to prioritise prosecuting those allegedly responsible. The Appellant did not allege that Judge Mumba was *actually* biased but that her continued promotion of the goals and interests of the UNCSW after her membership concluded gave the *appearance* of bias that created an apprehension as to her impartiality. The Appeals Chamber considered jurisprudence from the European Court of Human Rights as well as national legal systems and found there to be a general rule that a Judge should be subjectively free from bias, and also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. The Chamber emphasised the significant weight with which the presumption of impartiality attaches to a judge, setting a high threshold to rebut that presumption. In short, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established.'" *See Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 ("*Furundžija* AJ"), paras 164, 166, 170, 181-189, 196-197.

should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[16]

10. The "reasonable observer" has been defined as "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[17]

11. The ECCC has adopted and applied the *Furundžija* test and the above "reasonable observer" standard.[18]

12. The remaining applicable law is set out in the relevant sections below.

IV. SUBMISSIONS

A. Khieu Samphan overstates the strength of the jurisprudence upon which he relies

13. The Co-Prosecutors fully agree that the right to be tried by an impartial tribunal is part of the ECCC's legal framework.[19] However, the "relevant jurisprudence" that Khieu Samphan relies on to support his arguments[20] in no way constitutes "strong" jurisprudence that, when

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16 *Furundžija* AJ, para. 189. *See also Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001 ("*Akayesu* AJ"), para. 203; *Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006 ("*Galić* AJ"), para. 39; *Nahimana et al.*, ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007 ("*Nahimana* AJ"), para. 49.

17 *Furundžija* AJ, para. 190.

18 *See e.g.* **C11/29** 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, Pre-Trial Chamber, 4 February 2008 ("Judge Ney Thol Disqualification Decision"), paras 20-21; **E5/3** Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, Trial Chamber, 28 January 2011, para. 6; **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011 ("Case 002/01 TC Disqualification Decision"), paras 11-12; Special SC02-**1/4** Decision on Ieng Thirith's Application to Disqualify Judge Som Sereyvuth for Lack of Independence, Supreme Court Chamber, 3 June 2011, para. 10; **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015 ("Case 002/02 TC Disqualification Decision"), para. 33.

19 **F53** Disqualification Application, paras 12-17.

20 **F53** Disqualification Application, paras 25-39.

applied to this case, "leaves no doubt" as to the bias of the Contested Judges.[21] Rather, Khieu Samphan relies on the analysis of a single dissenting ECCC judge, an unpersuasive and controversial decision penned by a single judge at the International Residual Mechanism for Criminal Tribunals (the "Mechanism"), and three cases from the European Court of Human Rights ("ECtHR"). All contravene well-settled jurisprudence that upholds the strong presumption of judicial impartiality.

14. **Judge Downing's Partially Dissenting Opinion.** Khieu Samphan misplaces his reliance on Judge Downing's partial dissent[22] from the Special Panel's supermajority decision to dismiss applications to disqualify Case 002/02 Trial Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara.[23] Other than contrasting Judge Downing's view with that of the supermajority judges,[24] Khieu Samphan merely alleges that the Special Panel was wrong to dismiss the applications to disqualify the Case 002/02 trial judges in light of "the recent jurisprudence of the international criminal tribunals".[25] This allegation is without merit.

15. **The Antonetti Decision.** The "recent jurisprudence" that Khieu Samphan alludes to is solely comprised of Judge Antonetti's decision to disqualify Judges Meron, Agius, and Liu from the *Mladić* Appeals Chamber at the Mechanism (the "Antonetti Decision").[26] The Antonetti Decision stands, as the Prosecution's request for a *de novo* review was dismissed on jurisdictional grounds,[27] but it substantially departs from well-settled standards concerning judicial impartiality.

16. These established standards afford a strong presumption of impartiality to judges at

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21 *Contra* **F53** Disqualification Application, para. 40.

22 **E314/12/1** Case 002/02 TC Disqualification Decision, Partly Dissenting Opinion of Judge Rowan Downing, 23 January 2015.

23 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 5.

24 **F53** Disqualification Application, paras 25-27.

25 **F53** Disqualification Application, para. 28. *See also* **F53** Disqualification Application, paras 51-52.

26 **F53** Disqualification Application, paras 29-36; *Mladić,* MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, Senior Judge, 3 September 2018 (the "Antonetti Decision").

27 The Appeals Chamber stated that the exercise of appellate jurisdiction was only triggered in "exceptional circumstances", and the Prosecution had failed to demonstrate such circumstances that would establish jurisdiction over the appeal. Consequently, the Chamber declined to adjudicate the merits of the appeal (*see Mladić*, MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, Appeals Chamber, 4 December 2018, paras 12-19).

international criminal tribunals.[28] The judges are sworn to uphold the duty of impartiality,[29] and an extremely high threshold of proof must be met to establish that a judge has actual bias or that a reasonable observer, properly informed, would apprehend bias on the part of the judge.[30] Most importantly for the case at hand, the impartiality presumption has been consistently interpreted to hold that judges are not prohibited from sitting on two or more cases relating to the same series of events or addressing similar questions of fact and law.[31]

17. Aside from the large body of judicial precedent that contradicts the Antonetti Decision, subsequent events in the *Karadžić* case further belie Khieu Samphan's claim that the Antonetti Decision is strong jurisprudence.[32] While Khieu Samphan notes that Judge Meron "voluntarily withdrew from the *Karadžić* Case" in response to a motion against him based on the Antonetti

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[28] *See e.g. Furundžija* AJ, paras 196-197; *Šainović et al.*, IT-05-87-A, Judgement, Appeals Chamber, 23 January 2014 ("*Šainović* AJ"), para. 181; *Galić* AJ, para. 41; *Ntawukulilyayo*, ICTR-05-82-A, Decision on Motion for Disqualification of Judges, Appeals Chamber, 8 February 2011 ("*Ntawukulilyayo* Disqualification Decision"), para. 7; *Nahimana* AJ, para. 48; *Taylor*, SCSL-03-01-A, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 13 September 2012, para. 19.

[29] At the ECCC, *see e.g.* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, art. 3.3 ("The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for their appointment to judicial offices. They shall be independent in the performance of the functions and shall not accept or seek instructions from any Government or any other source."); Code of Judicial Ethics, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008 and amended on 5 September 2008, arts 2.1 ("Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions), 7.1 ("Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality."); The Bangalore Draft Code of Judicial Conduct, 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices in The Hague, 25-26 November 2002, art. 2.2 ("A judge shall ensure that his or her conduct, both in an out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."). The Bangalore Principles have been cited as applicable to ECCC judges (*see e.g.* Special PTC02-**7** Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, PTC, 14 December 2009 ("First Judge Lemonde Disqualification Decision"), para. 27; Special PTC02-**4** Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, PTC, 23 March 2010, para. 17). *See also* UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, endorsed by UN General Assembly Res. 40/32, 29 November 1985 and 40/146, 13 December 1985, paras 2, 6, 8.

[30] *See e.g.* **C11/29** Judge Ney Thol Disqualification Decision, para. 19; **E55/4** Case 002/01 TC Disqualification Decision, para. 12; *Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001 ("*Čelebići* AJ"), para. 707; *Šainović* AJ, para. 181; *Ntawukulilyayo* Disqualification Decision, para. 7; *Renzaho*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 April 2011 ("*Renzaho* AJ"), para. 23; *Nahimana* AJ, paras 48-50; *Galić* AJ, paras 41, 44.

[31] *See e.g.* **E55/4** Case 002/01 TC Disqualification Decision, para. 15; *Mladić*, IT-09-92-T, Decision on Defence Motion Seeking to Disqualify the Honourable Judge Alphons Orie and the Honourable Judge Christoph Flügge, President of the Tribunal, 26 August 2016 ("*Mladić* Decision on Judges Orie and Flügge"), p. 3, fn. 14, *citing Stanišić and Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016, para. 44; *Šešelj*, IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, Special Chamber, 19 November 2010, para. 28, *citing Brđanin and Talić*, IT-99-36-T, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, Trial Chamber, 18 May 2000, para. 18; *Ntawukulilyayo* Disqualification Decision, paras 12, 13; *Nahimana* AJ, para. 78; *Renzaho* AJ, para. 22; *Karera*, ICTR-01-74-A, Judgement, Appeals Chamber, 2 February 2009, para. 378; *Akayesu* AJ, para. 269.

[32] **F53** Disqualification Application, para. 40.

Decision,[33] Judge Meron made it clear that he chose to step down to ensure that disqualification proceedings did not impede the case's progress,[34] not because he agreed with the principles that the Antonetti Decision espouses. Moreover, Judge Meron pointedly observed that the Antonetti Decision "clearly contradicts established jurisprudence" and "harms the interests of the Mechanism", emphasising that he would have continued to adjudicate the case with an impartial mind.[35] Thus, even setting well-settled jurisprudence aside for argument's sake, the Antonetti Decision represents nothing more than the view of a single judge that is counterbalanced by the directly opposing view of another judge.[36] This by no means constitutes strong jurisprudence.[37]

18. **ECtHR Jurisprudence.** Khieu Samphan's attempt to bolster the views of Judges Antonetti and Downing using ECtHR jurisprudence does not withstand scrutiny.[38] First, he tries to circumvent the plain language of *Poppe v. The Netherlands* ("*Poppe*"), which examined whether two judges who had previously convicted the applicant's co-accused had determined in those cases whether the applicant's involvement fulfilled "*all* the relevant criteria necessary to constitute a criminal offence".[39] He does this by proclaiming that Judges Antonetti and Downing "correctly stated" that the Judgment's reference to "all the elements of a criminal offence" was merely "illustrative" and not a dispositive test for prejudgment.[40] In support, he wrongly asserts that "other cases" at the ECtHR demonstrate that judges do not have to pronounce on "each and every element" of a crime for prejudgment to occur.[41] In fact, the "all elements" test has been treated as dispositive on numerous occasions,[42] and the ECtHR, like

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33 **F53** Disqualification Application, para. 36.

34 *Karadžić*, MICT-13-55-A, Decision, 27 September 2018 ("Meron Decision to Withdraw").

35 Meron Decision to Withdraw, pp. 1-2. *See* particularly his citation of established jurisprudence that he considered to be contradicted by the Antonetti Decision (Meron Decision to Withdraw, fn. 6).

36 Subsequent disqualification decisions at the Mechanism have not considered the issue of prejudgment, although at least eight appeals judges have upheld the established approach regarding the high presumption of judicial impartiality. *See Karadžić*, MICT-13-55-A, Judgement, Appeals Chamber, 20 March 2019, paras 353, 355 (the Chamber was comprised of Judges Joensen, Sekule, de Prada, Gatti, and Rosa); *Karadžić*, MICT-13-55-A, Decision on Motion for Disqualification and Motion Challenging Jurisdiction, Special Panel, 28 October 2019, fn. 40 (the Special Panel was comprised of Judges Hall, Masanche, and Park).

37 When the *Taylor* and *Šainović* Appeals Chambers were faced with conflicting law on whether specific direction was required to establish the *actus reus* of aiding and abetting, they extensively assessed *ad hoc* jurisprudence as well as customary international law and ultimately rejected the *Perišić* Appeals Chamber's viewpoint, which was in direct and material conflict with prevailing jurisprudence. *See Taylor*, SCSL-03-01-A, Judgment, Appeals Chamber, 26 September 2013 ("*Taylor* AJ"), paras 466-481, 486; *Šainović* AJ, paras 1617-1651.

38 **F53** Disqualification Application, paras 37-39.

39 *Case of Poppe v. The Netherlands*, No. 32271/04, Judgment, 24 March 2009 ("*Poppe* Judgment"), paras 19-20, 28 (emphasis added).

40 **F53** Disqualification Application, para. 37.

41 **F53** Disqualification Application, para. 37.

42 Khieu Samphan misleadingly states that the Judgment has "at times" been interpreted to require that the impugned judge ruled on all the criteria necessary to constitute a criminal offence (**F53** Disqualification Application, para. 37). *But see e.g. Case of Schwarzenberger v. Germany*, No. 75737/01, Judgment, 10 August

the ECCC, has distinguished two of the three "other cases" upon which Khieu Samphan relies.[43] This is likely the reason Khieu Samphan never identifies the two cases by name and only refers to them indirectly.[44]

19. In *Miminoshvili v. Russia*, the Court implicitly found that the two "other cases" (*Ferrantelli and Santangelo* and *Rojas Morales*) no longer reflect the Court's stance on the presumption of judicial impartiality.[45] The Court contrasted the older cases with *Poppe* and *Schwarzenberger v. Germany*, which both found that, in similar circumstances, the applicant's fears about a judge's bias were unfounded.[46] The Court also highlighted *Thomann v. Switzerland*, which held that the same judges who convicted an accused *in absentia* could adjudicate the retrial in the accused's presence without casting doubt on their own impartiality because they would undertake a fresh consideration of the whole case.[47] Similarly, the *Miminoshvili* Court held that there was no evidence that a prior judgment against the applicant's alleged fellow organised crime member (his brother) prejudged the applicant's guilt in subsequent proceedings.[48] As in the case at hand, the Court emphasised that the judge sitting on both cases was a professional judge who, as such, was "*a priori* more prepared to disengage herself from her previous

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2006 ("*Schwarzenberger* Judgment), para. 43; *Case of Miminoshvili v. Russia*, No. 20197/03, Judgment, 28 June 2011 ("*Miminoshvili* Judgment"), para. 118; **E55/4** Case 002/01 TC Disqualification Decision, para. 21; **E314/12/1** Case 002/02 TC Disqualification Decision, paras 38-44, 94 (noting that the Case 002/01 Judgment did not assess or determine Khieu Samphan's mens *rea* in relation to the Case 002/02 crimes nor make findings on whether the JCE resulted in and/or involved the Case 002/02 crimes); *Mladić* Decision on Judges Orie and Flügge, Annex B: Internal Memorandum from Presiding Judge Alphonse Orie to President Theodor Meron entitled "Report pursuant to Rule 15(B)", 14 May 2012, paras 30, 36-37; *Mladić* Decision on Judges Orie and Flügge, Annex A: Internal Memorandum from Judge Christoph Flügge to Presiding Judge Alphons Orie entitled "Conferring on Disqualification Motion Pursuant to Rule 15(B)", 17 January 2014, paras 18-19, 36-38; *Mladić* Decision on Judges Orie and Flügge, Annex B: Internal Memorandum from Presiding Judge Alphons Orie to President Theodor Meron entitled "Report pursuant to Rule 15(B)", 17 January 2014, para. 29.

[43] *See* **F53** Disqualification Application, fn. 61 referencing the Antonetti Decision, fn. 55, which in turn references two ECtHR cases: *Case of Rojas Morales v. Italy*, No. 39676/98, Judgment, 16 November 2000 ("*Rojas Morales* Judgment") and *Case of Ferrantelli and Santangelo v. Italy*, No. 19874/92, Judgment, 7 August 1996 ("*Ferrantelli and Santangelo*"). These two cases have been repeatedly distinguished. *See e.g. Poppe* Judgment, para. 28; *Schwarzenberger* Judgment, paras 44-45; *Miminoshvili* Judgment, paras 115-116; **E55/4** Case 002/01 TC Disqualification Decision, fn. 45; **E314/12/1** Case 002/02 TC Disqualification Decision, para. 44.

[44] *See* fn. 43, *supra*.

[45] *Miminoshvili* Judgment, paras 115-116 ("The Court observes that, in a number of cases, it has come to the conclusion that the involvement of the same judge in two sets of proceedings concerning the same events may arguably raise an issue under Article 6 § 1 of the Convention." The Court then describes the *Ferrantelli and Santangelo* and the *Rojas Morales* Judgment before continuing: "**In more recent cases, however, the Court has found that the applicant's fears about a judge's bias in similar circumstances were unfounded**", referencing the *Schwarzenberger* Judgment and the *Poppe* Judgment) (emphasis added). *See also* **E55/4** Case 002/01 TC Disqualification Decision, fn. 45.

[46] *Miminoshvili* Judgment, para. 116.

[47] *Miminoshvili* Judgment, para. 116 *citing Case of Thomann v. Switzerland*, No. 17602/91, Judgment, 10 June 1996, para. 35. *See also* cases finding that the judges undertook a fresh consideration of the case before them: *Schwarzenberger* Judgment, para. 43; *Case of Khodorkovskiy and Lebedev v. Russia*, Nos. 11082/06 and 13772/05, Judgment, 25 July 2013 ("*Khodorokovskiy* Judgment"), paras 546, 548, 556; Case of *Ooo 'Vesti' and Ukhov v. Russia*, No. 21724/03, Judgment (Merits), 30 May 2013, para. 81.

[48] *Miminoshvili* Judgment, paras 117-119. *See also Khodorokovskiy* Judgment, paras 546-556.

experience in [the other trial] than, for instance, a lay judge or a juror."[49]

20. The "other" ECtHR case that Khieu Samphan *does* mention in his Disqualification Application similarly fails to demonstrate "strong" jurisprudence.[50] In *Mancel and Branquart*, the Court found that an appearance of bias had been established when seven of the nine Court of Cassation judges who had characterised the constitutive elements of an offence were asked to again examine the same issue for the same offence in the same case.[51] Clearly *Mancel and Branquart* presented a unique set of circumstances, and it is worth noting that Khieu Samphan points to no subsequent jurisprudence that follows *Mancel and Branquart* despite the fact that it was decided in 2010.[52] In any event, the case at issue is distinguishable from *Mancel and Branquart*. Here, the contested SCC judges must assess new findings of fact and law made by the Case 002/02 Trial Chamber which relate to different crimes, different crime sites, and a large body of new evidence, all of which were not considered in Case 002/01. Section B will discuss these issues in more detail below.

21. For all these reasons, Khieu Samphan has overstated the strength of the case law upon which he relies and has failed to demonstrate that the application of the law creates "compelling reasons" that would necessitate the disqualification of the Contested Judges.[53]

B. Khieu Samphan's challenges relating to severance, his right to appeal, and overlapping findings fail to overcome the presumption of judicial impartiality

i. Challenges relating to the severance of Case 002

22. Khieu Samphan's argument that the unprecedented nature of the severance of Case 002 breached his right to judicial certainty and threatened his right to a fair trial[54] has been repeatedly raised and explicitly answered.[55] Notably, in response to this exact argument, the

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[49] *Miminoshvili* Judgment, para. 120. *See also Khodorokovskiy* Judgment, para. 555; *S. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 April 2002, para. 29 ("if evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial.").

[50] **F53** Disqualification Application, paras 38-39 (discussing *Case of Mancel and Branquart v. France*, No. 22349/06, Judgment, 24 June 2010 ("*Mancel and Branquart*")), 40 (alleging "strong" ECtHR jurisprudence).

[51] *Mancel and Branquart*, paras 21-22, 27-28, 39.

[52] **F53** Disqualification Application, paras 38-39.

[53] *Contra* **F53** Disqualification Application, paras 24, 40.

[54] **F53** Disqualification Application, paras 42-46.

[55] *See e.g.* **E301/5/5** Mr Khieu Samphan's Submissions on the Need to Wait for a Final Judgment in Case 002/01 Before Commencing Case 002/02, 5 February 2014, denied by **E301/5/5/1** Decision on Khieu Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgement is Handed Down in Case 002/01, Trial Chamber, 21 March 2014, para. 12 (noting Khieu Samphan's claim that prejudice would arise from not knowing how the Trial Chamber would address the chapeau requirements for CAH, JCE and the scope of Case 002/01 and finding that no particular prejudice was caused given that all the parties were similarly situated);

SCC considered whether the additional severance of Case 002 caused "actual prejudice and not merely annoyance" and found that the Trial Chamber had not provided the "requisite legal certainty regarding the status of the remaining charges and the procedural consequences of the Additional Severance".[56] The SCC then provided its own clarification to remedy any confusion.[57] Rather than showing actual bias or an appearance of bias, this demonstrated the Contested Judges' willingness to uphold Khieu Samphan's fair trial rights.

23. The SCC's recommendation to the Trial Chamber to create a second panel of judges further demonstrates the Contested Judges' efforts to safeguard Khieu Samphan's rights.[58] However, Khieu Samphan fails to provide the full context and primary reason the recommendation was made. At the time the Case 002 severance was being litigated, the parties, the Trial Chamber, and the SCC were deeply concerned about the advanced age and declining health of the Co-Accused in light of the length of time required to reach a final determination on charges that were reasonably representative of the Indictment.[59] Ieng Sary's death before the Case 002/01 trial concluded only added to this sense of urgency.[60] Thus, the SCC recommended a second panel of judges primarily to make the proceedings more efficient, proposing that a second panel could begin the Case 002/02 trial while the original panel wrote the Case 002/01 trial judgment.[61] The SCC carefully considered a variety of legitimate interests, including potential prejudice to the rights of the Accused, the right to be tried without undue delay, the potential burden on witnesses, and the advanced age of the victims and their right to an expedient trial, concluding that ensuring meaningful justice through obtaining a verdict within the lifespan of the Co-Accused was a pressing interest that "may prevail over other concerns".[62]

E301/9/1/1/1 Mr Khieu Samphan's Immediate Appeal Against the Decision on Additional Severance of Case 002 and Scope of Case 002/02, 5 May 2014, *see particularly* paras 21-35, addressed by **E301/9/1/1/3** Third Severance Appeal Decision, paras 39, 63-86; **E314/1** Mr Khieu Samphan's Request for Reconsideration of the need to Await Final Judgement in Case 002/01 Before Commencing Case 002/02 and the Appointment of a New Panel of Trial Judges, 25 August 2014 (highlighting the risk of an overlap in findings), rejected by **E314/5** Decision on Khieu Samphan's Request to Postpone the Commencement of Case 002/02, Trial Chamber, 19 September 2014.

56 **E301/9/1/1/3** Third Severance Appeal Decision, paras 74, 86.

57 **E301/9/1/1/3** Third Severance Appeal Decision, para. 86.

58 **F53** Disqualification Application, paras 48-50.

59 *See e.g.* **E163/5/1/13** First Severance Appeal Decision, paras 24, 43, 49, 51; **E284/4/8** Second Severance Appeal Decision, paras 25, 44, 50-51; **E301/9/1/1/3** Third Severance Appeal Decision, paras 53-55, 61.

60 *See e.g.* **E284/4/8** Second Severance Appeal Decision, paras 25, 51.

61 **E163/5/1/13** First Severance Appeal Decision, para. 51; **E284/4/8** Second Severance Appeal Decision, paras 73-74; **E301/9/1/1/3** Third Severance Appeal Decision, paras 35, 90; **E284/4/7/1** Order Regarding the Establishment of a Second Trial Panel, SCC, 23 July 2013 ("Recalling that, on 23 July 2013, the Supreme Court Chamber considered that the circumstances surrounding the renewed severance of Case 002 makes it imperative to establish a second panel within the Trial Chamber *in order to ensure that Case 002/02 can commence as soon as possible after closing submissions in Case 002/01*") (emphasis added).

62 *See e.g.* **E284/4/8** Second Severance Appeal Decision, paras 37-38, 43, 50-52 ("The Trial Chamber's repeated stated goal in deciding on renewed severance of Case 002 is the preservation of its ability to reach 'any

24. Khieu Samphan cites Judge Downing's partially dissenting opinion as his authority to declare a "significant overlap of factual" and legal issues justifying disqualification.[63] As discussed above, Judge Downing's view was a lone dissent against a supermajority decision[64] and therefore should be given little weight. Moreover, Khieu Samphan has provided no cogent reasons to depart from well-settled jurisprudence that has consistently interpreted the impartiality presumption to hold that judges are *not* prohibited from adjudicating a case merely because they sat on another case relating to the same series of events or addressing similar questions of fact and law.[65]

25. Finally, Khieu Samphan's assertion that the Contested Judges should voluntarily recuse themselves is premised on the mistaken claim that they are now "in the same position as the Trial Chamber at the time when they themselves were calling for a second panel of judges".[66] At the time he references, the Case 002/02 trial proceedings had not even begun,[67] so the SCC could only hypothesise that there was a potential for bias and/or an appearance of bias due to an overlap with issues that would be raised in Case 002/02. In contrast, the SCC now has before it confirmation from the Special Panel that any overlap between the cases was not enough to establish that a reasonable observer would perceive that judges (there, the Trial Judges) might be unable to bring an impartial mind to Case 002/02 just because they had made findings based on the evidence in Case 002/01.[68]

ii. Alleged violations of Khieu Samphan's right to appeal

26. Khieu Samphan wrongly contends that his rights will be violated if the Contested Judges are not disqualified because it is "impossible to imagine" how they could not be influenced by their previous assessment of the evidence and their own findings in Case 002/01.[69] This and his

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timely verdict'. […] The Supreme Court Chamber considers that, once articulated, such a goal is not excluded by the notion of 'interest of justice', *including that it may prevail over other concerns*. […] The [SCC] accordingly finds that the Trial Chamber's determination that renewed severance of Case 002 is required in the interest of justice does not warrant appellate intervention.") (emphasis added); **E301/9/1/1/3** Third Severance Appeal Decision, paras 53-55.

63 **F53** Disqualification Application, paras 51-52.

64 *See* para. 14, *supra*.

65 As discussed in Section IV.A., *supra*.

66 **F53** Disqualification Application, paras 53-55.

67 The severance decisions in which the SCC recommended a second panel were issued on 8 February 2013 (*see* **E163/5/1/13** First Severance Appeal Decision, para. 51), 25 November 2013 (*see* **E284/4/8** Second Severance Appeal Decision, paras 73-74), and 29 July 2014 (*see* **E301/9/1/1/3** Third Severance Appeal Decision, para. 90). Case 002/02 proceedings were opened on 17 October 2014 (*see* **E465** Case 002/02 TJ, para. 13).

68 **E314/12/1** Case 002/02 TC Disqualification Decision, paras 11 (noting Khieu Samphan's allegation that there was a "problem of overlap"), 50-70 (re. jurisprudence discussing prejudgment and autonomous bodies of evidence), 91-105 (re. the Special Panel's analysis of prejudgment allegations), 106 (finding).

69 **F53** Disqualification Application, paras 56-58 (paraphrasing the Antonetti Decision).

further allegation that "it is almost certain" that the SCC will rule against him[70] are mere suspicions of bias that are insufficient to rebut the impartiality presumption.[71]

iii. Challenges to the Case 002/01 Appeal Judgment's factual findings

27. Khieu Samphan refers to 16 "exhaustive" annexes in which he claims he has demonstrated the overlap between the Case 002/01 Appeal Judgment and errors raised in his Notice of Appeal.[72] As it would be impossible to address each allegation individually within the time or space allowed for this Response, the Co-Prosecutors will confine their arguments to the issues Khieu Samphan deemed significant enough to develop within his Disqualification Application.

28. When considering similar arguments against the Trial Judges' decisions in the Case 002/01 Trial Judgment, the Special Panel stated:

> What must be shown is that the decisions are, or would reasonably be perceived to be, a result of a pre-disposition against the application rather than the genuine application of the law, on which there may be more than one possible interpretation, or to the judges' assessment of facts.[73]

29. Applying this test as well as the "all elements" test from *Poppe*, the Appeal Judgment findings that Khieu Samphan impugns clearly demonstrate that the SCC genuinely applied the law and assessed the facts without prejudging issues relevant to the Case 002/02 Appeal. Moreover, instead of following Khieu Samphan's approach of isolating single sentences for such an analysis, the Judgment is more properly assessed as an interconnected analysis in which qualifying statements made at the beginning of an analysis are understood to apply to the entire analysis that follows (such as statements indicating that the analysis is limited to the context of Case 002/01).

30. **Cooperatives and worksites.**[74] Khieu Samphan's reference to the SCC's *obiter dictum* fails to demonstrate prejudgment.[75] Literally, *obiter dictum* means "something said in passing",[76] and under *Poppe*, statements made in passing that do not rule on all the relevant criteria necessary to constitute a criminal offence nor find the applicant guilty of the offence

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70 **F53** Disqualification Application, para. 59.
71 **E55/4** Case 002/01 TC Disqualification Decision, paras 17-19; **E314/12/1** Case 002/02 TC Disqualification Decision, paras 35-36, Special PTC02-**7** First Judge Lemonde Disqualification Decision, paras 34-36.
72 **F53** Disqualification Application, para. 60.
73 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36; Special PTC02-**7** First Judge Lemonde Disqualification Decision, para. 34.
74 **F53** Disqualification Application, paras 62-64.
75 **F53** Disqualification Application, paras 62-63.
76 *Black's Law Dictionary*, 9th ed. (2009), p. 1177.

beyond a reasonable doubt fail to establish bias and/or the appearance of bias.[77] Khieu Samphan's other attempt to demonstrate prejudgment of the worksite policy also fails, as the paragraph he cites only states the view "according to the Closing Order", not as a finding of the SCC.[78] As to his other challenges, the SCC expressly noted that Khieu Samphan's visits to worksites were only relevant to Population Movement II, a Case 002/01 issue.[79] The paragraphs that purportedly "ruled on [Khieu Samphan's] involvement in making economic policy"[80] merely discussed whether the Trial Chamber was unreasonable in its assessment of a September 1975 document and found that it was not (therefore the related findings were not unreasonable).[81] Lastly, the SCC made no factual findings relating to "the outline of the 1977 Economic Plan".[82] Rather, it found that Khieu Samphan had failed to substantiate his arguments challenging the Trial Chamber's finding on the issue, and without more, the finding did not appear unreasonable.[83]

31. **Policy targeting former Khmer Republic soldiers and officials.**[84] Khieu Samphan selectively quotes two non-consecutive sentences from a large paragraph, misleadingly creating a finding that, in reality, does not exist.[85] When the Appeal Judgment paragraph is properly examined in its totality, the context makes clear that the SCC was discussing overlap in the Closing Order (D427), not making a finding on CPK policy. Khieu Samphan then excerpts two quotes from the SCC's extensive analysis of the evidence underpinning the Trial Chamber's finding that a policy which contemplated the execution of Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey.[86] Although the excerpted quotes reference evidence that post-dates the Tuol Po Chrey killings, the SCC explained that the Trial Chamber

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77 *Poppe* Judgment, para. 28.

78 **F53** Disqualification Application, para. 62, *citing* **F36** Case 002/01 AJ, para. 227 ("according to the Closing Order (D427), one of the objectives of moving the population was 'to fulfil the labour requirements of the cooperatives and worksites'.").

79 **F53** Disqualification Application, para. 64; **F36** Case 002/01 AJ, para. 1028 (after acknowledging Khieu Samphan's argument that the evidence fell outside the scope of Case 002/01, the SCC noted that "the evidence is relevant insofar as some of those who were transferred as part of the Population Movement Phase Two indeed had been transferred to worksites").

80 **F53** Disqualification Application, para. 64.

81 **F36** Case 002/01 AJ, paras 838, 840-842 (discussing Khieu Samphan's arguments, noting that several documents supported the Trial Chamber's finding, discussing *in dubio reo* principle and explaining that inconsistencies in individual items of evidence do not render a Chamber's reliance on them unreasonable provided the evidence taken as a whole supports a finding beyond a reasonable doubt).

82 *Contra* **F53** Disqualification Application, para. 64.

83 **F36** Case 002/01 AJ, para. 843.

84 **F53** Disqualification Application, paras 65-66.

85 **F53** Disqualification Application, para. 65 *quoting from* **F36** Case 002/01 AJ, para. 227.

86 **F53** Disqualification Application, para. 66, *quoting* excerpts from **F36** Case 002/01 AJ, paras 960, 970. The full SCC analysis is contained in **F36** Case 002/01 AJ, paras 934-972. An honest reading demonstrates that the SCC assessed every aspect of the evidence and found it to be, *inter alia*, "weak, ambivalent, [and] of low probative value" (para. 970). The SCC held that the Chamber's policy finding was unreasonable.

was entitled to rely on such evidence "to draw inferences on a pre-existing policy".[87] Thus, in its analysis of the underlying evidence to the Trial Chamber finding's, the SCC assessed the later evidence for this very limited purpose. Viewed in proper context and in their entirety, the impugned paragraphs merely show that the later evidence did not sufficiently establish a pre-existing policy.

32. **Enemies policy.**[88] When impugned paragraph 933 is viewed in the context of the section of the Judgment in which it is located rather than in isolation, it is clear that the SCC's analysis related to a Trial Chamber finding of a targeting policy that "continued throughout the time period relevant to Case 002/01"[89] and not impermissibly further. The second impugned paragraph is similarly qualified, confined to the "time of the events at Tuol Po Chrey", which is a Case 002/01 issue.[90]

33. **Joint Criminal Enterprise ("JCE") participation and awareness of the crimes.**[91] As noted by the Special Panel when it assessed the applications to disqualify the Case 002/02 Trial Judges, Cases 002/01 and 002/02 concern substantially different events in relation to crimes and crime sites.[92] Case 002/02 is also comprised of a sizeable list of documents, witnesses, Civil Parties, and experts that were not part of the evidence in Case 002/01.[93] In its assessment, the Special Panel considered that the Case 002/01 Trial Judgment contained prejudicial findings on Khieu Samphan's participation in the JCE, but because the Trial Chamber had not assessed or determined his *mens rea* in relation to the Case 002/02 crimes nor found whether the JCE resulted in and/or involved the Case 002/02 crimes, bias and/or the appearance of bias were not established.[94] Similarly, the Case 002/01 Appeal Judgment has not made such findings.

34. Even if any of the factual findings that Khieu Samphan has impugned should be considered to overlap, possible "prejudicial findings on matters commonly relevant" do not mean that a

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87 **F36** Case 002/01 AJ, para. 956.

88 **F53** Disqualification Application, para. 67.

89 **F53** Disqualification Application, fn. 95; **F36** Case 002/01 AJ, para. 923 states that the Accused raised several grounds of appeal challenging the "Trial Chamber's finding – that a policy to 'target for arrest, execution and/or disappearance all elements of the former Khmer Republic regime' *continued throughout the time period relevant to Case 002/01* – was also based on evidence relating to the CPK position and instructions, especially concerning the identification and treatment of 'enemies'" (emphasis added). The grounds of appeal are examined in the subsequent paragraphs, and impugned paragraph 933 relates to the first ground of appeal (paras 924-933) relating to this finding. As the overarching finding is limited to "the time period relevant to Case 002/01", so too is the SCC's finding in para. 933.

90 **F53** Disqualification Application, fn. 95; **F36** Case 002/01 AJ, para. 967 read in conjunction with paras 961-966.

91 **F53** Disqualification Application, paras 68-69.

92 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 93.

93 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 95.

94 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 94.

Judge should not be considered impartial.[95] Finally, the Contested Judges are well aware that "common factual elements in all cases must be established anew", which they have confirmed in the past,[96] and can be expected to uphold this requirement.

iv. Challenges to the Case 002/01 Appeal Judgment legal findings

35. Khieu Samphan's claim that the Contested Judges have prejudged questions of law that are crucial to his appeal in Case 002/02[97] has no merit. Judges are not prohibited from presiding over two separate criminal prosecutions arising from the same set of facts, even if the cases involve overlapping or similar questions of fact or law, as long as they can bring impartial minds to the evidence in the new case.[98] Contrary to his view of the law, the key issue to the prejudgment assessment here is whether the Contested Judges ruled in Case 002/01 on all the elements of a Case 002/02 offence and found Khieu Samphan guilty beyond a reasonable doubt of committing that offence.[99] This has not happened. For example, the Contested Judges will have to freshly assess whether the evidence relied upon by the Trial Chamber sufficiently met the constitutive elements of each crime against humanity charged in Case 002/02 despite any prior SCC findings on contextual elements in Case 002/01. Khieu Samphan has substantiated no actual bias or reasonable apprehension that the Contested Judges could not evaluate the issues in Case 002/02 with impartial minds.

36. In conclusion, not only has Khieu Samphan failed to demonstrate that the Contested Judges have done anything other than genuinely apply the law and assess the facts, he has also failed to meet the requirements of the *Furundžija* test. A reasonable observer, properly informed, would recognise the traditions of judicial integrity and strong presumption of judicial impartiality[100] and the full circumstances of Case 002 at the ECCC, including the fact that had Case 002 not been severed, each of the Contested Judges who adjudicated Case 002/01 would have decided the issues in Case 002/02 in a single judgment. The reasonable observer would

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95 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 96 *citing* **E301/9/1/1/3** Third Severance Appeal Decision, para. 83.

96 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 96 *citing* **E301/9/1/1/3** Third Severance Appeal Decision, para. 85.

97 **F53** Disqualification Application, paras 70-75.

98 *See* the citations listed in fn. 31, *supra*. The mere fact that a judge has previously made legal findings relating to the present case or "in line" with aspects of the present case does not suggest bias (*see e.g.* **E55/4** Case 002/01 TC Disqualification Decision, paras 16, 18; *Mladić*, IT-09-92-T, Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, Trial Chamber, 4 July 2016 ("*Mladić* Fair Trial Decision"), paras 2, 24.

99 *Poppe* Judgment, para. 28; **E314/12/1** Case 002/02 TC Disqualification Decision, paras 41-44; **E55/4** Case 002/01 TC Disqualification Decision, paras 17-18; *Mladić* Fair Trial Decision, paras 11-12. *Contra* **F53** Disqualification Application, para. 70.

100 *See e.g. Čelebići* AJ, para. 697.

also be informed that Khieu Samphan has been represented by largely the same defence team throughout the entirety of the case, and has long known of the intention to proceed with the same judges in Case 002/02.[101] Khieu Samphan has failed to demonstrate that a reasonable observer would objectively apprehend bias when informed of these circumstances.

C. Khieu Samphan fails to establish bias and/or appearance of bias in the Case 002/01 Appeal Judgment legal findings

37. In contending that legal findings made by the SCC in Case 002/01 ("Four Alleged Errors")[102] demonstrate bias and/or appearance of bias on the part of the Contested Judges, Khieu Samphan misapprehends, and then fails to meet, the standard of proof for allegations of bias and/or appearance of bias. Instead, he impermissibly seeks to relitigate, in an inappropriate forum, issues that he unsuccessfully pleaded in Case 002/01.

38. Khieu Samphan correctly acknowledges that, when assessing whether there is bias or an appearance of bias, the question is "not [...] whether the [SCC] erred, but whether its reasoning revealed lack of impartiality,"[103] and that judicial decisions cited as evidence of bias should be reviewed, "not to detect errors, but to determine whether errors, *if any*, demonstrate that the Judges are actually biased, or that a reasonable observer with knowledge of the relevant circumstances would reasonably apprehend bias."[104] Put another way, in themselves, errors of law are insufficient to demonstrate bias, and it is "insufficient for a party to merely allege that the decisions were erroneous."[105] In its Case 002/02 Disqualification Decision, the Special Panel made clear a party must not use disqualification applications as a platform for disputing the substance of previous decisions with which it disagrees.[106]

39. Yet it is clear from his submissions that Khieu Samphan impermissibly equates (alleged)

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101 **E314/12/1** Case 002/02 TC Disqualification Decision, paras 31, 106.

102 **F53** Disqualification Application, paras 80-109, alleging errors in the SCC's legal findings on (i) the legal test for crimes and modes of responsibility to satisfy the principle of legality; (ii) the *mens rea* for murder as a crime against humanity; (iii) the *mens rea* for joint criminal enterprise ("JCE"); and (iv) the recharacterisation of the modes of Khieu Samphan's criminal responsibility.

103 *See* **F53** Disqualification Application, para. 77 *citing* **F36** Case 002/01 AJ, para. 112 and citations therein. *See also* **F53** Disqualification Application, para. 78 *citing* **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36; **E55/4** Case 002/01 TC Disqualification Decision, para. 13.

104 **F53** Disqualification Application, para. 78 (emphasis added) *citing* **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36; **E55/4** Case 002/01 TC Disqualification Decision, para. 13. *See also* citations therein.

105 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36; **E55/4** Case 002/01 TC Disqualification Decision, para. 13.

106 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36 *citing* **E55/4** Case 002/01 TC Disqualification Decision, para. 13.

legal errors with bias,[107] and disguises a procedurally barred[108] appeal of the Case 002/01 Appeal Judgment as an application for disqualification. In doing so, he fails to either appreciate or meet the "high burden" a party seeking to rebut a judge's presumption of impartiality must discharge.[109] As the Special Panel held, "a mere suspicion of bias on the part of an accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances."[110] Consistent with this position, the ICTY Bureau stated that while it "would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, *it would be a truly extraordinary case in which they would.*"[111]

40. While relying on the Case 002/01 Appeal Judgment itself,[112] Khieu Samphan overlooks that the SCC dismissed Nuon Chea's allegations of Trial Chamber bias based on alleged errors in the Case 002/01 Trial Judgment for precisely these reasons:

> The [SCC] is not persuaded that the examples Nuon Chea cites were an indication of lack of impartiality, as opposed to (potentially) errors of fact or law, noting that a party seeking to displace a judge's presumption of impartiality has a *high burden*.[113]

41. Khieu Samphan's various assertions that the Four Alleged Errors demonstrate bias and/or an appearance of bias because they represented the only way for the SCC to secure a conviction in Case 002/01[114] are unsupported by any objective evidence and improperly assimilate conviction of an accused based on a proper application of the law to bias. Moreover, neither the mere fact that the Contested Judges previously upheld convictions against Khieu Samphan, nor

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107 *See e.g.* **F53** Disqualification Application, paras 79, 81, 84, 92, 104, 105.

108 *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as promulgated on 27 October 2004 ("ECCC Law"), art. 36new ("the Supreme Court Chamber shall make final decision on both issues of law and fact"); Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) as revised on 16 January 2015 ("Internal Rules"), Internal Rule 111(6) ("Where an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed").

109 *See e.g.* **E314/12/1** Case 002/02 TC Disqualification Decision, para. 35; **F36** Case 002/01 AJ, para. 112; *Furundžija* AJ, paras 196-197; *Norman*, SCSL-2004-14-PT, Decision on Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Appeals Chamber, 28 May 2004, para. 25.

110 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36 *citing Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Disqualification of Judges, ICTR Bureau, 28 May 2007 ("*Bagosora* Disqualification Decision"), para. 7.

111 *Blagojević et al.,* IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15(B), ICTY Bureau, 19 March 2003, para. 14 (emphasis added) *cited with approval* in *Bagosora* Disqualification Decision, para. 10.

112 **F53** Disqualification Application, para. 77 *citing* **F36** Case 002/01 AJ, para. 112.

113 **F36** Case 002/01 AJ, para. 112 (emphasis added).

114 **F53** Disqualification Application, paras 79, 84, 89, 91-92, 99, 105. *See also* **E457/6/4/1** Khieu Samphan Closing Brief (002/02), 2 May 2017, amended on 2 October 2017 ("Khieu Samphan Closing Brief"), paras 350, 403.

the reasonable apprehension that they would decide legal issues in the same way in the future, rebuts the strong presumption of impartiality.[115]

42. In any event, Khieu Samphan's contention that the SCC was determined to "twist[] the law"[116] in order to secure his conviction is belied by other findings in the Case 002/01 Appeal Judgment. The "informed person, with knowledge of all the relevant circumstances"[117] would be aware that the Chamber also overturned several of the Trial Chamber's factual and legal findings against Khieu Samphan. For example, the SCC reversed a number of factual findings concerning Khieu Samphan's contribution to the common purpose,[118] and found errors in specific findings of crimes committed in the course of Population Movements I and II.[119] It raised the *mens rea* for extermination in Khieu Samphan's favour,[120] leading to a reversal of the extermination convictions relating to Population Movements I and II.[121] Finally, it reversed the Trial Chamber's finding on the existence of a policy contemplating the execution of Khmer Republic soldiers and officials at the time of the events at Tuol Po Chrey, resulting in an acquittal of all charges against Khieu Samphan for that site.[122]

43. Equally misplaced is Khieu Samphan's contention that the SCC's failure to reduce the life sentence in Case 002/01 in light of these acquittals demonstrates bias.[123] As the SCC explained, the Trial Chamber's life sentence was a global sentence in respect of all convictions without specifying the sentences for individual crimes.[124] As life imprisonment is the maximum sentence available at the ECCC,[125] it can still logically be justified by the remaining convictions, and acquittals do not automatically require a reduction. In this case, the SCC correctly recalled that a sentence should reflect the inherent gravity of the criminal conduct,[126] and after careful

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115 **E314/12/1** Case 002/02 TC Disqualification Decision, paras 60-64, 73 and citations therein.

116 **F53** Disqualification Application, para. 79.

117 *See supra*, para. 10. *See also* paras 38-39.

118 *See e.g.* **F36** Case 002/01 AJ, paras 1009, 1023, 1080 (Finding that the Trial Chamber erred in finding that Khieu Samphan (i) attended a Central Committee meeting in June 1974 at which the attendees had endorsed the plan to evacuate Phnom Penh; (ii) gave the inaugural speech of 11 April 1976; and (iii) chaired a Special National Congress thereby supporting the commission of crimes during Population Movement II.)

119 *See e.g.* **F36** Case 002/01 AJ, paras 436, 448, 454, 471-472, 483.

120 **F36** Case 002/01 AJ, para. 522.

121 **F36** Case 002/01 AJ, paras 541, 560 and Disposition.

122 **F36** Case 002/01 AJ, para. 972 and Disposition.

123 **F53** Disqualification Application, paras 93, 106.

124 **F36** Case 002/01 AJ, para. 1117. *See also* **E313** Case 002/01 Judgement, Trial Chamber, 7 August 2014 ("Case 002/01 TJ"), para. 1072.

125 ECCC Law, art. 39.

126 **F36** Case 002/01 AJ, para. 1118. In the same paragraph, it further recalled correctly, as the SCC had in Case 001 (Case 001-**F28** Appeal Judgement, 3 February 2012 ("*Duch* AJ"), para. 375) that the gravity of the conduct is assessed with regard to, *inter alia*, "the number and vulnerability of victims, the impact of the crimes upon them and their relatives, the discriminatory intent of the convicted person when this is not already an element of the crime; the scale and brutality of the offences, and the role played by the convicted persons."

analysis, found that the acquittals had little impact on the overall number of victims for which Khieu Samphan was responsible, the lasting impact of the crimes on those victims, and the temporal scope of the crimes. Khieu Samphan's significant role in the crimes and his complete lack of consideration for the ultimate fate of the Cambodian people, especially the most vulnerable groups, similarly remained unchanged.[127]

44. Moreover, the SCC's exercise of discretion in this case was consistent with that shown by appellate judges at the other criminal tribunals. By way of example, at the ICTY, the Appeals Chamber maintained life sentences for Tolimir,[128] Popović,[129] and Beara[130] - despite acquitting them on several substantial charges - based on the gravity of the remaining convictions.

45. In conclusion, the Co-Prosecutors submit that Khieu Samphan's application to disqualify the Contested Judges based on the Four Alleged Errors should be denied. It is in effect a procedurally barred appeal disguised as a disqualification application, in which Khieu Samphan wrongly equates purported legal errors with bias. In any event, Khieu Samphan's assertions of error (and, by extension, bias) are misplaced, as the Co-Prosecutors set out briefly below. The Co-Prosecutors reserve the right to expand upon these submissions if, as anticipated, some of the same issues are again raised on appeal in Case 002/02.

i. The principle of legality

46. Khieu Samphan's allegations concerning the SCC's findings on the principle of legality in Case 002/01[131] are replete with misrepresentations, both of the findings themselves, as well as the SCC Judgment in Case 001 from which they supposedly deviated. Moreover, Khieu Samphan overlooks the consistency between the Case 002/01 Appeal Judgment and the standards established by both the PTC and the ICTY Appeals Chamber. The SCC's holdings demonstrate neither error nor bias.

47. First, contrary to Khieu Samphan's assertion, the SCC in Case 002/01 did *not* hold that "it

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127 **F36** Case 002/01 AJ, para. 1120.

128 *Tolimir*, IT-05-88/2-A, Judgement, Appeals Chamber, 8 April 2015, paras 215, 217-219, 233-235, 237, 266-268, 270, 272 (Reversing a number of Tolimir's conviction for genocide.), 648 ("Tolimir's remaining convictions in particular those for genocide committed through the killings of the men from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica are sustained. In light of these genocide convictions alone, the Appeals Chamber considers that Tolimir's responsibility does not warrant a revision of his sentence. In these circumstances, the Appeals Chamber affirms Tolimir's sentence of life imprisonment.").

129 *Popović et al.*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015 ("*Popović* AJ"), paras 545, 546, 557, 1065, 1068, 1069-1070, 1444, 2110.

130 *Popović* AJ, paras 554, 555, 557, 1059, 1065, 1068, 1069, 1444, 2111.

131 **F53** Disqualification Application, paras 80-81; **E457/6/4/1** Khieu Samphan Closing Brief, paras 331-380.

was sufficient that the crimes or modes of liability existed under customary international law at the time of the events and that the Accused held senior positions."[132] As in Case 001, the SCC in Case 002/01 held that the crimes or modes of liability must have (i) existed either under national or international law, and (ii) been accessible and foreseeable to the accused at the time of the alleged criminal conduct.[133] It *agreed* with Khieu Samphan's submission that "the requirements of foreseeability and accessibility must be determined through an objective analysis, namely that the crimes and modes of liability must be foreseeable and accessible in general",[134] but found that the Trial Chamber did not err in taking Khieu Samphan's senior positions into account when determining whether the principle of legality had been adhered to, just as the SCC had in Case 001.[135]

48. Moreover, the SCC's Case 002/01 holdings regarding the tests for "accessibility" and "foreseeability" are entirely consistent with those made by the Case 001 SCC bench. The Case 002/01 finding that "as to the accessibility requirement, in addition to treaties, 'laws based on custom [...] can be relied on as sufficiently available to the accused'" is based on a direct quote from the Case 001 Appeal Judgment supported by ICTY jurisprudence.[136]

49. As to foreseeability, Khieu Samphan erroneously portrays the SCC's Case 002/01 holding that the accused "must be able to appreciate that the conduct is criminal in the sense generally understood without reference to any specific provision" as a deviation from the SCC's past jurisprudence.[137] In fact, in making this finding in Case 002/01, the SCC explicitly referenced its prior *identical* holding on the meaning of "foreseeable" in Case 001.[138] Khieu Samphan provides no explanation as to why any other definition of "foreseeability" should then apply to the Case 001 Judgment's finding that "holdings on elements of crimes or modes of liability [...]

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132 **F53** Disqualification Application, para. 80.

133 **F36** Case 002/01 AJ, paras 761-762. *Compare* Case 001-**F28** *Duch* AJ, paras 91, 96-97.

134 **F36** Case 002/01 AJ, para. 761.

135 **F36** Case 002/01 AJ, para. 761 *citing* Case 001-**F28** *Duch* AJ, para. 280.

136 **F36** Case 002/01 AJ, para. 762 *citing* Case 001-**F28** *Duch* AJ, para. 96; *Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003 ("*Hadžihasanović* Command Responsibility Decision"), para. 34; *Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, Appeals Chamber, 21 May 2003 ("*Ojdanić* Jurisdiction Appeal Decision"), para. 40.

137 **F53** Disqualification Application, paras 80-81. *See also* **E457/6/4/1** Khieu Samphan Closing Brief, para. 345 ("[The SCC in Case 002/02] simply cited an ICTY decision which stated unabashedly and without citing any provisions, that '[A]s to foreseeability [...] [the accused] must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision.'" Khieu Samphan cites **F36** Case 002/01 AJ, para. 762, fn. 1983 "referring to [*Hadžihasanović* Command Responsibility Decision], para. 34" when fn. 1983 also cites Case 001-**F28** *Duch* AJ, para. 96), 350-351.

138 **F36** Case 002/01 AJ, para. 762 *citing* Case 001-**F28** *Duch* AJ, para. 96; *Hadžihasanović* Command Responsibility Decision, para. 34.

must have been foreseeable and accessible to the Accused."[139]

50. Finally, Khieu Samphan overlooks that the accessibility and foreseeability criteria adopted by the SCC were also supported well before the Case 002/01 Appeal Judgment by both PTC[140] and ICTY[141] jurisprudence. They are also consistent with the well-established principle that the international principle of legality does not prohibit a tribunal from interpreting and clarifying the law or from relying on those decisions that do so in other cases.[142] In criticising the SCC for finding in Case 002/01 that the crimes were so grave as to render it inconceivable that Khieu Samphan did not understand that his conduct was criminal "in the sense generally understood",[143] he similarly fails to acknowledge that other ECCC and ICTY Chambers have followed the same reasoning in relation to similar conduct.[144]

ii. Mens rea for murder as a crime against humanity

51. Khieu Samphan's contentions[145] regarding the SCC's finding in Case 002/01 that the *mens rea* of murder included *dolus eventualis* fail to establish an error, let alone meet the high standard of proof required to establish bias and/or appearance of bias. Nothing in Khieu Samphan's submissions demonstrate that the SCC's thoroughly reasoned analysis, undertaken in consideration of Khieu Samphan's own appeal against the Case 002/01 Trial Judgment,[146] was a result of the Contested Judges' predisposition against Khieu Samphan as opposed to a genuine application of the law, "on which there may be more than one possible interpretation".[147]

52. First, Khieu Samphan's assertions of bias are wholly undermined by the fact that nowhere in his Disqualification Application or Case 002/02 Closing Brief does he cite *any* authority for his contention, on which his allegation of bias is premised, that the *mens rea* of murder was the

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139 **F53** Disqualification Application, para. 80 *citing* Case 001-**F28** *Duch* AJ, para. 97.

140 **D427/2/15** Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, PTC, 15 February 2011 ("NC and IT Closing Order Appeal Decision"), para. 106; **D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, PTC, 11 April 2011, para. 235; **D97/14/15** Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), PTC, 20 May 2010, para. 45.

141 *Hadžihasanović* Command Responsibility Decision, para. 34.

142 *See e.g.* Case 001-**F28** *Duch* AJ, para. 95; *Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras 126-127; *Case of Kononov v. Latvia,* No. 36376/04, Judgment, Grand Chamber, 17 May 2010, para. 185 and citations therein.

143 **F53** Disqualification Application, para. 80 *citing* **F36** Case 002/01 AJ, para. 762.

144 *See e.g.* Case 001-**F28** *Duch* AJ, para. 96; **D427/2/15** NC and IT Closing Order Appeal Decision, para. 106; *Ojdanić* Jurisdiction Appeal Decision, para. 42.

145 **F53** Disqualification Application, paras 82-84; **E457/6/4/1** Khieu Samphan Closing Brief, paras 394-429.

146 *See* **F36** Case 002/01 AJ, paras 387-388, 410.

147 **E314/12/1** Case 002/02 TC Disqualification Decision, para. 36; **E55/4** Case 002/01 TC Disqualification Decision, para. 13.

"direct intent to kill".[148]

53. Khieu Samphan also overlooks the consistency between the Case 002/01 Appeal Judgment's finding and the holdings of the ECCC Chambers in Case 001,[149] as well as the *ad hoc* tribunals.[150] These all establish that a direct intent to kill was *not* required under customary international law for the crime against humanity of murder, and all adopt the same formulation adopted by the Case 002/01 Trial Judgment[151] that the SCC upheld.[152] The *ad hoc* Tribunals carried out their own assessment of customary international law based on pre-1975 sources in reaching this conclusion,[153] and took note of the International Law Commission's commentary that "murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation."[154]

54. Contrary to Khieu Samphan's arguments,[155] the SCC did not "misinterpret" the *Medical Case* when it held that the case provided a strong indication that, in the post-World War II

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148 **F53** Disqualification Application, paras 83-84; **E457/6/4/1** Khieu Samphan Closing Brief, paras 395, 404-405, 425.

149 Case 001-**F28** *Duch* AJ, paras 332-334, *citing* Case 001-**E188** Judgement, Trial Chamber, 26 July 2010 ("*Duch* TJ"), para. 333 ("'[I]ntent either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death' (*mens rea*)").

150 *See e.g. Kordić & Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 113 (upholding as "undisputed" *Kordić & Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, paras 235-236 ("In order for an accused to be found guilty of murder, the following elements need to be proved: [...] that the accused or his subordinate intended to kill the victim, or to cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death.")); *D. Milošević*, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009, para. 108; *Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003, paras 587 ("Turning to the mens rea element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3."), 642 ("the intent required for murder as a crime against humanity (i.e. *dolus directus* or *dolus eventualis*)". Undisturbed on appeal.); *Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para. 589; *Taylor*, SCSL-03-01-T, Judgment, Trial Chamber, 18 May 2012, para. 412; *Bikindi*, ICTR-01-72-T, Judgement, Trial Chamber, 2 December 2008, para. 429.

151 **E313** Case 002/01 TJ, para. 412.

152 *See* **F36** Case 002/01 AJ, paras 387-388, 410.

153 *See e.g. Delalić at el.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 420-438 (analysing the 1949 Geneva Conventions, 1977 Additional Protocol I and commentaries, together with jurisprudence from civil and common law jurisdictions), 439 ("On the basis of this analysis alone, the Trial Chamber is in no doubt that the necessary intent, meaning mens rea, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."). As confirmed by the ECCC and ICTY Chambers, the elements of wilful killing as a grave breach of the 1949 Geneva Conventions and murder as a war crime or crime against humanity are the same. *See e.g.* Case 001-**E188** *Duch* TJ, para. 431; *Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para. 380 and citations at fn. 903.

154 *Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 217 *finding* that the *mens rea* of murder included "the intent [...] to cause grievous bodily harm in the reasonable knowledge that the attack was likely to result in death" and *citing* Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. A/51/10, p. 96.

155 **F53** Disqualification Application, para. 83; **E457/6/4/1** Khieu Samphan Closing Brief, paras 397-420.

period, murder as a crime against humanity included the notion of *dolus eventualis.*[156] Whether any other international tribunal has relied on the *Medical Case* for this purpose is irrelevant to its authoritative value,[157] as is the fact that it contains no explicit definition of the *mens rea*. The U.S. Tribunal's finding of murder in the absence of direct intent to kill is clear from its reasoning.[158]

55. Khieu Samphan's assertions that all Nazi concentration camps were "used for [...] people that the Hitler regime designated for certain death", and that the defendants in the *Medical* case must have had the direct intent to kill[159] are erroneous and unsupported by relevant evidence. First, they are illegitimately based in part upon a *different* case's factual findings,[160] which do not even mention all the concentration camps at issue in the *Medical* Case, and which in any event demonstrate that there was no direct intent to kill all concentration camp inmates.[161] The remainder of Khieu Samphan's arguments amount to nothing more than inappropriate inferences about the defendants' *mens rea* that he has incorrectly drawn from the Tribunal's findings that deaths ultimately occurred,[162] together with his own unsubstantiated assertions about the toxicity of the treatments given to experiment victims.[163]

56. Finally, Khieu Samphan misapprehends the purpose of the SCC's reliance[164] on domestic law supporting the *dolus eventualis* standard.[165] The SCC did not seek to "disclose any widespread or uniform state practice or *opinio juris* establishing [a] pre-1975 norm of customary international law."[166] Rather, it demonstrated a general principle of law that "the

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156 **F36** Case 002/01 AJ, para. 395, *citing United States v. Brandt et al.,* Judgment, 19 August 1947 ("*Medical* Judgment"), Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. II, pp. 189-207, 235-241, 253-263, 271, 290.

157 *Contra* **E457/6/4/1** Khieu Samphan Closing Brief, para. 405.

158 *See e.g. Medical* Judgment, p. 236 (Evidence shows that these medical experiments were conducted "to determine the limits of human endurance and existence at extremely high altitudes"), 237-238 (Experiments were conducted to "ascertain the efficacy of the different treatment of wounds inflicted by Lost gas [...] the experiments consisted of inflicting wounds upon various parts of the bodies of the experimental subjects and infecting them thereafter with Lost.").

159 **E457/6/4/1** Khieu Samphan Closing Brief, paras 411-420.

160 **E457/6/4/1** Khieu Samphan Closing Brief, paras 412, 416 *citing United States et al. v. Göring et al.,* Judgment, 1 October 1946 ("IMT Judgment"), Trial of the Major War Criminals before the International Military Tribunal, Vol. I, pp. 234-235, 252.

161 **E457/6/4/1** Khieu Samphan Closing Brief, para. 412 *citing* IMT Judgment, pp. 234-235.

162 **E457/6/4/1** Khieu Samphan Closing Brief, paras 415, 417. The Co-Prosecutors note, moreover, that the findings do not bear out Khieu Samphan's assertion that Experiments A and B "inevitably led to death". Rather, the Tribunal's findings make clear that there were many examples of survivors. *See e.g. Medical* Judgment, pp. 175 (Experiment A: "others suffered grave injury, torture, and ill-treatment"; Experiment B: "After the survivors were severely chilled, re-warming was attempted by various means."), 236-237 (Experiment A: "The greater number of the experimental subjects suffered grave injury, torture and ill-treatment. ").

163 **E457/6/4/1** Khieu Samphan Closing Brief, paras 416-420.

164 **F36** Case 002/01 AJ, paras 396-409.

165 **E457/6/4/1** Khieu Samphan Closing Brief, paras 422-429.

166 *Contra* **E457/6/4/1** Khieu Samphan Closing Brief, para. 429.

requisite mental element of intentional killing is satisfied even if the perpetrator acted with less than direct intent to kill" (but more than negligence).[167] Khieu Samphan's challenges to the applicability of these domestic laws on the basis that they postdate 1975[168] are misrepresentations of the authorities on which the SCC relied. His own analysis demonstrates that the majority of these sources - from both civil and common law jurisdictions - predate 1975,[169] and he fails to show that any of the remaining jurisdictions had changed their fundamental approach after 1975 or used different *mens rea* standards before that date.[170]

iii. Joint Criminal Enterprise Liability

57. Khieu Samphan erroneously claims that the SCC's Case 002/01 finding that the scope of a JCE's common criminal plan includes crimes that the JCE members accept "as an eventuality treated with indifference" ("Common Plan Finding") shows actual bias and/or an appearance of bias.[171] He again fails to appreciate the high burden placed on him, as the moving party, to meet the standard of demonstrating that the Contested Judges' decision could not have been a "genuine application of the law, on which there may be more than one possible interpretation".[172] Only in a "truly extraordinary case" will this burden be discharged,[173] and Khieu Samphan has fallen far short of doing so here.

58. Khieu Samphan's contention that the "challenged judges did not support their reasoning with any reference"[174] unjustifiably isolates two paragraphs from the SCC's reasoning. As Khieu Samphan previously acknowledged in his Case 002/02 Closing Brief,[175] the SCC's comprehensive assessment of the *actus reus* requirement for JCE liability covered some 44 paragraphs of detailed analysis of jurisprudence from the ICTY, ICTR, and SCSL as well as

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167 *See, in particular,* **F36** Case 002/01 AJ, paras 396, 409.

168 **F53** Disqualification Application, para. 83; **E457/6/4/1** Khieu Samphan Closing Brief, paras 427-428.

169 **E457/6/4/1** Khieu Samphan Closing Brief, paras 424-425, 427-428 *confirming* that the sources relied on by the SCC in **F36** Case 002/01 AJ, paras 398-404 pre-dated 1975: Cambodia (1956), (Belgium (1879); Poland (1932, 1969); South Africa (1963); England and Wales (1974); India (1860); Singapore (1872); Australia (1899, 1900, 1913, 1924, 1971, 1973); United States (1962).

170 The Co-Prosecutors note, for example, that whilst the SCC cited Canada's 2009 Criminal Code (**F36** Case 002/01 AJ, fn. 1004), the Canadian Criminal Code included a reckless murder provision by the latest in 1953-54, which remained in effect through the entirety of the 1975-1979 period. *See* Canada Criminal Code, 1953-54, Chap. 51, §201(a) (murder encompasses "(i) mean[ing] to cause [...] death, or (ii) mean[ing] to cause [...] bodily harm that he knows is likely to cause his death, *and [being] reckless whether death ensues or not*") (emphasis added); §201(c) (murder encompasses conduct "where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being").

171 **F53** Disqualification Application, paras 85, 92 *citing,* at para. 85, **F36** Case 002/01 AJ, para. 809.

172 *See supra*, paras 28, 51.

173 *See supra*, para. 39.

174 **F53** Disqualification Application, para. 86 *citing* **F36** Case 002/01 AJ, paras 808-809.

175 **E457/6/4/1** Khieu Samphan Closing Brief, paras 432-453, 474.

post-World War II cases,[176] on which the SCC expressly relied in each step of its analysis to reach its Common Plan Finding.[177] The SCC did not, as Khieu Samphan alleges, "free[] itself from all applicable legal rules".[178]

59. Rather, the SCC correctly recognised that post-World War II case law "required [...] that [the accused] agree to a common purpose of a criminal character."[179] Relying on the *Tadić* Appeal Judgment, it recalled that for the purpose of establishing the *actus reus* of JCE, there must be a common plan "which amounts to or involves the commission of a crime".[180] The SCC also recalled and applied the SCSL Appeals Chamber jurisprudence in the *Brima* case, which found that "the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means *contemplated* to achieve that objective. The objective *and the means* to achieve the objective constitute the common design or plan."[181] It then found that the "means contemplated" to achieve the object of the common purpose included those crimes the JCE members recognised were to be committed to achieve an ulterior objective. Put another way, the SCC found that "the members of the JCE must accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference."[182] Khieu Samphan fails to demonstrate how this analysis exhibits bias.

60. The SCC's analysis in the remainder of the Appeal Judgment also belies Khieu Samphan's claim that the SCC impermissibly created a "hybrid JCE combining *actus reus* elements of JCE I with *mens rea* elements of JCE III."[183] When assessing the Accused's *mens rea*, the SCC confirmed, consistent with well-established jurisprudence from this Court and the *ad hoc* Tribunals on the *mens rea* for JCE I, that the accused must share with the other JCE participants both the intent, *i.e.* relevant *mens rea*,[184] to commit the crimes within the common purpose and the intent to participate in a common plan aimed at its commission.[185] It also dismissed the Co-

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176 **F36** Case 002/01 AJ, paras 767-810.
177 **F36** Case 002/01 AJ, paras 808, 810.
178 **F53** Disqualification Application, para. 86.
179 **F36** Case 002/01 AJ, paras 779, 789 (emphasis added). For the SCC's analysis of the post-World War II jurisprudence supporting this position, *see* **F36** Case 002/01 AJ, paras 780-788 and citations therein.
180 **F36** Case 002/01 AJ, paras 789, 807 *citing Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999 ("*Tadić* AJ"), para. 227.
181 **F36** Case 002/01 AJ, para. 789 *citing Brima et al.,* SCSL-2004-16-A, Judgment, Appeals Chamber, 22 February 2008 ("*Brima* AJ"), para. 76 (emphasis added). *See also* **F36** Case 002/01 AJ, para. 808 *citing Brima* AJ, para. 80.
182 **F36** Case 002/01 AJ, para. 809.
183 **F53** Disqualification Application, para. 86.
184 Since participation in a JCE is a form of commission, it follows that the JCE members would require the same, not a higher, *mens rea* as that required of the direct perpetrators.
185 **F36** Case 002/01 AJ, paras 1053-1054. *See further e.g.* **D97/15/9** Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, PTC, 20 May 2010, paras 37, 39; Case 001-**E188** *Duch*

Prosecutors' Appeal, holding that liability was limited to crimes encompassed by the common purpose.[186]

iv. Legal Recharacterisation of the facts in Case 002/01

61. Contrary to Khieu Samphan's contentions,[187] his submissions regarding: (i) the SCC's recharacterisation of the killings during Population Movement II from the crime of extermination to murder with *dolus eventualis*;[188] and (ii) its entering a conviction for murder and other inhumane acts through enforced disappearances during Population Movement II under JCE responsibility,[189] do not discharge the high burden[190] of showing actual bias[191] (and/or appearance of bias) on the part of the Contested Judges.

62. First, the SCC's recharacterisation of facts from the crime of extermination to murder committed with *dolus eventualis* during Population Movement II[192] was legitimate. Rule 110(2) provides that "[i]n all cases, the [SCC] may change the legal characterisation of the crime adopted by the Trial Chamber. However, it shall not introduce new constitutive elements that were not submitted to the Trial Chamber." Following the SCC's finding that the *mens rea* of extermination did not include *dolus eventualis*, murder was no longer fully subsumed by the crime of extermination in that case.[193] However, Khieu Samphan is incorrect to assert that the SCC inappropriately added new elements when it carried out its recharacterisation.

63. As the SCC explained,[194] when the Trial Chamber characterised killings that took place during Population Movement II as extermination, it made all the relevant factual and legal findings necessary to fulfil the elements of the crime of murder, including the finding that the perpetrators acted with at least *dolus eventualis*.[195] The SCC was therefore permitted to recharacterise those facts without adding any new constitutive elements.[196] Contrary to Khieu

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TJ, para. 509; **E313** Case 002/01 TJ, paras 690, 694; *Tadić* AJ, paras 196, 220, 228; *Popović* AJ, para. 1369; *Munyakazi*, ICTR-97-36A-A, Judgement, Appeals Chamber, 28 September 2011, para. 160; *Sesay et al.,* SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 475.

186 **F36** Case 002/01 AJ, para. 807.

187 **F53** Disqualification Application, paras 93-109.

188 **F53** Disqualification Application, paras 97-99, *citing* **F36** Case 002/01 AJ, paras 557-562.

189 **F53** Disqualification Application, paras 101-104, *citing* **F36** Case 002/01 AJ, paras 1097, 1099.

190 *See supra*, paras 39-40.

191 *Contra* **F53** Disqualification Application, paras 93, 105, 109.

192 **F36** Case 002/01 AJ, paras 561-562.

193 **F36** Case 002/01 AJ, paras 522, 1097 (fn. 2975).

194 **F36** Case 002/01 AJ, paras 561.

195 **E313** Case 002/01 TJ, paras 646-648.

196 This is fully consistent with the SCC's Rule 110(2) recharacterisation in Case 001. The Trial Chamber had made the findings necessary for convictions for the crimes against humanity of murder, extermination, enslavement, imprisonment, torture and other inhumane acts, but entered only a conviction for the crime against humanity of persecution. The SCC overturned the Trial Chamber's decision to subsume the individual crimes

Samphan's contention,[197] since the Trial Chamber was seised of the *facts*[198] of the Population Movement II killings charged as extermination in the Closing Order, neither the Trial Chamber, nor by extension the SCC, was precluded from recharacterising them as murder.[199]

64. Khieu Samphan's allegations concerning the SCC's finding that he was responsible by participating in a JCE for these murders, as well as other inhumane acts through enforced disappearances, are similarly misplaced. Contrary to his assertions,[200] and as the Co-Prosecutors set out in detail in their Case 002/01 Response to the SCC's Request for Submissions on Recharacterisation,[201] the Co-Investigating Judges charged Khieu Samphan with committing *all* the crimes relevant to Case 002/01 under the JCE mode of responsibility,[202] including extermination and other inhumane acts through enforced disappearances during Population Movement II.[203] Moreover, Khieu Samphan remained on notice throughout the Case 002/01 trial that he could be convicted of these crimes under JCE, and he was given the opportunity to, and did, conduct his defence accordingly.[204]

65. It was only as the result of the Trial Chamber's overly restrictive interpretation of the scope of Case 002/01, *which it made for the first time in the Trial Judgment*, that it did not enter a

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under persecution and entered, in addition to the Accused's conviction for persecution, separate convictions for each of the underlying crimes against humanity (Case 001-**F28** *Duch* AJ, paras 331, 336). In a footnote, the SCC noted "that entering formal convictions here is in accordance with Internal Rule 110(2) and Article 401 of the 2007 Code of Criminal Procedure whereby a court of appeal may change the legal characterization of crimes without introducing new constitutive elements that were not submitted to the Trial Chamber". (Case 001-**F28** *Duch* AJ, fn. 735).

197 **F53** Disqualification Application, para. 99.

198 Internal Rule 98(2) ("The judgment shall be limited to the *facts* set out in the Indictment. *The Chamber may*, however, *change the legal characterisation of the crimes* as set out in the Indictment as long as no new constitutive elements are introduced." (emphasis added))

199 **D427** Closing Order, paras 1373, 1381. *See* **F36** Case 002/01 AJ, para. 562.

200 **F53** Disqualification Application, paras 101 (murder), 103 (enforced disappearances).

201 **F30/6** Co-Prosecutors' Submissions on Potential Recharacterisation of the Crimes, 6 November 2015 ("OCP Recharacterisation Submissions").

202 **D427** Closing Order, paras 1524-1525, 1540 ("Khieu Samphan [...] committed the crimes listed in this Closing Order through [his] membership in the [JCE]").

203 Pursuant to **D427** Closing Order, para. 1525, through the implementation of the Population Movement Policy, the Accused were charged with murder, political persecution and other inhumane acts through attacks against human dignity and forced transfer. **D427** Closing Order, para. 209 explicitly linked the commission of several crimes during the population movement Phases One and Two to the implementation of the Targeting Policy, pursuant to which were committed the crimes against humanity of (i) *extermination* and (ii) other inhumane acts through *enforced disappearances*. **D427** Closing Order, paras 1381-1383, 1387-1390 confirmed that exterminations perpetrated during Populations Movements (Phases I and II) were "an integral part of the means used to achieve the common purpose of eliminating 'enemies'. [...] [T]hey were decided upon and coordinated by the CPK leaders within the framework of the common purpose." **D427** Closing Order, paras 1470-1478 confirmed that other inhumane acts through enforced disappearances perpetrated during Population Movement (Phase II) "formed an integral part of the means used to achieve the common purpose aimed at the elimination of 'enemies'. [...] [T]hey were decided and co-ordinated by the CPK leadership within the framework of a common purpose." *See further,* **F30/6** OCP Recharacterisation Submissions, paras 21-22, 25.

204 **F30/6** OCP Recharacterisation Submissions, paras 3, 17, 24-27, 31-32.

conviction for extermination and enforced disappearances under the JCE mode of responsibility.[205] Nonetheless, the Trial Chamber made all the requisite findings regarding Khieu Samphan's significant contribution to the JCE which included those crimes.[206] Before the Appeal Judgment, the SCC put the parties on notice of a potential recharacterisation and gave them an opportunity to make submissions.[207] As such, Khieu Samphan's rights were fully protected[208] and the SCC was permitted to enter convictions for these crimes under JCE responsibility (including extermination recharacterised as murder[209]) pursuant to Internal Rule 110(2) or otherwise.

66. Moreover, Khieu Samphan has not demonstrated that any error (of which there was none) in entering convictions for these crimes pursuant to JCE, rather than planning, ordering and aiding and abetting, was instrumental in the SCC's decision to uphold his life sentence.[210]. It is well established that there is no inherent hierarchy of gravity for modes of responsibility,[211] and that a sentence is based upon the totality of the accused's conduct.[212] As discussed above, the SCC assessed Khieu Samphan's sentence in light of these principles and correctly upheld his sentence.[213]

D. Khieu Samphan fails to establish bias in the SCC Decisions issued after 16 November 2018

67. Khieu Samphan fails to demonstrate that either of the two SCC decisions[214] issued since the public pronouncement of the Case 002/02 Trial Judgment on 16 November 2018[215] was even erroneous. By extension, he fails to meet the considerably higher[216] standard of proof for

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205 **F30/6** OCP Recharacterisation Submissions, paras 23-26; **E313** Case 002/01 TJ, paras 779-781, 811-813, 838, 943.

206 **E313** Case 002/01 TJ, paras 786, 804-810, 960-996.

207 **F30** Order Scheduling the Appeal Hearing, 9 October 2015.

208 **F30/6** OCP Recharacterisation Submissions, paras 12-13,18.

209 *See supra*, paras 62-63.

210 **F53** Disqualification Application, paras 93, 105-108.

211 *Taylor* AJ, paras 661-670 (finding that "there is no hierarchy or distinction for sentencing purposes between forms of criminal participation established in customary international law" and that the Trial Chamber erred in law in holding that aiding and abetting as a mode of liability generally warrants a lesser sentence than other forms of participation.).

212 *See e.g. Taylor* AJ, paras 662-670; *Gacumbitsi*, ICTR-2001-64-A, Judgement, Appeals Chamber, 7 July 2006, para. 204 ("the sentence should first and foremost be based on the gravity of the offences and degree of liability of the convicted person"); **F36** Case 002/01 AJ, para. 1118.

213 *See supra*, paras 43-44.

214 **E463/1/3** Decision on Khieu Samphan's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019 ("Decision on Urgent Appeal"); **E463/1/5** Decision on Khieu Samphan's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 16 August 2019 ("Decision on Annulment Request").

215 **E1/529.1** Pronouncement of Judgment in Case 002/02, T. 16 November 2018.

216 *See supra*, paras 38-40.

establishing bias (and/or an appearance of bias).[217] Khieu Samphan misrepresents the SCC's reasoning in both decisions,[218] and impermissibly seeks to use this Disqualification Application to relitigate yet again his inadmissible appeal against the Trial Chamber's legitimate decision to announce its Judgment before releasing full written reasons.[219]

68. Contrary to Khieu Samphan's contention,[220] the SCC did *not* act in its Decision on his Urgent Appeal[221] as if he was appealing against the summary, rather than the disposition, of the Trial Judgment pronounced orally on 16 November 2018. The Chamber expressly recalled Khieu Samphan's pleadings in which he averred that he was appealing the "disposition".[222] Elsewhere, it identified the object of the Urgent Appeal as the "pronouncement of the disposition",[223] or the "pronouncement of a summary of its judgement and findings"[224] which contained the "disposition" of the Trial Judgment[225] in accordance with Rule 102(1).[226]

69. In any event, the SCC's reasons for declaring the Urgent Appeal inadmissible on each of the three grounds raised by Khieu Samphan apply to an appeal of the disposition alone. As the SCC stated: (i) Rule 105(1)(b) only "applies to appeals against trial judgements on the merits *stricto sensu*";[227] (ii) Rule 104(4)(a) does not apply because the pronouncement of disposition simply concluded the trial phase, but had no effect of terminating the proceedings or depriving

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217 The Co-Prosecutors note that Khieu Samphan alleges actual bias in these cases (*see* **F53** Disqualification Application, Heading D and para. 110).

218 *See* **F53** Disqualification Application, paras 111, 113.

219 As the Co-Prosecutors explained in response to the merits of Khieu Samphan's original Appeal (**E463/1** Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018), there was nothing in the Internal Rules or elsewhere either (i) prohibiting the Trial Chamber from fulfilling its *obligation* to pronounce the judgment publicly (with a summary of the judgment and disposition), in accordance with Rule 102(1), earlier than it published the written reasons in compliance with Rule 101, or (ii) providing that doing so renders the judgment invalid. Indeed, the SCC, PTC and Trial Chamber, as well as the Chambers of the SCSL, ICTY and ICTR, have all followed this practice when issuing their judgments and decisions. The absence of a written judgment on 16 November 2018 did not mean that the summary and disposition constituted "the Case 002/01 judgment", and the Trial Chamber confirmed on several occasions that the written reasons would be issued in due course, at which point the deadlines for appeal would begin to run for the Case 002/02 parties. Khieu Samphan failed to demonstrate how any of his rights had been adversely affected by the Trial Chamber's approach. *See* **E463/1/2** Co-Prosecutors' Response to Khieu Samphan's Appeal against the Judgment Pronounced on 16 November 2018, 30 November 2018, paras 14-22.

220 **F53** Disqualification Application, para. 111.

221 **E463/1/3** Decision on Urgent Appeal.

222 **E463/1/3** Decision on Urgent Appeal, paras 6, 9.

223 **E463/1/3** Decision on Urgent Appeal, para. 14.

224 **E463/1/3** Decision on Urgent Appeal, paras 6, 12, 18 (the SCC's language differs in non-material ways between these three paragraphs).

225 **E1/529.1** Pronouncement of Judgment in Case 002/02, T. 16 November 2018, 11.25.43 ("This completes the summary of the Chamber's findings. I will now read out the disposition.").

226 Internal Rule 102 ("Announcement of the Judgment at a Public Hearing: 1. All judgments shall be issued and announced during a public hearing. A summary of the findings and the disposition shall be read aloud by the President or any other judge of the Chamber.").

227 **E463/1/3** Decision on Urgent Appeal, para. 12.

the Accused of his right to examine the merits of the conviction and sentence;[228] and (iii) the SCC has no inherent jurisdiction "[w]here a fully reasoned, final written judgement and any anticipated appellate proceedings are still pending" and there is no risk of a right to appeal becoming ineffective without the Chamber's intervention.[229]

70. Khieu Samphan's allegations of bias arising out of the SCC's Decision on his Annulment Request[230] are similarly unfounded. First, Khieu Samphan's allegation of nefarious intent[231] on the part of the SCC due to the three-month delay in the notification of his Request,[232] is entirely unsubstantiated. He fails to demonstrate how he suffered any prejudice, particularly when the SCC issued its Decision on the Annulment Request just over one month after the notification.[233] Imperatively, Khieu Samphan fails to show how this could possibly rebut the strong presumption of the Contested Judges' impartiality.[234]

71. Second, Khieu Samphan misapprehends[235] the SCC's finding that he "mischaracterize[d] the chronology by which the Chamber issued the Designation Order[236] and Impugned Decision[237]."[238] On the basis of the chronology *put forward by Khieu Samphan*, the SCC correctly determined that Khieu Samphan "conflate[d] receipt of the Impugned Decision by the Case File Officer with the electronic notification of the Designation Order",[239] thus defeating Khieu Samphan's claim[240] that Reserve Judge Rapoza was not validly appointed to the bench until after the filing of the SCC's Decision on the Urgent Appeal.[241] As the SCC pointed out, deliberations are confidential,[242] and Khieu Samphan's further submissions[243] as to their timing

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228 **E463/1/3** Decision on Urgent Appeal, para. 14.
229 **E463/1/3** Decision on Urgent Appeal, paras 16-17.
230 **E463/1/5** Decision on Annulment Request.
231 **F53** Disqualification Application, para. 112.
232 **E463/1/4** Case 002/02 Khieu Samphan's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019 ("Annulment Request").
233 The Annulment Request was notified on 3 July 2019, with **E463/1/5** Decision on Annulment Request following on 16 August 2019.
234 *See supra*, paras 10, 16, 26, 39-40.
235 **F53** Disqualification Application, para. 113.
236 **F38** Order Appointing Reserve Judge, 13 February 2019, filed by the SCC at 1.46pm (French and Khmer) and 1.47pm (English) on 13 February 2019, and notified to the parties at 3.06pm on the same day.
237 **E463/1/3** Decision on Urgent Appeal, filed by the SCC at 2.52pm on 13 February 2019.
238 **E463/1/5** Decision on Annulment Request, para. 5 (internal references added by the Co-Prosecutors for clarity).
239 **E463/1/5** Decision on Annulment Request, para. 5.
240 **E463/1/4** Annulment Request, paras 7-8 (claiming that the Disqualification Order (**F38**) only became effective when it was notified at 3.06pm, when in fact the time of filing, 1.46pm, is relevant for determining when the SCC committed the decision to appoint Judge Rapoza to writing. The SCC's Decision (**E463/1/3**) was filed at 2.52pm, *after* the filing of the Designation Order.); **F53** Disqualification Application, para. 113.
241 *See* **E463/1/5** Decision on Annulment Request, paras 4-5.
242 **E463/1/5** Decision on Annulment Request, para. 6 *citing* Internal Rules 96(1), 104*bis*.
243 **F53** Disqualification Application, para. 113; **E463/1/4** Annulment Request, paras 9-11, 14.

and substance constitute no more than mere speculation.

72. In any event, any procedural error (of which there were none) had no effect on the substance of the Decision, and the Chamber could have simply reissued the Decision on the Urgent Appeal to cure any procedural defect. The SCC's issuance of a decision that, contrary to his contention[244] caused Khieu Samphan no prejudice, does not establish any bias against him.

V. RELIEF REQUESTED

73. For all the foregoing reasons, the Co-Prosecutors request the Supreme Court Chamber to deny Khieu Samphan's Disqualification Application. The Co-Prosecutors submit that there are ample written submissions from all the parties to decide this issue, but they do not oppose an oral hearing on the matter should the SCC determine that it would assist the Chamber.[245]

Respectfully submitted,

Date	Name	Place	Signature
25 November 2019	CHEA Leang National Co-Prosecutor	Phnom Penh	
	Brenda J. HOLLIS International Co-Prosecutor		

244 **E463/1/4** Annulment Request, para. 21.
245 **F53** Disqualification Application, para. 116 (requesting a public adversarial hearing).