

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

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**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO KHIEU SAMPHÂN'S
APPLICATION FOR DISQUALIFICATION OF SIX APPEAL JUDGES**

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-
MUMBA
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

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I. INTRODUCTION

1. Pursuant to the *Decision on the Co-Prosecutors and Civil Party Urgent Requests for Extension of Time to Respond to KHIEU Samphân's Disqualification Request*, issued by the Supreme Court Chamber ("the Chamber") on 15 November 2019,¹ the Civil Party Lead Co-Lawyers ("Lead Co-Lawyers") hereby respond to the *KHIEU Samphân's Application for Disqualification of the Six Appeal Judges who Adjudicated in Case 002/01* (the "Application for Disqualification" or "Application").² In the Application, the KHIEU Samphân Defence (the "Defence") seeks the disqualification from further Case 002/02 proceedings³ of six of the seven sitting Supreme Court Chamber judges, namely the six judges who determined the Case 002/01 appeal.⁴
2. The Lead Co-Lawyers limit their response to the admissibility of the Application since the serious concerns regarding expedition and legal certainty which this issue raises are matters which particularly affect civil party interests. The Application was filed significantly outside of the time permitted by Internal Rule 34. The Defence has been aware of the grounds underlying the motion since November 2016. They were required to file immediately when appellate proceedings were first initiated in November 2018. Instead of doing so, they repeatedly seized the now-impugned judges with various motions; the outcomes of which they now seek to rely on as proof of bias. This is a clear violation of the Internal Rule 34 procedure.
3. Moreover, in contrast to the circumstances which arose in 2014 when challenges were brought concerning the Trial Chamber's impartiality, in the present instance the interests of justice strongly support the rejection of the Application as inadmissible.

¹ **F53/3** Decision on the Co-Prosecutors and Civil Party Urgent Requests for Extension of Time to Respond to KHIEU Samphân's Disqualification Request, 15 November 2019, para. 13.

² **F53** KHIEU Samphân's Application for Disqualification of the Six Appeal Judges who Adjudicated in Case 002/01, 31 October 2019 (notified on 1 November 2019) ["Application for Disqualification"].

³ In fact the Application does not specify which proceedings it considers are affected by the alleged bias, but appears to be directed at the complete disqualification of these judges from *all* Case 002/02 proceedings.

⁴ No disqualification application is made in respect of Judge Harding Clark, who was appointed as a judge in the Supreme Court Chamber in August 2019, after the conclusion of appeals in Case 002/01.

II. STANDING

4. Civil Parties have a right to respond to submissions during the appellate phase of proceedings,⁵ provided that the submissions affect Civil Parties' rights and interests.⁶ As further explained below (see Section III(2)b below), Civil Parties not only have an interest in 'legal certainty and transparency of proceedings' (Internal Rule 21(1)), but also an interest in expeditious proceedings. Internal Rule 21(1)(c) requires that these rights of victims are respected throughout the proceedings.

III. SUBMISSIONS

5. The Lead Co-Lawyers submit that: (1) the Application for Disqualification was filed significantly out of time; (2) in this instance the interests of justice favour the dismissal of the Application as inadmissible.

(1) The Application was filed significantly out of time

6. Before assessing whether – and to what extent – the Application for Disqualification was filed out of time, it is necessary to correctly construe the legal provisions establishing the time at which a disqualification application must be filed. Having done so, the Lead Co-Lawyers will address the existence and extent of the delay in this case.

a. The time for filing a disqualification application under the Internal Rules

7. Rule 34 of the Internal Rules prescribes the procedure for seeking the disqualification of a judge. Paragraph (3) states that “[t]he application shall be filed as soon as the party becomes aware of the grounds in question.” Paragraph (4)(d) applies specifically to disqualification

⁵ F10/2 Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, paras 14 and 17 (“Decision on Civil Party Standing”). The Decision on Civil Party Standing addressed the right to respond to Defence Appeal Briefs specifically. The principles contained in paragraphs 14 and 17 of that decision apply to other responses. See F36 Appeal Judgement, 23 November 2016, para. 81 (“In this respect, it agreed with NUON Chea in that the Civil Party Lead Co-Lawyers had failed to substantiate how their submission complied with the principles set out in its previous jurisprudence, namely, how NUON Chea's requests affected the Civil Parties' rights and interests. Mere reference to the need to guarantee the 'balance of parties' is too generic to meet that requirement, even if understood as a Civil Parties' right to obtain a timely verdict.”)

⁶ F10/2 Decision on Civil Party Standing, 26 December 2014, para. 17.

applications concerning a Supreme Court Chamber Judge, and states that where the matter has arisen before the appeal, “[t]o be admissible an application must be submitted [...] at the beginning of the appellate proceedings”.

8. It is well established that these two requirements are cumulative: *both* must be complied with.⁷ The Lead Co-Lawyers submit that this is because each paragraph plays its own role in ensuring the requirement for expedition.⁸
9. Internal Rule 34(4)(d) references “the beginning of the appellate proceedings” in order to avoid disqualification applications being presented in anticipation of an appeal which may never eventuate. This is clear from the Supreme Court Chamber’s 2011 decision concerning the application to disqualify Judge SOM Sereyvuth (“the Judge SOM Sereyvuth Decision”), in which it referred to Rule 34(4)(d) as being:

consistent with the requirement that the applicant have [a] legal interest that could be adversely affected (*gravamen*) if the Supreme Court Chamber does not consider the merits of his/her application for disqualification.⁹

Thus, Internal Rule 34(4)(d) serves the objective of avoiding the resolution of alleged bias problems which remain hypothetical because the judge in question may not be seized with an appeal which is affected by the alleged bias.

10. On the other hand, Internal Rule 34(3) seeks to ensure expedition and the integrity of judicial proceedings in a direct way: once an allegation of relevant bias is no longer a merely hypothetical question, it must be raised immediately. This enables allegations of

⁷ **Doc. No. 8** Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, para. 12 (Attachment 1); **Doc. No. 1/4** Decision on Ieng Thirith’s Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, 3 June 2011, para. 4 (Attachment 2).

⁸ Required by articles 33 *new* and 37 *new* of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea; **F49** Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 19.

⁹ **Doc. No. 1/4** Decision on Ieng Thirith’s Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, 3 June 2011, para. 4. See further below.

bias to be addressed before proceedings are tainted. Moreover, if a new judge or judges must be appointed, this can be done as early as possible.

11. The paramount nature of Internal Rule 34(3)'s requirement to file any disqualification applications at the earliest opportunity was highlighted by the Trial Chamber when it enabled IENG Sary's defence team to file a disqualification application *before* the time stipulated in Internal Rule 34(4). At that time, prior to its amendment, Internal Rule 34(4)(c) regarding Trial Chamber judges stipulated that applications for disqualification "concerning matters arising before the trial" must be submitted "at the initial hearing".¹⁰ Despite this, the Trial Chamber permitted a disqualification application to be presented to it *before* the initial hearing. Referring to the requirement in Internal Rule 34(3) that such applications be made "as soon as the moving party becomes aware of the grounds in question", the Chamber stated that: "in view of the parties' obligations of due diligence and the interests of effective trial management, the Application should be determined expeditiously."¹¹
12. This reasoning is equally applicable to proceedings before the Supreme Court Chamber: if a ground for disqualification is known before the formal seizing of the Supreme Court Chamber, it is not only possible to file an application for disqualification, but desirable to do so. The rationale underlying Internal Rule 34(4)(d) and the reasoning of the Judge SOM Sereyvuth Decision would be satisfied so long as the proceedings have already reached a stage at which it is clear that an appeal – and specifically one affected by the alleged bias – will be filed. From that point the appeal and the issue of bias are no longer hypothetical, but concern a real issue of interest to the appellant. The Lead Co-Lawyers submit that this is the *earliest* point at which an application is admissible.

¹⁰ See Internal Rules, Revision 6, 17 September 2010.

¹¹ E5/3 Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, para. 2.

13. Conversely, the *latest* point at which an application can be made for recusal of a Supreme Court judge occurs “at the beginning of the appellate proceedings”. Once the appellate proceedings have begun, the motion must be submitted in order to comply with Internal Rule 34(3)’s imperative to file the application “as soon as” the party is aware of the grounds in question. This makes clear that any such motion must be filed at the earliest possible moment following the beginning of the appeal proceedings. To interpret the “beginning” of the appellate proceedings as encompassing a period of some months or years (or, for example, the entire period before the filing of an Appeal Brief¹²) would ignore both the plain meaning and clear intention behind Internal Rule 34(3).
14. The Lead Co-Lawyers therefore submit that where a party becomes aware of an issue of bias arising before the commencement of appellate proceedings:
- (1) the party *may* file an application for the disqualification of a Supreme Court Chamber judge from the time that the party is aware of the need for an appeal which is affected by the allegation of bias; and
 - (2) in order to be admissible, the party *must* file the application immediately once the appellate proceedings have commenced.
15. Finally, the Lead Co-Lawyers submit that in order to uphold the objective of Internal Rule 34, the term “appellate proceedings” in this context should be read broadly to encompass any procedure which seeks to seize the Supreme Court Chamber, including immediate appeals, appeals from trial judgments and procedural filings in relation to both sorts of appeal proceedings. This interpretation is required in order to ensure that a judge is able to be disqualified in a timely manner from any decision-making which would be tainted by bias, including in respect of immediate appeals, preliminary matters such as determinations of admissibility, or even requests for extensions of page and time limits.

¹² This interpretation is suggested by the Defence in footnote 22 of the Application for Disqualification.
Lead Co-Lawyers’ Response to KHIEU Samphân’s Application for Disqualification

b. Delay in the present case

16. In order to determine the question of timeliness or delay, it is necessary to consider:

- (1) at what time the ground of alleged bias became known to the filing party;
- (2) at what time appellate proceedings affected by that ground of alleged bias became certain rather than hypothetical; and
- (3) at what point the Supreme Court Chamber was first seized with appellate proceedings affected by that ground of alleged bias.

(1) The Defence has known of the alleged ground for disqualification for three years

17. In order to identify correctly when a party became aware of grounds underlying a disqualification application it is necessary to properly construe those grounds.¹³ The ground raised by the Application is the claim that the judges who sat on the appeal in Case 002/01 are biased because of their involvement in that previous case.¹⁴ The Defence has been aware of this ground at least in November 2016 when the Case 002/01 appeal judgment was handed down.

18. Indeed the Lead Co-Lawyers note, by way of context, that the Defence had reason to anticipate this issue even significantly before the appeal judgment. In 2013 lengthy discussions were initiated concerning whether a new panel of judges should be constituted to hear Case 002/02.¹⁵ Eventually, in December 2013, a decision was taken not to constitute

¹³ **Doc. No. 8** Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, paras 15-21.

¹⁴ **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015, paras 6, 9.

¹⁵ On 8 February 2013, the Supreme Court Chamber invalidated, without prejudice, the Trial Chamber's first severance in Case 002 and stated "in the event of a renewed severance of Case 002, [it] considers that the ECCC should explore the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002": **E163/5/1/13** Decision on the Co-Prosecutor's Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, paras 49, 50, 52.

On 23 July 2013, in this context of its second decision on severance, the Supreme Court Chamber instructed "the Office of the Administration of the ECCC to immediately explore the establishment of a second panel of national and international judges within the Trial Chamber to hear and adjudicate Case 002/02.": See **E284/4/7** Summary of Reasons, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, *Lead Co-Lawyers' Response to KHIEU Samphân's Application for Disqualification* Page 8 of 21

a new Trial Chamber for Case 002/02.¹⁶ Rather, the same judges who had dealt with Case 002/01 would determine Case 002/02.

19. It was in this context, following the issuance of the Case 002/01 trial judgment on 7 August 2014, that the Defence filed its first Case 002/01-related disqualification application. That application sought (in the alternative to staying proceedings until a final appeal judgment in Case 002/01) the disqualification of all Trial Chamber judges in part because of their role in determining KHIEU Samphân's criminal responsibility in Case 002/01.¹⁷ (Notably, this application was filed on 25 August 2014, two and a half weeks after the trial judgment had been issued.)
20. On 14 November 2014 a Special Panel of the Trial Chamber (the "Special Panel") rejected the disqualification applications.¹⁸ Reasons were issued on 30 January 2015 (the "Trial Chamber Disqualification Decision").¹⁹ By majority the Special Panel held that the role of

23 July 2013, para. 11; and **E284/4/7** Order Regarding the Establishment of a Second Trial Panel, 23 July 2013, p. 2.

The Office of the Administration followed up the order with two memorandums indicating the potential legal challenges to setting up such a panel and its feasibility: **E284/7/1/1** Interoffice Memorandum, 18 September 2013; **E284/7/1/2** Interoffice Memorandum entitled "Judicial order regarding establishment of a second trial panel", 31 October 2013.

A trial management meeting was held on 11 and 12 December 2013, where the parties were invited by the Trial Chamber to discuss both the legality and feasibility of a second panel, *as well as any potential disqualification requests that may arise from the same judges hearing both Cases 002/01 and 002/02*: See **E1/238.2** Transcript 12 December 2013, p. 88 line 19 – p. 94 line 10 and p. 96 line 21 to p. 97 line 9. Upon invitation of the Trial Chamber, all of the parties were explicitly invited to comment upon whether disqualification would be sought on the basis that the same judges who decided Case 002/01 would hear Case 002/02.

¹⁶ **E301/4** Trial Chamber Memorandum entitled "President's Memorandum on the Proposal to Appoint a Second Panel to the Trial Chamber to Try the Remaining Charges in Case 002", 20 December 2013.

¹⁷ **E314/1** Mr KHIEU Samphân'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, paras 47-48 ("Alternatively and in any event, if the Chamber were to decide not to grant the stay, the Defence requests that all the judges of the Trial Chamber (including Reserve Judge FENZ, since she sat on the bench on several occasions during Case 002/01 and participated in some deliberations) should be disqualified, so that if Case 002/02 were to start immediately, it would be conducted by a panel of judges who would not yet have ruled on Mr KHIEU Samphân's criminal responsibility for matters supposedly falling within the scope of Case 002/02 and subsequent trials"). See also **E314/8** Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who Are to Hear Case 002/02, 10 October 2014, para. 10.

¹⁸ **E314/12** Decision on Applications for the Disqualification of Trial Chamber Judges, 14 November 2014.

¹⁹ **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015.

the Trial Chamber judges in determining the criminal responsibility of the accused in Case 002/01 did not create a bias or a perception of bias such as should lead to their disqualification from Case 002/02.²⁰

21. Although this decision related the Trial Chamber rather than the Supreme Court Chamber, its reasoning is directly applicable to the question of whether the same Supreme Court Chamber judges should hear any appeal in Case 002/02. As a result, it has been clear since the publication of those reasons in the Trial Chamber Disqualification Decision that no new panel of Supreme Court Judges would be convened to hear any appeal in Case 002/02. Since that time the Defence could have anticipated that in the event of a conviction on appeal in Case 002/01 this issue would arise.
22. KHIEU Samphân's conviction on appeal occurred on 23 November 2016. As of that date, the Defence was aware of the ground for disqualification on which it now seeks to rely: namely the allegation that the Supreme Court Judges judges are biased (or could be perceived as biased) because of their role in convicting the accused in Case 002/01.
23. Indeed, the conclusion that the alleged ground of bias was known by November 2016 is supported by the arguments made in the Application itself. It argues that the Trial Chamber Disqualification Decision was in error; and that the correct approach, was that taken in Judge Downing's dissent.²¹ That approach was expressed by Judge Downing as follows:

...in respect of KHIEU Samphan, the Trial Chamber had previously ruled upon the existence of a joint criminal enterprise involving the Accused; charged CPK policy; KHIEU Samphan's general involvement in the common purpose and in

²⁰ E314/12/1 Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 106 ("Reviewing the Case 002/01 Judgement as a whole, including the particular passages relied upon in the Disqualification Applications, the Trial Chamber Judges understood their findings to be limited to Case 002/01. A reasonable observer would recognise that professional Judges are capable of trying successive cases against the same accused, just as they are capable of trying successive cases involving related events and similar evidence. The Disqualification Applications fail to establish that a reasonable observer would perceive that the Judges in question might be unable to bring an impartial mind to Case 002/02 just because the Judges made findings in Case 002/01. NUON Chea's and KHIEU Samphân's submissions that the Case 002/01 Judgement prejudices their guilt in relation to Case 002/02 are therefore dismissed."). *See also* paras 75-76, 80.

²¹ Application for Disqualification, paras 24-55. *See especially* paras 26-28, 51.

particular themes within the scope of Case 002/02, such as the establishment of cooperatives and worksites; crime base evidence relevant to this policy; and chapeau elements of crimes against humanity. As these findings were made beyond reasonable doubt, in respect of the same Accused, I consider that these grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias.²²

24. If the Defence truly holds to this approach, the allegation of bias arises from the judges' findings regarding KHIEU Samphân's criminal responsibility in Case 002/01. That alleged ground crystallised in respect of the Supreme Court Chamber judges on the issuance of the appeal judgment on 23 November 2016.
25. That this ground had been identified by the Defence, well before the conclusion of the Case 002/02 trial, is further demonstrated by the fact that it was expressly referred to in the Defence's Case 002/02 Closing Brief in October 2017.²³
26. Reference in the Application to a "cumulative" third "ground" is misleading. This "ground" is said to concern "procedural irregularities committed since the pronouncement of the Trial Judgement"; that is, since November 2018. In reality, these matters can constitute nothing more than "supporting evidence" in relation to an already known ground. Indeed, the Defence itself argues that decisions taken by the Supreme Court Chamber since 16 November 2018 "reinforce" its conclusion that the judges are biased by virtue of their involvement in Case 002/01. Nothing in the series of decisions adverse to the Defence – which the Defence argues constitute errors, without explaining why an error should be equated to bias – demonstrates a separate *ground* to that said to arise from the judges' involvement in Case 002/01. Indeed, if a separate ground *did* arise from those decisions, it is unclear why Judge Harding Clark would not be included in the Application: she was

²² *Ibid.* para. 40.

²³ E457/6/4/1 KHIEU Samphân's Closing Brief (002/02), 2 May 2017 and amended on 2 October 2017, para. 656.

among the judges who decided the Decision of 16 August 2019, which the Defence complains of in paragraph 113 of the Application.²⁴

27. For all of these reasons, the Lead Co-Lawyers submit that the Defence knew of the ground that truly underlies the Application on 23 November 2016. It remains then only to determine at what point it became possible and necessary for this question to be raised in light of the apprehension, and then existence, of appeal proceedings.

(2) The Defence knew of its intention to appeal from 16 November 2018

28. A summary judgment was delivered by the Trial Chamber on 16 November 2018, in which its key conclusions of were provided, including adverse findings as to the individual criminal responsibility of KHIEU Samphân. The Defence was now concretely aware that it would appeal against KHIEU Samphân's convictions. Statements confirming this were made to the press.²⁵ From this moment, the question of alleged bias of the Supreme Court Chamber judges who had sat on the Case 002/01 appeal was no longer hypothetical. The Defence knew that it would appeal. And it knew – as it had done since at least 30 January 2015 – that its appeal would be heard by the same judges who had heard the Case 002/01 appeal.

29. It is not relevant that at this time the Defence did not yet know the full reasons from which it would appeal (as those full reasons for the judgment were only published on 28 March 2019). The Application makes clear that the Defence already considered the Supreme Court Chamber judges involved in Case 002/01 to be biased on questions relating to the criminal responsibility of KHIEU Samphân. Any appeal in relation to KHIEU Samphân's conviction would be affected by that allegation of bias.

²⁴ E463/1/5 Decision on KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgment of 16 November 2018, 16 August 2019, cover page. See Annex 1: ECCC Press Release entitled "Appointment of New ECCC Judge" of 2 August 2019 on the appointment of Judge Harding Clark to the Supreme Court Chamber.

²⁵ See generally Annex 2: News Articles.

30. If the Defence was truly concerned about possible bias in the Supreme Court Chamber, it would have spared no effort to seek disqualification at this time, as soon as it became certain that it would need to seize the Chamber with an appeal. In fact, instead of seeking to disqualify the judges immediately in order to prevent the alleged bias from tainting the appeal proceedings in Case 002/02 and from causing any delay to the proceedings, the Defence robustly engaged in litigation before the now impugned judges, as detailed below.

(3) Appellate proceedings began on 19 November 2018

31. While the Defence could and should have filed its disqualification requests as soon as it became aware that it *would* appeal, Internal Rule 34(4)(d) is clear that such a request would have been admissible only if it was filed immediately once the appellate proceedings before the Supreme Court Chamber *were* initiated. This occurred on 19 November 2018 with the filing of “KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018” (the “Urgent Appeal”).²⁶

32. Although the Supreme Court Chamber ultimately held that the Defence’s Urgent Appeal was inadmissible,²⁷ it had nonetheless been seized with a request which required (and received) its judicial determination and which was fundamentally linked to the timing of and procedure involved in the conviction of KHIEU Samphân. In other words, the matter raised in the Urgent Appeal was a matter which would have been affected by the ground now argued, if that ground had any merit. Indeed, the Defence now seeks to argue that the Supreme Court Chamber’s decision on its Urgent Appeal demonstrates bias.²⁸

33. Despite this, the Defence trusted the now-impugned Supreme Court Chamber judges with its Urgent Appeal. Four months later, on 20 March 2019, they again seized the Supreme

²⁶ E463 KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018.

²⁷ E463/1/3 Decision on KHIEU Samphân’s Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, para. 17.

²⁸ Application for Disqualification, para. 111.

Court Chamber, this time with a request in which they asked the same judges (who are now, retrospectively, accused of bias) to annul their decision on the Urgent Appeal.

34. Compounding matters further, the main (non-immediate) appeal proceedings concerning the reasons for the Case 002/02 trial judgment commenced on 21 June 2019, with the filing of the Co-Prosecutors' Notice of Appeal,²⁹ to which the Defence filed its Response before the same panel of Supreme Court Judges.³⁰ Under the Defence's logic, this appeal must also be affected by its allegations of bias, since it is fundamentally concerned with the question of the legal characterisation of conduct for which KHIEU Samphân has been convicted. Indeed, the Application appears to request the outright disqualification of the six judges from all proceedings in Case 002/02, including the determination of the Co-Prosecutors' appeal.

35. The Lead Co-Lawyers therefore submit that appellate proceedings commenced for the *first* time on 19 November 2018. Further appellate proceedings were initiated by the Defence itself on 20 March 2019 and by the Co-Prosecutors on 21 June 2019.

(4) The Application has therefore been filed with significant delay

36. Based on the above it is clear that the Defence has known of the alleged ground of bias since at least 23 November 2016. It has had ample time to prepare its motion. That motion could have been filed as soon as the defence knew that it would appeal KHIEU Samphan's conviction, on 16 November 2018. It was incontrovertibly *required* to be filed no later than the commencement of appellate proceedings, a phase which the Defence itself initiated on 19 November 2018.

37. Had the Defence been genuinely concerned about bias in these proceedings, it was required to raise the issue at the earliest possible moment. Instead, the Defence has filed an

²⁹ **E465/2/1** Co-Prosecutors' Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019.

³⁰ **F50/1** KHIEU Samphân Defence Response to the Prosecution's Appeal in Case 002/02, 23 September 2019.

immediate appeal,³¹ a request for annulment based on the composition of the bench,³² a notice of appeal,³³ requests for time and page limits,³⁴ submissions on the presumption of innocence following NUON Chea's death,³⁵ a response brief,³⁶ and a request for the admission of additional evidence,³⁷ all before judges whom it now claims should be disqualified for reasons which have long been known.

38. Indeed, the Defence perversely seeks to benefit from its own delay by arguing that the decisions made in response to its own motions "reinforce" the allegation of bias. However a party is not permitted by the Internal Rules to wait beyond the required time for filing an application for disqualification, in order to "reinforce" its allegation. If the request for disqualification had been made at the appropriate time, the matter would have been resolved before any of these procedural steps were taken. As the Special Panel held in its Trial Chamber Disqualification Decision, "the most egregious delay occurs when a party already knows the facts purportedly showing an appearance of bias but waits until after an adverse decision has been made before raising the issue of disqualification."³⁸ The approach taken by the Defence would permit a party to identify alleged bias, but rather than making a disqualification application, to instead seize the judges in question with motions, later using the determination of those very motions as proof of a pre-existing bias. This approach is clearly in contravention of both the letter and spirit of Internal Rule 34. It should not be permitted.

³¹ **E463/1** Appel urgent de KHIEU Samphân contre le jugement prononcé le 16 novembre 2018, 19 November 2018.

³² **E463/1/4** KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019.

³³ **E465/4/1** Déclaration d'appel de KHIEU Samphân (002/02), 1 July 2019.

³⁴ **F39/1.1** KHIEU Samphân's Request for Extension of Time and Page Limits on Notice of Appeal, 3 April 2019; **F44** KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 3 May 2019; **F45** KHIEU Samphân's Request for an Extension of Time and Page Limits for Filing his Appeal Brief, 10 July 2019.

³⁵ **F46/2/4/1** KHIEU Samphân's Reply to the Co-Prosecutors concerning the Presumption of Innocence on Appeal (F46/2/4), 9 September 2019.

³⁶ **F50/1** KHIEU Samphân Defence Response to the Prosecution's Appeal in Case 002/02, 23 September 2019.

³⁷ **F51** KHIEU Samphân's Request for Admission of Additional Evidence, 8 October 2019.

³⁸ **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 32.

(2) The interest of justice favour the dismissal of the Application

39. When considering the materially identical applications brought in 2014 concerning the Trial Chamber, the Special Panel expressed “misgivings” about the apparent delay in bringing the applications, but concluded that “overall it is in the interests of justice to admit the Disqualification Applications in their entirety and address the various submissions advanced.”³⁹ Accordingly, it appears that Chambers retain a discretion to consider and determine the merits of an application for disqualification, even if it appears to be otherwise inadmissible under Internal Rule 34, where doing so is in the interests of justice.

40. The Lead Co-Lawyers emphasise that the current circumstances are markedly distinct from those which arose in 2014. In this instance the interests of justice strongly favour the firm rejection of the Application as inadmissible. This is for several reasons:

a. The delay and Defence conduct are particularly egregious

41. First, the conduct of the Defence is significantly more problematic in the present instance. It is marked by a much more substantial delay, with significantly less potential justification, and the taking of a number of *positive* steps to engage with the very judges now impugned by the Application.

42. In the Trial Chamber Disqualification Decision, the Special Panel considered that it was at least arguable that some grounds had only become fully apparent to the Defence with the filing of the trial judgment on 14 August 2014. The first application for disqualification was filed only 11 days later. In the present instance, there has been a delay of almost an entire year since the commencement of appellate proceedings.

43. The Application itself gives no explanation for that delay. It fails even to explain the delay since the date which it presents (wrongly) as the beginning of appellate proceedings: namely 1 July 2019. It is unclear why a 30 page request, the basis of which has been

³⁹ E314/12/1 Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 32.

known for years, and which largely replicates arguments made in respect of the Trial Chamber judges in 2014, would require months to produce even if the Defence has been faced with limited resources.

44. Matters are made worse by the fact that the Defence has been expressly on notice since the Trial Chamber Disqualification Decision on 30 January 2015 decision of the need to file disqualification applications in a timely fashion.
45. Rather than doing so, the Defence have repeatedly filed requests before the very judges whose impartiality they now seek to impugn. Express references has been made by the Defence to the fact that a disqualification motion was being contemplated,⁴⁰ With the Defence in one instance appearing to suggest that this reduced the damage done by delay.⁴¹ Such assertions are not plausible: neither the other parties nor the Judicial Administration Committee can act on speculative references to the possibility of a future disqualification application. Indeed, the fact that such references have been made are only further evidence of delay: they demonstrate irrefutably the Defence's much earlier knowledge of the ground which is now belatedly raised.

b. Considering the request despite the delay would prejudice civil party rights and interests

46. The delay in bringing the Application is problematic not only as a matter of principle: it has the potential to occasion real prejudice to the Civil Parties. Internal Rule 21(1) requires that civil party rights and interests are taken into account throughout proceedings at the ECCC.
47. Legal certainty is a fundamental tenet of ECCC proceedings on which Civil Parties are entitled to rely.⁴² This entails that when a procedural challenge has not been filed at the

⁴⁰ **F39/1.1** KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File his Notice of Appeal, 3 April 2019, para. 35

⁴¹ See in particular the assertion that preparations could already be made for the creation of a special panel, in **E465/1/4** KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, para. 14.

⁴² Internal Rule 21(1).

required time, other parties are entitled to conclude that no such motion is brought. A closely related principle is that proceedings must be dealt with expeditiously.⁴³

48. Had this matter been litigated in November 2018, there would have been ample time for its resolution *before* any substantive work on appeals was done by the Supreme Court Chamber and its staff. As matters stand now, not only have a number of important questions already been *resolved* by this bench of the Supreme Court Chamber (not least: decisions on KHIEU Samphân’s immediate appeal and annulment request, partial timeframes for the conduct of the appeals from the trial judgment, and a decision terminating proceedings against NUON Chea); but appeal filings have actually *concluded* in respect of the Co-Prosecutors’ appeal from the trial judgment.
49. Appointing a special panel to determine the Application will draw on the time of the Supreme Court Chamber staff and of Judge Harding Clark, thereby delaying work on the Co-Prosecutors’ appeal and on other matters which remain pending before the Supreme Court Chamber. In the event that the Application were to be granted, new judges would have to be found and all substantive work on the Co-Prosecutors’ appeals recommenced.
50. Civil parties have a strong interest in seeing such delays avoided. In any case where victims await a final judicial determination concerning crimes against them, an interest arises in having that determination made within a reasonable time.⁴⁴ This interest is notably stronger in the present case because of the advanced age of most of the civil parties. Many have already died during the course of proceedings. Those who continue to

⁴³ Articles 33 *new* and 37 *new* of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea; **F49** Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 19.

⁴⁴ ICC, *Prosecutor v Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s “Decision on Defence Motions Alleging Defects in the Confirmation Decision”, ICC-02/04-01/15-1562, 17 July 2019, para. 136 (Attachment 3); ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, ICC-01/04-01/07-2259, 12 July 2010, paras 46-47 (Attachment 4).

follow proceedings are anxious for their timely resolution. Further delays to the final conclusion of this case must therefore be minimised, and procedural rules designed to ensure expedition robustly enforced.

c. The Application does not raise any novel or serious questions

51. The 2014 disqualification applications concerning the Trial Chamber represented the first time that this very specific question had come before the ECCC, or indeed any international criminal tribunal. A somewhat similar question had been litigated concerning the involvement of a single panel in multiple related cases *against different accused persons*. However the severance of Case 002 had created an entirely novel scenario in which the same accused persons were defendants in two separate cases.
52. Given the importance of the question, and the fact that it was without any precedent in international criminal law, there was a clear benefit in having the question determined. This contributed to legal certainty because if the matter was not determined at that stage, it may have been raised in another way later, with the risk that trial proceedings could be tainted by a ruling that found a perception of bias did exist.
53. In the present instance no such justifications demand the resolution of the Application on its merits. The issue raised in the Application is materially identical to that which has already been determined comprehensively in the Trial Chamber Disqualification Decision of 30 January 2015.

d. The interests of justice favour the enforcement of applicable procedural rules

54. Procedural rules requiring parties to file in a timely matter are fundamental to the fair conduct of proceedings and should be upheld unless attenuating circumstances are clearly established. As the European Court of Human Rights has explained, rules concerning time-limits in legal proceedings:

...are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied.⁴⁵

55. Rejecting untimely defence motions as inadmissible is not only permissible, but ensures the fair and expeditious conduct of proceedings.⁴⁶ The ICC Appeals Chamber's recent ruling to this effect, which highlighted that "the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings, including the accused person"⁴⁷ is entirely consistent with the requirement for expedition in which applies in ECCC proceedings,⁴⁸ and the concerns expressed in the Trial Chamber Disqualification Decision.⁴⁹

56. Indeed, the fact that the Trial Chamber Disqualification Decision engaged with the merits of late disqualification requests "in the interests of justice" may have emboldened the Defence to disregard Internal Rule 34's stipulations concerning admissibility in the present instance. The Supreme Court Chamber should now act firmly to enforce the procedural rules which protect the Civil Parties' rights to legal certainty and expeditious proceedings.

IV. THE DEFENCE REQUEST FOR A HEARING

57. The Defence request for a hearing should be dismissed. Internal Rule 34 makes no reference to oral hearings in the determination of disqualification applications. While the Chambers retain a discretion to determine procedure, no reason has been given as to how

⁴⁵ ECtHR, *Miragell Escolano and Others v Spain*, Judgment of 25 January 2000, App. Nos 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41446/98, 41484/98, 41487/98 and 41509/98, para. 33 (Attachment 5).

⁴⁶ ICC, *Prosecutor v Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's "Decision on Defence Motions Alleging Defects in the Confirmation Decision", ICC-02/04-01/15-1562, 17 July 2019, paras 131-136.

⁴⁷ *Ibid.* para. 152.

⁴⁸ Articles 33 new and 37 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea; **F49** Decision on KHIEU Samphân's Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 19.

⁴⁹ **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 32.

a hearing would assist in the resolution of the matter. Such a hearing would only involve further unnecessary loss of time and resources. The request should be dismissed.


V. REQUEST

58. The Civil Parties therefore respectfully request that the Chamber:

(1) **DISMISS** *KHIEU Samphân's Application for Disqualification of the Six Appeal Judges who Adjudicated in Case 002/01* as inadmissible.

(2) **DISMISS** the request for an oral hearing.

Respectfully submitted,

Date	Name	Place	Signature
25 November 2019	PICH Ang Lead Co-Lawyer	Phnom Penh	
	Megan HIRST Lead Co-Lawyer	London	