BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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KHIEU Samphân's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01

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Before:

The Supreme Court Chamber
Judge KONG Srim
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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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 15 September 2010, KHIEU Samphân was indicted for crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code, before being sent for trial on 13 January 2011.[1]

2. On 22 September 2011, the Trial Chamber (the "Chamber") severed the charges by a first severance order,[2] quashed by the Supreme Court Chamber (the "Supreme Court") on appeal (the "First Severance Decision").[3] A second order was upheld on appeal on 23 July 2013 (the "Second Severance Decision").[4] On 4 April 2014, a decision on a new severance was issued and upheld on 29 July 2014 (the "Third Severance Decision")[5] endorsing the holding of two trials (Cases 002/01 and 002/02) with related and overlapping factual and legal elements.

3. On 7 August 2014, in Case 002/01, the Chamber found KHIEU Samphân guilty of crimes against humanity and sentenced him to life imprisonment.[6] On 23 November 2016, all the judges of the Supreme Court, with the exception of Judge HARDING CLARK, delivered its judgement on the appeals against the trial judgement and upheld the conviction ("Case 002/01 Appeal Judgement").[7]

4. On 16 November 2018, in Case 002/02, the Chamber found KHIEU Samphân guilty of genocide (of the Vietnamese), crimes against humanity and grave breaches of the Geneva Conventions without issuing the reasons for judgement.[8] On 19 November 2018, the KHIEU Samphân Defence (the "Defence") asked the Supreme Court to annul the Judgement on grounds of procedural defect and lack of reasoning.[9] On 13 February 2019, a Supreme Court panel

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[1] Closing Order, 15 September 2010, **D427** ("Closing Order **D427**"), para. 1613; Decision on IENG Thirith's and NUON Chea's Appeals against the Closing Order, 13 January 2011, **D427/2/12** and Decision on KHIEU Samphân's Appeal against the Closing Order, 13 January 2011, **D427/4/14**.
[2] Severance Order Pursuant to Internal Rule 89 *ter*, 22 September 2011, **E124**.
[3] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01, 8 February 2013, **E163/5/1/1/3** ("First Severance Decision **E163/5/1/1/3**").
[4] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons, 23 July 2013, **E284/4/7**; Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, **E284/4/8** ("Second Severance Decision - Reasons **284/4/8**").
[5] Decision on KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, **E301/9/1/1/3** ("Third Severance Decision **E301/9/1/1/3**").
[6] Case 002/01 Trial Judgement, 7 August 2014, **E313**.
[7] Appeal Judgement in Case 002/01, 23 November 2016, **F36** ("Case 002/01 Appeal Judgement **F36**").
[8] Transcript of the hearing of 16 November 2018, **E1/529.1** pp. 53-57 between 11:25 and 11:38.
[9] KHIEU Samphân Defence's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, **E463** ("Urgent Appeal **E463**").

including Judge RAPOZA found the appeal inadmissible.[10] On 20 March 2019, the Defence requested the annulment of this decision because the panel of judges was then improperly composed.[11] This motion, notified on 3 July 2019,[12] was found to be without merit[13] by the Supreme Court on 16 August 2019.

5. On 28 March 2019, the parties were notified of the full reasons for the Trial Judgement in Case 002/02 dated 16 November 2018 ("reasons for the Trial Judgement").[14]

6. On 3 April 2019, the Defence indicated its intention to file an application to disqualify the judges of the Supreme Court ("the challenged judges") in its request for extension of time and number of pages to file its notice of appeal.[15]

7. On 1 July 2019, the Defence filed its notice of appeal, reaffirming its intention to file an application for disqualification as soon as possible.[16] On 23 September 2019, the Defence filed its response to the Prosecution's appeal.[17]

8. The Defence hereby requests the disqualification of the six appeal judges who adjudicated in Case 002/01. This admissible application (I) is based on the fundamental and absolute right to be tried by an impartial tribunal (II), violated by the existence of bias and an appearance of bias that are inconsistent with the function of an appeal judge (III).

I. ADMISSIBILITY OF THE APPLICATION

9. According to Internal Rule 34, an application for disqualification of a Supreme Court judge "concerning matters arising before the appeal", must be filed "at the beginning of the appellate proceedings" and "as soon as the party becomes aware of the grounds in question".[18] Moreover, the Supreme Court has held that the conditions prescribed in Internal Rule 34:

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[10] Decision on KHIEU Samphân's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, **E463/1/3** ("Decision on Urgent Appeal **E463/1/3**"), para.18.
[11] 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, **E463/1/4** ("Request for Annulment of Decision **E463/1/4**").
[12] The request was filed on 20 March 2019 at 11:52 a.m. and was therefore illegally kept secret for more than 3 months.
[13] Decision on KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, **E465/1/5** ("Decision on the Request for Annulment **E465/1/5**")
[14] Case 002/02 Trial Judgement, 16 November 2018, **E465**.
[15] KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, **F39/1.1** ("Request for Extension **F39/1.1**"), para. 35
[16] KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, **E465/4/1** ("Notice of Appeal **E465/4/1**"), para. 14.
[17] KHIEU Samphân Defence Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, **F50/1**.
[18] Internal Rules 34(4)(d) and 34(3).

> **necessarily imply that the applicant must have an appeal pending** before the Chamber at the time of the filing of the application for disqualification. This is consistent with the requirement that the applicant **have legal interest that could be adversely affected (*gravamen*)** if the Supreme Court Chamber does not consider the merits of his/her application for disqualification.[19]

10. The application must be made in writing and "shall clearly indicate the grounds and shall provide supporting evidence".[20] The burden of proof rests with the party seeking a disqualification and there is a strong presumption of impartiality which attaches to judges.[21]

11. This application is admissible. It is filled while an appeal is pending at the beginning of the appeal proceedings.[22] This application is based on the scope of the appeal against the Case 002/02 Trial Judgement,[23] and is limited to the errors raised by the parties.[24] It is also based on recent procedural irregularities.[25] Furthermore, the application provides written reasons and evidence in support of the allegations of bias. Thus, the Defence notes, *inter alia*, the link between the reasons for the Case 002/02 Trial Judgement, those of the Case 002/01 Appeal Judgement and the impact on the appeal of the Case 002/02 Trial Judgement. Annexes 1 to 16 show the extent of the issues already adjudicated by the challenged judges.

II. AN ABSOLUTE AND FUNDAMENTAL RIGHT TO BE TRIED BY AN IMPARTIAL TRIBUNAL

12. The right to be tried by an impartial tribunal is encompassed within the legal framework applicable before the ECCC and its violation gives rise to a violation of the right to a fair trial.

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[19] Decision on IENG Thirith's Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, 3 June 2011, **1/4**, para. 4 (emphasis added).
[20] Internal Rule 34(3).
[21] Case 002/01 Appeal Judgement **F36**, para. 112. See also: Public 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, 4 February 2008, **C11/29** ("Disqualification Decision **C11/29**"), paras 15, 16 and 19 citing in footnote 4, *The Prosecutor v. Furundžija*, IT-95-17-1/A, Appeal Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 196; 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, **E55/4** ("Disqualification Decision **E55/4**"), para. 12; Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012, **E171/2** ("Disqualification Decision **E171/2**"), para. 12; Decision on IENG Sary's Application for Disqualification of Judge Cartwright, 4 June 2012, **E191/2** ("Disqualification Decision **E191/2**"), para. 13; Reasons for Decision on Applications for Disqualification, 30 January 2015, **E314/12/1** ("Reasons for Disqualification Decision E314/12/1"), para. 35.
[22] The appeal is pending since the filing of the notice of appeal on 1 July 2019. In addition, the appeal brief has not yet been filed (it should be filed on 27 February 2020).
[23] See the arguments developed below in Sections III. B and C.
[24] Internal Rule 106.
[25] See the arguments developed below in Section III. D.

13. The Agreement between the United Nations and the Government of Cambodia (the "ECCC Agreement") and the ECCC Law both provide that judges "shall be persons of high moral character, impartiality and integrity".[26] They must exercise their jurisdiction:

> in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (the "Covenant"), to which Cambodia is a party.[27]

14. Article 14(1) of the Covenant provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal".

15. The Internal Rules provide that the proceedings must be fair[28] and set out the legal framework for the disqualification of judges in Internal Rule 34 which protects the accused.[29]

16. Article 2 of the ECCC Code of Judicial Ethics states that "[j]udges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions".

17. ECCC jurisprudence has recognized that "[t]he right to an independent and impartial tribunal is a **key** element of the **fundamental** right to a fair trial".[30] The Human Rights Committee has also noted that "[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an **absolute** right that is not subject to **any exception**".[31] The absolute force of this right must guide the adjudication of this application and binds the judges in their assessment of the law and the facts.[32]

III. THE EXISTENCE OF UNACCEPTABLE ACTUAL BIAS AND APPEARANCE OF BIAS

18. The disqualification of the challenged judges is necessary to guarantee the fundamental and absolute right to be tried by an impartial tribunal.

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[26] Article 3(3) of the ECCC Agreement; Article 10 of the ECCC Law.
[27] Articles 12(2) and 13 of the ECCC Agreement; Articles 33 and 37 of the ECCC Law.
[28] Internal Rule 21(1)(a).
[29] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, **E137/5/1/3**, para. 15: "Rule 34 is a specialized procedure intended to safeguard the right to a fair trial and the integrity of the judicial role".
[30] Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and related requests, **E5/3**, para. 5, see footnote 13 (emphasis added).
[31] General Comment No. 32, Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, UN Doc CCPR/C/GC/32, 23 August 2007 ("General Comment No. 32"), para. 19 (emphasis added), citing *Gonzalez del Rio v. Peru*, Communication No. 263/1987, para. 51. Referred to in the Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 11 and footnote 21.
[32] Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 21.

19. The legal test for disqualification is that of unacceptable actual bias and/or appearance of bias (A). In this case, there are three cumulative grounds rebutting the strong presumption of impartiality that attaches to judges. The findings reached in the Case 002/01 Appeal Judgement prejudge the Defence's grounds of appeal in Case 002/02 (B). In addition, certain erroneous findings reached in the Case 002/01 Appeal Judgement (C) and procedural irregularities committed since the pronouncement of the Trial Judgement (D) are proof of the lack of impartiality of the challenged judges.

A. The legal test applicable to applications for disqualification

20. Internal Rule 34(2) sets out the applicable test by providing that:

> Any party may file an application for disqualification of a judge in any case in which the judge has a personal or financial interest or concerning which the judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.[33]

21. This rule includes the notions of subjective (actual bias) and objective (appearance of bias) partiality,[34] in accordance with the maxim that "justice should not only be done but should manifestly and undoubtedly be seen to be done".[35]

22. The jurisprudence of the ECCC has consistently held that Internal Rule 34 is to be interpreted in the light of the test set out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The test is as follows:

> A Judge is not impartial if it is shown that **actual bias** exists.
>
> There is an **unacceptable appearance of bias** if:
>
> - 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;
> - the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[36]

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[33] Internal Rule 34(2).
[34] Disqualification Decision **C11/29**, para. 12; Disqualification Decision **E55/4**, para. 11; General Comment No. 32, para. 21.
[35] Maxim stated by Lord Hewart CJ in R. v. Sussex Justices ex p. McCarthy, [1924] 1 KB 256 [1923] All E R 233, quoted in English in Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 12.
[36] Case 002/01 Appeal Judgement **F36**, para. 112 (emphasis added). See also: Disqualification Decision **C11/29**, para. 20, citing the *Furundžija* Appeal Judgement, para. 189; Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests, 28 January 2011, **E5/3**, para. 6; Decision on IENG Thirith and IENG

23. A reasonable apprehension of bias is established from the perspective of a reasonable observer who is:

> 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.[37]

B. The existence of bias based on the Case 002/01 Appeal Judgement prejudging the appeal in Case 002/02

24. Following the relevant jurisprudence (1), it is clear that compelling reasons make the disqualification necessary since the Case 002/01 Appeal Judgement unacceptably prejudges the appeal in Case 002/02 (2).

1. Relevant jurisprudence

25. ***ECCC jurisprudence***. In deciding the application for disqualification of the judges of the Chamber at the beginning of the trial in Case 002/02, the Special Panel considered that the test identified by the Supreme Court was whether the contested finding "'evince[s] attributing criminal responsibility' in relation to the la[t]ter case".[38] For the Special Panel, the "crucial point" was "whether findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases".[39] A "pre-disposition toward a certain resolution" is not enough.[40]

26. In his partly dissenting opinion, Judge DOWNING considered that:

> the Trial Chamber made **findings in the Case 002/01 Judgement on a number of** extant and **significant issues** for determination in Case 002/02, **the effect of which is to evince the attribution of individual criminal responsibility** to NUON Chea and **KHIEU Samphan for crimes charged in Case 002/02**. I consider that these findings constitute **grounds** for concluding that **a reasonable observer properly informed would reasonably apprehend bias on the part of the challenged judges in Case 002/02**.[41]

Sary's Applications for Disqualification of Judge YOU Ottara from the Special Bench and Requests for a Public Hearing, 9 May 2011, **E63/5**, para. 11; Disqualification Decision **E171/2**, para. 12; Disqualification Decision **E191/2**, para. 13 and Reasons for Disqualification Decision E314/12/1, para. 33.

[37] Disqualification Decision **C11/29**, para. 21, footnote 8 citing the *Furundžija* Appeal Judgement, para. 190; Disqualification Decision **E55/4**, para. 12; Disqualification Decision **E191/2**, para. 13.

[38] Reasons for Disqualification Decision E314/12/1, para. 54, citing the Third Severance Decision **E301/9/1/1/3**, para. 85.

[39] Reasons for Disqualification Decision E314/12/1, para. 70.

[40] Disqualification Decision **E55/4**, para. 15, see footnote 36; Reasons for Disqualification Decision E314/12/1, para. 62.

[41] Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 1 (emphasis added).

27. With regard to the set of clues that may help resolve the issue, he helpfully clarified:

> **The impact of previous judicial findings** on the **overall determination of the guilt of the accused is of significant import** when examining apprehension of bias, such that **findings relative to the accused's involvement in the crimes at issue** are more likely to lead to disqualification than factual findings touching upon secondary factual issues.[42]

28. Despite Judge DOWNING's opinion, the Defence application for disqualification was dismissed by the Special Panel.[43] This is wrong, having regard to the recent jurisprudence of the international criminal tribunals enshrining the fundamental right to be tried by an impartial tribunal.

29. ***Jurisprudence of the international criminal tribunals***. The unique circumstances of Case 002/02 justify taking even greater precautions than before the other international tribunals and courts which have ruled in favour of the strict respect for the principle of judicial impartiality. In the words of the Supreme Court:

> This body of jurisprudence, however, originates from cases that had neither a common main hearing nor common accused.[44]

30. The case which approximates most closely to the present situation is that of MLADIĆ, who alleged the existence of bias on the part of the judges assigned to hear his appeal on the basis of previous findings reached by these same judges at the trial of other accused, which prejudged his own guilt. The International Residual Mechanism for Criminal Tribunals ("MICT") granted the motions to disqualify the judges in question. They were based on findings made by the Appeals Chamber presided by Judge MERON in the context of the *Krstić* and *Tolimir* Cases, by the Trial Chamber presided by Judge AGIUS in the *Popović* Case, and by the Trial Chamber presided by Judge LIU in the *Blagojević and Jokić* Case. The existence of a reasonable apprehension of bias was recognized and addressed.[45]

31. The MICT's decision on the motion against Judge MERON is enlightening as it concerns "the particular context of the appeals procedure".[46] It is thus specified that:

> although the Appeals Chamber has a different role from that of a Trial Chamber, the Appeals Chamber may nevertheless intervene in those findings of a Trial Chamber where no

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[42] Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 23 (emphasis added).
[43] Decision on the Applications for the Disqualification of Trial Chamber Judges, 14 November 2014, **E314/12**.
[44] Third Severance Decision **E301/9/1/1/1/3**, para. 83. See also Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 3: "the circumstances of the present case, which are due to the severance of Case 002, are unique".
[45] *The Prosecutor v. Mladić*, Decision on Defence Motions for Disqualification of Judges Theodor MERON, Carmel AGIUS and Liu DAQUN, MICT-13-56-A, 3 September 2018 ("*Mladić* Disqualification Decision").
[46] *Mladić* Disqualification Decision, para. 41.

> reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. It appears in practice that the Appeals Chamber is not always satisfied to rely on the findings of a Trial Chamber, and may on occasion substitute itself for the Trial Chamber to reverse or confirm the latter's findings and assume these findings. The Appeals Chamber therefore occasionally plays the role of a court of cassation and a second-instance chamber.[47]
>
> Although in appellate proceedings the standard of review is different, the judges must have in-depth knowledge of the case. Judges can therefore also be involved in analysing incriminating evidence and in making findings relevant to another person's responsibility, on which they have ruled in the context of a different trial.[48]

32. Accordingly, the findings of an Appeals Chamber may be sufficient to establish at least one allegation of an appearance of bias:

> if certain formulations by the Appeals Chamber would lead a reasonable observer, properly informed, to think that its Judges had an unacceptable bias regarding the guilt of an accused in a connected case.[49]

33. In this MICT decision, Single Judge ANTONETTI stated that a "reference [which] clearly implies the attribution of criminal responsibility to the Accused Ratko Mladić for crimes being contested on appeal" or "a finding of the Appeals Chamber Judges on the genocidal intent of members of the VRS Main Staff" in the absence of a footnote or explicit reference to the Trial Chamber is sufficient to rebut the presumption of impartiality.[50]

34. In addition, Judge ANTONETTI considered that although "extremely incriminating references regarding the Accused Ratko Mladić do not directly constitute findings of the Appeals Chamber, their accumulation in two separate appeal judgements presents a problem".[51] He concluded that there was an "impression of bias" with regard to MLADIĆ because of "the reference in the *Krstić* Appeal Judgement to the Accused Ratko Mladić having been one of those who "ordered the executions and actively took part in them" and the "numerous other references to the Accused in the *Krstić* and *Tolimir* Appeal Judgements".[52] The judge also noted that:

> The Appeals Chamber Judges, including Judge Meron, were confronted intensively by the evidence admitted by and the findings of the Trial Chamber regarding General Mladić's genocidal intent, his belonging to a joint criminal enterprise and even his central role in the planning and commission of a crime which he is contesting on appeal. Reference is made to his individual criminal responsibility and to his criminal responsibility as a superior on

[47] *Mladić* Disqualification Decision, para. 37, see footnote 88.
[48] *Mladić* Disqualification Decision, para. 82.
[49] *Mladić* Disqualification Decision, para. 38.
[50] *Mladić* Disqualification Decision, paras 43-46.
[51] *Mladić* Disqualification Decision, para. 49.
[52] *Mladić* Disqualification Decision, para. 49.

> numerous occasions. Consequently, it is **difficult to imagine how Judge Meron could apprehend the appeal filed by the Accused Ratko Mladić without being influenced by the incriminating evidence that he analysed against him and by his own previous findings**.[53]
>
> [T]he analysis of incriminating references against Ratko Mladić, taken cumulatively, tends to show that there is a reasonable apprehension of bias.[54]

35. Finally, this MICT decision explicitly recognizes the pitfalls of judges hearing several related trials and marks the end of a risky practice in the matter of impartiality:

> By allowing certain judges to hear two separate trials arising from the same series of facts, and where the cases involve overlapping questions of fact or law, the international criminal tribunals took **risks** in the matter of impartiality.[55]

36. Since then, following this jurisprudence, Judge MERON voluntarily withdrew from the *Karadzić* Case in response to a motion against him on the ground of appearance of bias resulting from his participation in previous cases against other accused but in which findings had been reached concerning KARADZIĆ.[56]

37. ***Jurisprudence of the European Court of Human Rights ("ECHR")***. In *Poppe v. The Netherlands*, the ECHR held that the fact that a judge's earlier judgements contain findings that actually prejudge the question of the guilt of an accused in subsequent proceedings was sufficient to cast doubt on the judge's impartiality.[57] This Judgement has at times been interpreted "as requiring that the impugned judge has ruled on all "'the relevant criteria necessary to constitute a criminal offence' in order to be disqualified".[58] However, Judges ANTONETTI and DOWNING correctly stated that the reference in this case to all the elements of a criminal offence[59] was "illustrative and d[id] not establish a dispositive test for prejudgement".[60] In particular, they noted that in other cases, the ECHR had found a violation

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[53] *Mladić* Disqualification Decision, para. 49.
[54] *Mladić* Disqualification Decision, para. 52.
[55] *Mladić* Disqualification Decision, para. 82. See also para. 83: "In the past, this situation was difficult to avoid given that the international criminal tribunals were seised of cases which were grouped together and that the number of judges was limited. However, in addition to this practice being criticised by the ECHR at a national level, I believe that it is no longer justified in the current context of the Mechanism."
[56] *The Prosecutor v. Karadzić*, MICT-13-55-A, *Decision*, 27 September 2018.
[57] *Case of Poppe v. The Netherlands* (Application No. 32271/04), Judgement, 24 March 2009 ("*Poppe v. The Netherlands*"), para. 26.
[58] *Mladić* Disqualification Decision, para. 25.
[59] *Poppe v. Netherlands*, para. 28, cited in Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 15.
[60] *Mladić* Disqualification Decision, para. 25 citing in footnote 54 Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 16.

of the right to an impartial tribunal, even though the judges in question had not previously pronounced on each and every element of the crimes.[61]

38. Furthermore, in *Mancel and Branquart v. France,* the ECHR established the existence of a violation of the right to an impartial tribunal on the ground that:

> the apprehension of bias was due to the fact that **seven of the nine judges** sitting in the Criminal Division [of the Court of Cassation], which, on 30 November 2005, had ruled on the appeal lodged by the applicants against the sentencing judgement, **had previously sat in the chamber that had ruled on** 27 November 2002 on the appeal lodged by the Prosecutor General of the Amiens Court of Appeal against the decision to acquit (Unofficial translation).[62]

39. The ECHR sets out a fundamental criterion for deciding this case because the Supreme Court plays the role of a court of cassation and a second-instance chamber.[63] Judges must consider "whether the issues that the Judges have to consider in the second appeal are similar to those they adjudicated in the first appeal" (Unofficial translation).[64]

40. Thus, the situation of the challenged Supreme Court judges, considered in the context of the strong MICT and ECHR jurisprudence, leaves no doubt as to their bias.

Disqualification is necessary as a result of the severance of charges and the right to appeal

41. This application is the direct consequence of the problematic severance of Case 002 into two separate trials with related and overlapping factual and legal elements that no longer ensure the guarantee of impartiality (a). The hearing of Case 002/02 by the relevant six appellate judges would infringe the right to appeal (b). In fact, the findings in the Case 002/01 Appeal Judgment determine KHIEU Samphân's criminal responsibility in the appeal in Case 002/02 (c).

a. <u>Violation of the right to be tried by an impartial tribunal due to the overlapping of Cases 002/01 and 002/02</u>

42. Severance of Case 002 was done in an unprecedented and problematic manner, leading to the violation of the right to be tried by an impartial tribunal.

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[61] *Mladić* Disqualification Decision, para. 25 and footnote 55; Partly Dissenting Opinion of Judge DOWNING **E314/12/1**, para. 16.
[62] *Case of Mancel and Branquart v. France* (Application No. 022349/06), Judgement, 24 June 2010, para. 36 (emphasis added).
[63] Article 36 of the ECCC Act; Internal Rule 104. See the reasoning of the MICT above, para. 31.
[64] *Case of Mancel and Branquart v. France* (Application No. 022349/06), Judgement, 24 June 2010, para. 37.

43. KHIEU Samphân was indicted by the Closing Order alleging that the common purpose of CPK leaders was "to implement rapid socialist revolution in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary".[65] This purpose was allegedly implemented through five policies.[66]

44. The severance of charges in Case 002 is an exception. There is no precedent in which an indictment against defendants has been split into several successive trials emanating from the same case involving the same accused. Where severance has been ordered, "it has only been in order to separate the trials of individual persons in multi-accused indictments".[67]

45. As acknowledged by the Supreme Court Chamber in its First Decision on Severance:

> Considerations of efficiency and fairness lend support to **the general principle, expressed in the laws applicable to the ECCC as well as in international criminal jurisdictions**, that charges concerning similar events against several accused should **preferably** be tried in joint proceedings. **Severance of a confirmed indictment is not foreseen under Cambodian law, and the *ad hoc* international criminal tribunals have been reluctant to grant severance requests**. Where severance has been deemed necessary, it has characteristically involved separating an accused person from joint proceedings. As such, decisions on severance constitute **exceptions to the general preference for joint trials**.[68]

46. Judges must be aware of the unprecedented nature of this short-sighted severance which poses a permanent threat to the right to a fair trial. This severance which was exceptional in international criminal law as well as in domestic law, was conducted in a chaotic manner. The nature and imprecise scope of the complex litigation that characterized Case 002/01 and Case 002/02 breaches judicial certainty.[69]

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[65] Closing Order **D427**, para. 1524.

[66] Closing Order **D427**, para 1525. These five policies are: (1) The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another, (2) the establishment and operation of cooperatives and worksites, (3) the re-education of "bad-elements" and killing of "enemies", both inside and outside the Party ranks, (4) the targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and (5) the regulation of marriage.

[67] Second Decision on Severance - reasons **284/4/8**, para. 40.

[68] First Decision on Severance **E163/5/1/1/3**, para. 33 (emphasis added). See also: Second Decision on Severance - reasons **284/4/8**, paras 39, 40 and Third Decision on Severance **E301/9/1/1/3**, para. 51.

[69] In addition to the appeals against the severance decisions referred to *supra* (para. 2) and the countless court proceedings, see among others: Specifications on the procedural framework defining conditions under which persons who have already given in-court testimony in [Case 002/01] can be recalled to testify in [Cases 002/02] and concerning the use of evidence adduced during [Case 002/01] in [Case 002/02], 7 February 2014, **E302/5**; Decision on Khieu Samphan request to postpone commencement of Case 002/02 until a final judgement is handed down in [Case 002/01], 21 March 2014, **E301/5/5/1**; Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists of Evidence (E305/3), 11 June 2014, **E307/1**.

47. During the proceedings in Case 002/01, both at trial and on appeal, and in Case 002/02 trial proceedings, many questions were raised regarding the impartiality of the Judges in relation to the severance. This was particularly the case with factual findings which did not fall within the scope of Case 002/01 and/or are prejudging Case 002/02.[70]

48. At the trial stage, the **Supreme Court Chamber itself** thus explicitly recommended the establishment of a second panel of judges which "**would safeguard against any potential concerns about actual or appearance of bias of judges from the first trial adjudicating the second trial**".[71]

49. In the Second Decision on Severance, the Supreme Court Chamber raised the issue of impartiality and underlined the Trial Chamber's disregard of the issue:

> Efficiency of holding multiple trials instead of one has been examined notably in terms of [...] (vi) legal and managerial concerns if the same panel of judges are assigned to the first and second cases, **including the possibility that partiality and appearance of partiality of the chamber may be raised** as well as the pace of the second trial if the chamber is busy with drafting the judgement in the first case."[72]
>
> **[T]here is no discussion of the potential prejudice to the rights of the Co-Accused caused by real or perceived judicial bias** in the subsequent trials should any conviction follow in Case 002/01.[73]

50. The Supreme Court Chamber has thus always adjudicated in favour of the need to establish a second trial panel,[74] rejected nonetheless by the Chamber.[75] Thus, in its Third Decision on Severance, the Supreme Court Chamber still insisted on this unresolved issue of bias, sensing the ensuing difficulties:

> "Where, however, the same judges consider and determine multiple counts against the same accused, **questions arise concerning judicial impartiality, to the extent that adjudicating a portion of charges may in the same or subsequent trials cause a bias (or appearances of bias) against the accused or a bias resulting from having made findings of facts relevant to the other cases**, a concern, as previously signalled, contemplated in international jurisprudence and municipal systems."[76]

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[70] See for example: KHIEU Samphân's Closing Brief Case 002/02, 2 May 2017, **E457/6/4**, paras 651-658.
[71] First Decision on Severance **E163/5/1/1/3**, para. 51 (emphasis added).
[72] Second Decision on Severance - reasons **284/4/8**, para. 39 (emphasis added).
[73] Second Decision on Severance - reasons **284/4/8**, para. 46 (emphasis added).
[74] Second Decision on Severance - reasons **284/4/8**, paras 73-74; Order regarding the establishment of a second trial panel, 23 July 2013, **E284/4/7/1**; First Decision on Severance **E163/5/1/1/3**, para. 51.
[75] President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002", 20 December 2013, **E301/4**, para. 10.
[76] **E301/9/1/1/3**, para 45 (emphasis added).

> "In the event that the verdict in Case 002/01 leads to **a conviction, there a risk of an overlap of findings that determine individual criminal responsibility in subsequent trials**.".[77]

51. The insistence of the Chamber Judges on hearing both Cases 002/01 and 002/02 led the Defence teams to file applications to disqualify them for lack of impartiality.[78] In denying these applications,[79] the special panel failed to adopt an approach guaranteeing the fundamental right to be tried by an impartial tribunal and protecting the integrity of the proceedings. In his partly dissenting opinion, Judge DOWNING, on the other hand, rightly ruled in favour of the disqualification for reasons we will revisit *infra*. Stressing the exceptional nature of the legal situation created by the severance, he noted, inter alia, that:

> It is the first time in international criminal proceedings that judges have been called upon to adjudicate two separate cases arising out of a single indictment against the same accused persons. Although Cases 002/01 and 002/02 concern different themes, **there is a significant overlap of factual issues**.[80]

52. This "significant overlap of factual" and legal issues justifies this application for disqualification of the Judges who have already made findings of fact and law.

53. The six Judges of the Supreme Court Chamber have already adjudicated and convicted KHIEU Samphân in Case 002/01 comprising the same Accused and raising similar issues. They are in the same position as the Trial Chamber at the time when they themselves were calling for a second panel of judges. To paraphrase the Third Decision on Severance, just like with the Trial Chamber Judges, there is a risk of an overlap of findings "that determine individual criminal responsibility" by the six Supreme Court Judges during the appeal hearing. Similarly, at the appellate stage:

> Where, however, the same judges consider and determine multiple counts against the same accused, questions arise concerning judicial impartiality, to the extent that adjudicating a portion of charges may in the same or subsequent trials cause a bias (or appearances of bias) against the accused or a bias resulting from having made findings of facts relevant to the other case.[81]

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[77] **E301/9/1/1/3**, para 85 (emphasis added).
[78] Mr KHIEU Samphân's Request for reconsideration of the need to await final judgment in Case 002/01 before commencing Case 002/02 and the appointment of a new panel of Trial Judges, 25 August 2014, **E314/1** ; NUON Chea Application for Disqualification of Judges NIL Nonn YA Sokhan Jean Marc LAVERGNE and YOU Ottara, 29 September 2014, **E314/6**; Renewed Application for disqualification of the current Judges of the Trial Chamber who are to hear Case 002/02, 10 October 2014, **E314/8**.
[79] Decision on Applications for disqualification of Trial Chamber Judges, 14 November 2014, **E314/12** and Reason for Decision on Applications for disqualification, **E314/12/1**.
[80] Partly dissenting opinion of Judge DOWNING **E314/12/1**, para 3 (emphasis added).
[81] Third Decision on Severance **E301/9/1/1/3**, para. 45.

54. Based on the sacrosanct principle of the right to be tried by an impartial tribunal and pursuant to Internal Rule 34(1), the six Judges should have recused themselves voluntarily from hearing the appeal in Case 002/02 as there is bias or an appearance of bias.[82] In accordance with the principles that they themselves laid down in the above-mentioned decisions, they still have the time to follow their own recommendation to the Chamber (Internal Rule 34(5)) and to apply the law fairly by complying with this obligation.

55. At the current stage of the proceedings and in the face of issues of impartiality caused by the severance of the case, recusal (voluntary or otherwise) of the Appeal Judges is indeed the only way to guarantee the right to appeal.

b. Violation of the right to appeal

56. At the ECCC, "the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.".[83] The role of Judges at this appeal stage is crucial. This is the second and final instance for KHIEU Samphân, who has also been sentenced to life imprisonment.

57. The impartiality of the Judges who adjudicated in Case 002/01 on many issues of law and fact relevant to the appeal of the Case 002/02 Trial Judgment is impugned. In the words of Judge ANTONETTI of the MICT,[84] it is impossible to imagine how these six judges could hear the appeal in Case 002/02 without being influenced by the incriminating evidence they assessed against KHIEU Samphân and by the findings that they themselves reached previously in Case 002/01.

58. The impugned Judges cannot hear the appeal lodged by the Defence without infringing the fundamental right to be tried by an impartial tribunal, the right to appeal and to the presumption of innocence. The Case 002/02 Appeal Judgment will mark the end of proceedings against KHIEU Samphân. Ensuring the impartiality of the last Judges to hear his case is therefore even more crucial.

59. The following evidence from the Case 002/01 Appeal Judgment does not constitute a mere predisposition to adopt certain positions on matters raised by the Defence on appeal. The

[82] Third Decision on Severance **E301/9/1/1/3**, para. 45, see footnote. 95 which provides a detailed list of references to international case law.
[83] Article 3(2)(b) of the ECCC Agreement. See also: article 36 of the ECCC Law; Internal Rule 104.
[84] *Mladic* Disqualification Decision, paras 49 and 67.

evidence demonstrates that it is almost certain that the Supreme Court Chamber will rule against KHIEU Samphân. Indeed, the manner in which the Judges adjudicated in the Case 002/01 Appeal Judgment does not allow the Appellant to effectively exercise his right to appeal in Case 002/02, should the said Judges not be disqualified.

c. The Case 002/01 Appeal Judgement prejudges KHIEU Samphân's criminal responsibility in the appeal in Case 002/02

60. The Defence refers to the annexes, which are as exhaustive as possible, that demonstrate in a detailed and precise manner the extent of the overlap of the errors raised in its Notice of Appeal with the findings reached in the Case 002/01 Appeal Judgement.[85] Here the Defence will discuss only some of these factual (i) and legal (ii) findings made by the impugned Judges. The findings prejudge the outcome of the appeal in Case 002/02.

i. Factual findings determining KHIEU Samphân's criminal responsibility

61. The impugned Judges made factual findings which were determining factors in KHIEU Samphân's criminal responsibility in Case 002/02. The findings include the alleged criminal policies of establishing cooperatives and work sites, targeting the specific group of former Khmer Republic soldiers and officials, eliminating the enemy and, more importantly, incurring criminal responsibility through a joint criminal enterprise (JCE).[86]

62. ***Cooperatives and work sites.*** The six impugned Judges upheld the existence and purpose of a population movement policy in Case 002/01, thereby prejudging the issue of the existence of a policy to establish worksites which, according them, was justification for such a policy.[87] Above all, they ruled:

> While it is correct that crimes allegedly committed at co-operatives and worksites were not included in the scope of Case 002/01, this does not mean that the Trial Chamber could not regard collectivisation as one of the underlying objectives of the population movements. **Indeed, it**

[85] Annexes 1 to 16 are tables of the errors raised in the notice of appeal (including the relevant paragraphs in the reasons for the Case 002/02 Trial Judgement) with the corresponding paragraphs in the Case 002/01 Appeal Judgement prejudging these issues.
[86] See also paras 753-757 and 1013-1015 (Annex 3); Annexes 2, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16.
[87] Case 002/01 Appeal Judgement **F36**, para. 227. See paras 815-817, 820, 825, 827-830, 834, 837, 839-844, 1005 (Annex 3). See also Annexes 8, 9, 13 and 14.

> **would appear that the enslavement of population was one of the principal objectives of the Khmer Rouge regime, of which the population transfer was but a first step**.[88]

63. This *obiter dictum* is a finding on the existence of a crime that is the subject of Case 002/02 and appears in the absence of a footnote or explicit reference to a finding by the Chamber. On its own, it shows actual bias and/or at least is likely to establish a reasonable apprehension of bias by the Judges. It is inconsistent with the duty of appellate Judges to be totally free of bias when adjudicating on the crime of enslavement and the objectives of the policy to establish cooperatives and work sites.

64. In addition, the Supreme Court Chamber made factual findings on the alleged visits by KHIEU Samphân to work sites.[89] It also ruled on his involvement in making economic policy, including the alleged policy to establish cooperatives and work sites [90] and the outline of the 1977 Economic Plan.[91]

65. ***Alleged policy of targeting the specific group of former Khmer Republic soldiers and officials***
The Supreme Court Chamber explicitly found that the policy of killing enemies overlaps with the policy of targeting former Khmer Republic soldiers and officials:

> Similarly, there appears to be an overlap between the so-called policy of re-educating and killing enemies and the policy of targeting Khmer Republic soldiers and officials. […] This demonstrates once again the overlap between, inter alia, the policy of killing enemies and the targeting policy.[92]

66. Moreover, the Supreme Court Chamber made findings on the murders of former Khmer Republic soldiers and officials and included them in the common purpose for the period relevant to Case 002/02:

> Evidence **[of CPK instructions to kill Khmer Republic soldiers and officials] relating to the subsequent period appears to be much stronger,** but lacks a clear connection to April 1975.[93]
>
> "The Supreme Court Chamber observes that **the evidence post-dating the events at Tuol Po Chrey appears to be generally stronger** than that pre-dating them".[94]

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[88] Case 002/01 Appeal Judgement **F36**, para. 828 (emphasis added).
[89] Case 002/01 Appeal Judgement **F36**, para 1028.
[90] Case 002/01 Appeal Judgement **F36**, paras 838, 840-842.
[91] Case 002/01 Appeal Judgement **F36**, para. 843.
[92] Case 002/01 Appeal Judgement **F36**, para 227.
[93] Case 002/01 Appeal Judgement **F36**, para. 960 (emphasis added).
[94] Case 002/01 Appeal Judgement **F36**, para. 970 (emphasis added). Seer also paras 860, 883-884, 891, 900, 902, 903, 908, 930, 933, 947, 951-952, 958, 962, 965, 967, 968, 971; Annexes 3, 8, 9, 10, 11, 13 et 14.

67. ***Alleged policy of killing enemies***. In particular, the Supreme Court Chamber reached findings on the existence of a policy to kill enemies:

> In sum, the evidence of CPK ideology permitted a reasonable trier of fact to arrive at the conclusion that the Party line, as described, if disseminated through public statements and trainings, could potentially lay the ideological ground for a range of measures against perceived enemies, including physical elimination. [...] 967. As to the evidence concerning the general position of the CPK on communist ideology *vis-à-vis* enemies, the Supreme Court Chamber has found it plausible that the cited Party statements could be regarded as paving the way for a policy contemplating the execution of enemies.[95]

68. ***Findings that KHIEU Samphân allegedly participated significantly in a joint criminal enterprise***. The Supreme Court Chamber made many general findings on KHIEU Samphân's role in implementing the common purpose underpinning his responsibility for the crimes covered by the appeal in Case 002/02. These findings relate to "KHIEU Samphan's role as an economist in implementing the common purpose", in particular in his capacity as member of Office 870[96] and his oversight of the Commerce Committee.[97] They also relate to KHIEU Samphân's contribution by participating in policy[98] and education meetings,[99] making "public statements",[100] "in his role as a diplomat"[101] and by his "authority and influence".[102] The Supreme Court upheld on appeal the Chamber's findings that KHIEU Samphân made a significant contribution to the common purpose.[103] In addition, it has already reached a finding on the "role of the Central Committee", notably on the meeting of 30 March 1976[104] and on "democratic centralism".[105] The Appellant disputes these facts on appeal in Case 002/02.[106]

69. ***Findings that KHIEU Samphân would have known of the crimes committed and on his intent.*** The Supreme Court made findings on KHIEU Samphân's knowledge of the crimes

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[95]Case 002/01 Appeal Judgement **F36**, paras 933, 967. See also paras 860, 883-884, 891, 900, 902, 903, 908, 930, 947, 951-952, 958, 960, 962, 965, 968, 970, 971; Annexes 3, 8, 9, 10, 11, 13 and 14.
[96]Case 002/01 Appeal Judgement **F36**, para. 1017.
[97]Case 002/01 Appeal Judgement **F36**, para. 1018.
[98] Case 002/01 Appeal Judgement **F36**, paras 1006, 1011. See also para. 1086.
[99] Case 002/01 Appeal Judgement **F36**, para. 1015.
[100]Case 002/01 Appeal Judgement **F36**, paras 1022, 1024.
[101]Case 002/01 Appeal Judgement **F36**, paras 1027-1028.
[102] Case 002/01 Appeal Judgement **F36**, para. 1029.
[103]Case 002/01 Appeal Judgement **F36**, para. 1030.
[104]Case 002/01 Appeal Judgement **F36**, para. 1047.
[105]Case 002/01 Appeal Judgement **F36**, para. 1050.
[106] See Annex 15.

committed as relevant to Case 002/01 and on his intent. These findings are intrinsically related to Case 002/02 and are also disputed by the Appellant.[107]

ii. Legal findings determining KHIEU Samphân's criminal responsibility

70. As the final arbiter of the law adjudicating on the errors of law alleged by the Defence, the Supreme Court has jurisdiction to conduct a judicial review. Such jurisdiction is similar to that "[exercised by the Court of Cassation [which], as the final arbiter of the law, may judicially review findings of facts]" (unofficial translation).[108] The partiality of the impugned Judges is assessed on the basis of the test adopted by the ECHR referred to *supra*. It is about establishing whether "[the **issues** [that the Judges] [have] to consider in the second appeal [are] **similar** to those they adjudicated in the first appeal]" (unofficial translation).[109]

71. Each of the questions of law prejudged by the impugned Judges determines KHIEU Samphân's criminal responsibility. They concern the *actus reus* and *mens rea* of the crimes relevant to the appeal in Case 002/02 and the mode of the accused's criminal responsibility, as well as their foreseeability and legality. These issues are again at the heart of the appeal in Case 002/02 and have a decisive impact on its outcome.

72. In particular, the Supreme Court Chamber had already ruled on the contextual elements of crimes against humanity,[110] temporal jurisdiction,[111] the foreseeability and the principle of legality,[112] the *mens rea* of murder as crimes against humanity[113] and joint criminal enterprise.[114] These legal issues are part of the appeal in Case 002/02 and are crucial in determining KHIEU Samphân's individual criminal responsibility for the crimes charged in Case 002/02.[115]

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[107]Case 002/01 Appeal Judgement **F36**, paras 837, 839-842, 1005-1006, 1054-1055, 1071-1077, 1079, 1081-1082, 1084, 1085-1090. See also Annex 15.
[108] *Case of Mancel and Branquart v. France* (Application No. 022349/06), Judgement, 24 June 2010, para. 38.
[109] See *supra*, paras 38-39; *Case of Mancel and Branquart v. France* (Application No. 022349/06), Judgment, 24 June 2010, para. 37.
[110] Case 002/01 Appeal Judgement **F36**, paras 711-732, 738-740, 744-749, 753-754. See also Annex 3.
[111] Case 002/01 Appeal Judgement **F36**, para. 213-221, 229, 741. See also Annex 1.
[112] Case 002/01 Appeal Judgement **F36**, paras 576, 589, 761-762, 765 (see Annexes 1 and 7); 1093 and 1095 (see Annex 12).
[113] Case 002/01 Appeal Judgement **F36**, paras 390-410, 516, 765. See also Annex 7.
[114] Case 002/01 Appeal Judgement **F36**, paras 773-789, 807-810, 814-817, 857, 860, 980-984, 1053-1055. see also Annex 12.
[115] See Annexes 1, 3, 7 and 12.

73. In Case 002/01, the Judges did not only restate case law but **made** numerous, detailed and unorthodox findings by taking the liberty to depart from the law.[116] Once again, not only is it a fundamental right to be tried by an impartial tribunal but also KHIEU Samphân's right to appeal which who would be *de facto* reduced to nothing, absent disqualification.

74. It is not about claiming a right to further appeal in cassation that does not exist within the ECCC but of actually safeguarding the actual effectiveness of Khie Samphân's right to appeal.

75. There is clearly actual bias and, at the very least, a reasonable apprehension of bias on the part of the impugned Judges who have already convicted KHIEU Samphân in the Case 002/01 Appeal Judgment and made findings not only on facts in Case 002/02 underpinning his responsibility but also on similar legal issues.

Existence of bias based on erroneous findings in the Case 002/01 Appeal Judgement

76. Moreover, the existence of bias and/or the appearance of bias on the part of the six challenged judges arises from the erroneous findings they reached in the Case 002/01 Appeal Judgement.

77. The Supreme Court acknowledged that it was possible to establish the existence of bias or the appearance of bias:

> "based on statements contained in the reasoning of a decision of the court in question. (…) [S]uch enquiry is not directed, in the first place, at establishing whether the Trial Chamber erred, but whether its reasoning revealed lack of impartiality."[117]

78. The Special Panel hearing allegations of impartiality relating to the Case 002/01 Trial Judgement noted that it must be shown that:

> "the decisions are, or would reasonably be perceived to be, a result of a predisposition 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. The judicial decisions cited as evidence of bias should be reviewed, but the purpose of that review is not to detect errors, but to determine whether errors, if any, demonstrate that

[116] See Annexes 1, 3, 7 and 12.
[117] Case 002/01 Appeal Judgement **F36**, para. 112. See also references to international jurisprudence in footnote 243 and 244.

the Judges are actually biased, or that a reasonable observer with knowledge of the relevant circumstances would reasonably apprehend bias."[118]

79. In the instant proceedings, in the Case 002/01 Appeal Judgement, the six challenged judges made many errors which are not the result of a true application of the law of which there may be more than one interpretation. The errors are certainly not a result of happenstance and prove their bias. This is evidenced by the erroneous findings on the principle of legality (1) the *mens rea* of the crime against humanity of murder (2) JCE (3) and the legal re-characterisation of the crimes (4). Twisting the law on these issues was indeed the only means of securing KHIEU Samphân's conviction.

1. Erroneous findings on the principle of legality

80. Taking a punitive legislative approach, the challenged judges gutted the principle of legality to make it a mere formality. In *Duch*, in accordance with the case law of the ECHR, the Supreme Court had required that "**the holdings on elements of crimes**" and "**modes of liability**" must have existed in the law at the relevant time, and must have been foreseeable and accessible.[119] In Case 002/01, it departed from this case law by considering that it 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.[120] It held that the foreseeability requirement was met if the Accused had been able to appreciate that his conduct was criminal "in the sense **generally** understood**, without reference to any specific provision**", which is the case for "the gravest [crimes] known".[121] The Defence refers to the arguments developed in its Closing Brief in Case 002/02 (see paras 331-380)

81. This erroneous and biased reasoning is supported by the timely application of this new "principle of legality". In particular, the judges did not consider the foreseeability and accessibility of the *mens rea* of murder and JCE.[122] This is not insignificant.

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[118] Reasons for the Disqualification Decision **E314/12/1**, para. 36; Decision on Applications for Disqualification **E55/4**, para. 13: "Where allegations of bias are made on the basis of a Judge's decisions, it is insufficient merely to allege error, if any, on a point of law. What must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and **not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts**." (emphasis added).

[119] Duch Appeal Judgement, 3 February 2012, **001-F28**, para. 97. *See* KHIEU Samphan's Closing Brief (002/02) **E457/6/4**, paras 300-330.

[120] Case 002/01 Appeal Judgement **F36**, paras 761-762, 764.

[121] Case 002/01 Appeal Judgement **F36**, paras 762 (emphasis added), and 765.

[122] Case 002/01 Appeal Judgement **F36**, para. 765: "Thus, what is required is not an analysis of the technical terms

2. Erroneous findings lowering the *mens rea* of the crime against humanity of murder to *dolus eventualis*

82. The Supreme Court erroneously and with bias adopted a definition of the *mens rea* of the crime against humanity of murder "*largo sensu*" encompassing *dolus eventualis*.[123] This legal finding by the challenged judges vividly reveals a disregard for the cardinal principle of strict interpretation in criminal law.

83. This definition violates the principle of legality since the definition of the crime against humanity of murder in 1975 was limited to intent to kill. To lower the requisite *mens rea*, the judges unlawfully and selectively relied on the subsequent case law of the international criminal tribunals, on a misinterpretation of the Medical Case and cited post-1975 domestic laws. The Defence refers to the arguments developed in its Closing Brief in Case 002/02 (see paras 394-429).

84. In the absence of evidence of direct intent to kill,[124] that was the only way to punish those responsible for the deaths that occurred during the movement of the population. However, that was not enough; it was also and above all necessary for the judges to introduce *dolus eventualis* in the definition of the mode of liability to ensure conviction.

3. Erroneous findings on JCE lowering intent to *dolus eventualis*

85. The Supreme Court erred in law and showed actual bias by asserting that a common purpose of a non-criminal nature in itself could be characterized as a criminal purpose and serve as a basis for a JCE I if the crime committed was an "eventuality treated with indifference".[125]

86. The challenged judges did not choose between several possible interpretations, but dismissed without reason clear and unambiguous case law to adopt *dolus eventualis* as the criterion on which the criminal nature of the common purpose was based.[126] The Supreme Court freed itself from all applicable legal rules and created a hybrid JCE combining *actus reus* elements of JCE I with *mens rea* elements of JCE III, which is not applicable before the ECCC. The Defence refers to submissions in its Closing Brief in Case 002/02 (see paras. 430-516). This

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of the definition of the crimes, but whether it was **generally** foreseeable that the conduct in question could entail criminal responsibility. **Accordingly, there is no need to show that it was foreseeable that criminal responsibility could arise in circumstances was acting with *dolus eventualis*, as opposed to *dolus directus*.**" (emphasis added); 1093.

[123] Case 002/01 Appeal Judgement **F36**, para. 410.

[124] Case 002/01 Appeal Judgement **F36**, paras. 538, 558.

[125] Case 002/01 Appeal Judgement **F36**, para. 809.

[126] Case 002/01 Appeal Judgement **F36**, paras. 808-809.

unprecedented judicial creation is contrary to the established case law of the international criminal tribunals that applies JCE. The challenged judges did not support their reasoning with any reference: there is no footnote to the two paragraphs, which nevertheless radically altered the nature of this mode of liability.

87. In the reasoning of the Case 002/02 Trial Judgement, the Chamber correctly rejected that creation:

> "As JCE III was not part of customary international law during the relevant period of the Closing Order, the intent (*dolus eventualis*) that forms part of the definition of JCE III cannot be transposed into JCE I. [...] Accordingly, and consistent with the submissions of the KHIEU Samphan Defence, the Chamber finds that the degree of intent required under JCE I is direct intent."[127]
>
> "[T]he Chamber sees no reason to deviate from established jurisprudence from the ad hoc Tribunals defining JCE I's *mens rea*."[128]

88. It goes without saying that, on appeal, the fact that the same Supreme Court judges have to adjudicate JCE is a problem for the Appellant.

89. The broad interpretation of JCE I was the only means of criminalizing the common purpose. In their analysis of the facts, the challenged judges immediately leveraged their elastic JCE to bring the crimes charged within the scope of the common purpose.[129]

90. For example, to include in the common purpose the crime against humanity of murder during Movement of the Population (Phase 1), the judges explicitly relied on *dolus eventualis* for deaths resulting from the circumstances in which the population movement took place[130] and for the killing of civilians.[131] With respect to the killing former Khmer Republic soldiers and

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[127] Case 002/02 Trial Judgement, 16 November 2018, **E465**, para. 3715. *See* paras 3714, 3921 ("Recalling that JCE in its basic form is incompatible with *dolus eventualis*").
[128] Case 002/02 Trial Judgement, 16 November 2018, **E465**, footnote 12386.
[129] Case 002/01 Appeal Judgement **F36**, para. 849. According to their reasoning, the existence of a policy must first be established before the identification of the crimes that "were encompassed by the common purpose in the sense that the population movement policy as relevant to Population Movement Phase One amounted to or involved the commission of those crimes, applying the principles set out above".
[130] Case 002/01 Appeal Judgement **F36**, para. 853: the Supreme Court Chamber considers that the common purpose involved the death of civilians since the Party leadership were aware of the circumstances and it was **likely** that people would die during the evacuation.
[131] Case 002/01 Appeal Judgement **F36**, para. 857: the Supreme Court Chamber is of the view that the common purpose involved the execution of civilians during the evacuation of Phnom Penh, based exclusively on the circumstances under which transfers were carried out (lack of provision for the well-being of the evacuees) which

officials, they relied solely on their own assumptions unsupported by evidence that "even in the absence of an order to kill Khmer Republic soldiers, in the circumstances in which the evacuation of Phnom Penh was carried out, it was **likely** that such killings would take place."[132] Similarly, for the Movement of the Population (Phase 2), it integrated the crime against humanity of murder into the common purpose based exclusively and explicitly on the *likelihood* that the evacuees would die under the conditions under which the evacuations were carried out.[133]

91. Accordingly, the Supreme Court used its hybrid JCE as the centrepiece of its system for convicting the accused. This already malleable mode of liability has been stretched to the maximum to make such a criminal conviction possible.

92. It is only through their broad interpretation of JCE I and that of the *mens rea* of the crime against humanity of murder that the challenged judges were able to establish KHIEU Samphân's individual criminal responsibility in Case 002/01. Criminal intent is reduced to a level below JCE III (which is not applicable before the ECCC), in violation of the principle of individual criminal responsibility. This dangerous and unprecedented lowering of the threshold of criminal intent is precisely proof of the development of a tailor-made law to convict KHIEU Samphân. It supports the argument that the judges were motivated by actual bias, or at the very least shows an appearance of bias, and supports their disqualification.

4. <u>Erroneous findings on the legal re-characterisation of the facts</u>

93. In order to make sure that KHIEU Samphân's life sentence was upheld despite all the errors made by the Chamber, the Supreme Court still needed to add as many crimes as possible, including those that resulted in deaths as part of the JCE. Its intention was not yet clear when, on the eve of the appeal hearing, it informed the parties that it was thinking of changing the characterisation of the facts. But it became obvious from reading the Appeal Judgement.

94. When it set the date for the appeal hearing, the Supreme Court informed the parties that it was considering changing the characterisation of the mode of liability of the Accused to liability

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indicate that, implicitly, the common purpose "encompassed the anticipation" that deadly force could be used by the troops, should they encounter any resistance since "it was evident that the forces tasked with carrying out the evacuation of the city would **likely** resort to deadly force if they encountered resistance." (emphasis added).

[132] Case 002/01 Appeal Judgement **F36**, para. 860 (emphasis added). It finds that the evacuation of former Khmer Republic soldiers and officials was "implicitly" part of the common purpose.

[133] Case 002/01 Appeal Judgement **F36**, para. 868. It finds that the policy "encompassed implicitly" the crime against humanity of murder.

based on JCE for all crimes for which it would decide to uphold the conviction. For some crimes, KHIEU Samphân had been indicted and found guilty only on the basis of modes of liability other than JCE (indirect modes of liability like planning, incitement, aiding and abetting):

- extermination during Movement of the Population (Phase 1),

- extermination during Movement of the Population (Phase 2),

- other inhumane acts of enforced disappearances during Movement of the Population (Phase 2),

- persecution on political grounds at Tuol Po Chrey.[134]

95. Referring to ECHR case law according to which an accused must be informed of the legal characterisation of the facts and must have the opportunity to subject evidence to adversarial debate,[135] the Supreme Court gave the parties the opportunity to make submissions and set a short time limit to that effect.[136]

96. In its submissions on the subject,[137] the Defence explained that the Supreme Court could not proceed with the proposed change of characterisation for several reasons. First, it would introduce, in violation of Internal Rule 110(2), new constitutive elements (since a common purpose consists in the commission of the crime and a shared intent to commit it) on which the Chamber had not been called upon to rule.[138] Secondly, it would aggravate the fate of KHIEU Samphân on appeal, in violation of the principle of *non-reformatio in peius* enshrined in the texts applicable before the ECCC (the elevation of forms of indirect liability to a form of direct liability as JCE entails an increase in criminal responsibility and therefore general guilt).[139] Lastly, it would rule for the first time on appeal on the responsibility of KHIEU Samphân for

[134] Order scheduling the Appeal hearing, 9 October 2015, **F30** ("Order **F30**").
[135] Order **F30**, p. 4 and footnote 11.
[136] Order **F30**, p. 6. The parties, right in the middle of Case 002/02, had up to 6 November 2015 (that is, slightly less than a month) to file any written submissions they had in the two languages without exception. Responses could be presented during hearings scheduled for 16 to 18 November 2015, without exceeding the time allocated to thematic sessions on "crimes" or "responsibilities".
[137] KHIEU Samphan's Submissions on potential re-characterisation of the crimes, 6 November 2015, ("Submissions **F30/5**").
[138] Submissions **F30/5**, paras 4-12 and 18-27.
[139] Submissions **F30/5**, paras 4-12 and 28-32.

having committed (by participating in a JCE) the crimes in question, in violation of the Accused's right of appeal before a higher court.[140]

97. In the Appeal Judgement, there is never any mention of this re-characterisation of the mode of liability envisaged by the Supreme Court before the appeal hearing. It is simply noted in the procedural history that the Supreme Court had notified the parties of a potential change to the characterisation (without further clarification), inviting them to file submissions thereupon,[141] to which no reference is made anywhere, however. Ultimately, the only change to the characterisation made pursuant to Internal Rule 110(2) is a surprising re-characterisation of the crime of extermination as murder with *dolus eventualis* during Movement of the Population (Phase 2).[142]

98. This change of characterisation, which was carried out through the backdoor during the deliberations without the Defence having been informed of it and without having had the opportunity to subject it to adversarial debate, is unlawful, particularly since a new constitutive element has been introduced (*dolus eventualis* is not one of the constitutive elements of extermination and was thus not an intrinsic element of the initial charge).

99. Above all, this change to the characterisation was carried out opportunistically. As the Supreme Court noted, the accused were not charged with the crime of murder during Movement of the Population (Phase 2).[143] However, that was the case for Phase 1, for which the Accused were indicted for both extermination and murder.[144] Thus, when the Supreme Court had no choice but to overturn the convictions for extermination during Population Movements (Phases 1 and 2) due to the absence of the elements of scope and direct intent,[145] deaths that occurred during Movement of the Population (Phase 1) were still punished through the confirmation of the Accused's conviction for murder with *dolus eventualis*. However, deaths that occurred during Phase 2 were no longer punished and could only be punished after re-characterisation as murder with *dolus eventualis*.

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[140] Submissions **F30/5**, para. 33.
[141] Case 002/01 Appeal Judgement **F36**, para. 11.
[142] Case 002/01 Appeal Judgement **F36**, paras 561-562.
[143] Case 002/01 Appeal Judgement **F36**, para. 562 and footnote 1428.
[144] Closing Order **D425**, paras 1373 and 1381.
[145] Case 002/01 Appeal Judgement **F36**, para. 541, Movement of the Population (Phase 1), paras 557-560, Movement of the Population (Phase 2).

100. In addition, the Supreme Court used this change to the characterisation of the crime to indirectly re-characterise the mode of liability and without ever saying so. Indeed, in justifying the fact that it would not consider the grounds of appeal concerning other modes of liability than JCE, it stated:

> The Supreme Court Chamber **recalls** that it has **confirmed** the Accused's liability, based on the notion of JCE, in respect of murder, other inhumane acts and persecution in relation to Population Movement Phase One as well as other inhumane acts and murder in relation to Population Movement Phase Two.[146]

101. However, while the Phase 1 murders were initially charged under JCE, this was not the case with the Phase 2 deaths, initially charged under the sole characterisation of extermination according to all indirect modes of liability but not under JCE. KHIEU Samphân was therefore not tried for having committed these crimes (by participating in a JCE), whether they were characterised as extermination or even murder. Nor was he convicted at trial of committing them by participating in a JCE. He was convicted on this basis for the first time on appeal. The so-called "recall[ing]" of the fact that it had "confirmed" the Accused's conviction based on JCE in respect of murders committed during Movement of the Population (Phase 2) is in fact only a ploy to cover the prohibited change to the characterisation of the mode of liability envisaged shortly before the appeal hearing.[147]

102. Furthermore, the Supreme Court found another stratagem to indirectly carry out this prohibited change of characterisation with regard to the crime of other inhumane acts of enforced disappearances during Movement of the Population (Phase 2). It simply indicated in a footnote to its Appeal Judgement:

> The Trial Chamber distinguished in this regard between other inhumane acts of "forced transfer" and "attacks against human dignity", which it found to be covered by JCE I, and other inhumane acts of "enforced disappearance", which it did not find to be covered. In respect of the latter, the Trial Chamber therefore found NUON Chea and KHIEU Samphân to be liable because of planning, etc. As the Supreme Court Chamber

[146] Case 002/01 Appeal Judgement **F36**, para. 1099 (emphasis added).
[147] This cannot be an error on any account since the Supreme Court points out in the footnote that with regard to Phase 1, the crime of extermination, which had not been established, no longer included the crime of murder and that, accordingly, liability for this crime therefore resulted from the application of JCE Case 002/01 Appeal Judgement, **F36**, footnote 2975 in para. 1099). It says nothing and guards against saying anything with regard to Phase 2.

has found the Trial Chamber's approach to the crime of other inhumane acts to have been erroneous (see above, paras 572 *et seq.*), the Supreme Court Chamber considers this distinction in treatment to have been uncalled for. Rather, liability for the crime of other inhumane acts should have been based only based on JCE I liability.[148]

103. The Supreme Court had criticized the Chamber for having given specific anachronistic legal definitions of the crimes and for having considered them separately in light of those definitions.[149] However, whether the crimes in question were characterised as other inhumane acts of forced transfer/attacks against human dignity/enforced disappearances or simply as other inhumane acts, the Chamber had to consider them separately since they were three separate sets of crimes in the indictment.[150] It had to do so, all the more because in the indictment only the facts initially characterised as other inhumane acts of enforced disappearances were charged solely on the basis of indirect modes of liability and not under JCE.

104. Regardless of the legal definition of the crime, the Chamber could not reach a finding of guilt under JCE for these crimes without going through a change of the characterisation of the mode of liability. It did not do so. Therefore, again, the so-called "confirmation"[151] by the Supreme Court of the Accused's conviction based on JCE for other inhumane acts committed during Movement of the Population (Phase 2) is in fact a first conviction under this mode of liability on appeal with respect to the facts initially characterised as other inhumane acts of enforced disappearances.

105. It was therefore by obscure, devious and patently erroneous means that the Supreme Court finally brought under JCE all the crimes for which it decided to uphold the conviction or to pronounce it to save the conviction for the deaths.[152] Its lack of transparency and its methods

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[148] Case 002/01 Appeal Judgement **F36**, footnote 2974 (from para. 1097).
[149] Case 002/01 Appeal Judgement **F36**, paras 572 *et seq.* (and, in particular, 589 and 590). See also para. 651 specifically regarding the findings on enforced disappearances in Movement of the Population (Phase 2, referring to footnote 1693 in para. 589.
[150] Closing Order **D427**, paras 1449-1450 (victims forced to leave their place of legal residence), para. 1436 (population forced to leave their place of residence as soon as possible, without preparation, without adequate food, water or medical assistance, under inhumane conditions of transportation and shelter), para. 1471 (arrest, detention or abduction of relatives or others without information concerning their fate). In addition, the Supreme Court also considered separately the "findings relating to the disappearance of evacuees". Case 002/01 Appeal Judgement **F36**, paras 647-653.
[151] Case 002/01 Appeal Judgement **F36**, para. 1099.
[152] The Supreme Court overturned the conviction for the fourth of the crimes referred to above in para. 94, namely the crime of persecution on political grounds at Tuol Po Chrey, for the reason that the policy regarding measures against certain specific groups had not been reasonably established (Case 002/01 Appeal Judgement, F36, paras 1091, 1104 and the operative provisions).

that violate the rights of the Defence are more than dubious. In this context, its intervention to extend the common criminal purpose and responsibility to ensure a sentence of life imprisonment can only be the result of actual bias.

106. Indeed, despite the acquittals, the Supreme Court upheld the life sentence by increasing the number of victims with its "confirmation" of the findings of guilt for murder, the "role of the Accused in the crimes", their "complete lack of consideration" for the fate of the people, the fact that the crimes were not isolated events and the "significant roles" they played.[153]

107. It could not do so without violating the principle of legality and introducing *dolus eventualis* into the definitions of murder and JCE I, and without changing the characterisation of the crime of extermination to murder with *dolus eventualis* and the mode of liability to commission by participating in a JCE.

108. In Case 002/02, while the Chamber did not adopt the Supreme Court's definition of JCE and did not re-characterise indirect modes of liability as commission by participating in a JCE, it however adopted its definition of murder and likewise changed the characterisation of the crime of extermination to murder with *dolus eventualis*.[154]

109. In any event, before a Supreme Court composed of six judges (out of seven) who adjudicated in Case 002/01 and who were necessarily biased on the same issues that arise again, KHIEU Samphân has no chance on appeal in Case 002/02.

D. Confirmation of the bias since the pronouncement of the Case 002/02 Trial Judgement

110. The fact that KHIEU Samphân has no chance on appeal in Case 002/02 unless new judges are assigned is reinforced by the manner in which the Supreme Court's decisions have been made since the Judgement was pronounced on 16 November 2018.

111. First, when the Defence requested that the Judgement be set aside for non-compliance with the explicit and very clear provisions of the Internal Rules regarding the form of judgements,[155] the Supreme Court circumvented the difficulty by finding the appeal inadmissible through a

[153] Case 002/01 Appeal Judgement **F36**, para. 1120.
[154] Issues that are indeed currently in dispute on appeal, see Annexes 1 (re-characterisation), 7 (murder) and 8-9 on the use of re-characterisation.
[155] Urgent Appeal **E463/1**; KHIEU Samphân's Reply to the Co-Prosecutors' Response to his Urgent Appeal against the Summary of Judgement pronounced on 16 November 2018, 20 December 2018, **E463/1/2/1** ("Reply **E463/1/2/1**").

misrepresentation of its purpose.156 Indeed, while the Defence was very clearly appealing against the **disposition** of the judgement,[157] the Supreme Court acted as if it was appealing against the **summary**.[158]

112. Then, when the Defence requested the annulment of that decision on the grounds that the Reserve Judge had not been officially designated as a sitting judge when the decision was issued,[159] the Supreme Court did not have the request notified for more than three months, even though it should have been attached to the case file "forthwith".[160] This cannot be an oversight since the Defence reiterated the existence of that request four times in subsequent submissions.[161]

113. Five months after the filing of this embarrassing request, the Supreme Court found that it had no merit based on perplexing "reasons".[162] Indeed, it was of the view that the Defence had mischaracterized the chronology, even though it had provided exactly the same chronology,[163] and supported the fact that deliberations were held with the Reserve Judge before his appointment was confirmed.[164] Although it took care to point out that he had been validly appointed as a reserve judge and sworn in as a judge of the Supreme Court before the decision was rendered,[165] it did not say anything about the confirmation of his appointment as a sitting judge. Either because it deliberately evaded the question, or because it considered that the appointment as a sitting judge does not have to be confirmed to be effective. In any event, the Supreme Court's frequent and questionable lack of transparency is not such as would elicit the litigant's trust.

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[156] Decision on Urgent Appeal **E463/1/3**.
[157] *Inter alia*: Urgent Appeal **E463/1**, paras 2-3 (and footnote 2 solely referencing the operative provisions), 11, 37; Reply **E463/1/2/1**, paras 17-22. On the two occasions when the Defence referred to the summary, it recalled that it had no legal value since, as it was not even authentic, it was not authoritative (Urgent Appeal **E463/1**, para. 61; Reply **E463/1/2/1**, para. 52).
[158] Decision on Urgent Appeal **E463/1/3**, heading and paras 6, 12, 18.
[159] Request for Annulment **E463/1/4**.
[160] *See supra*, para. 4 and footnote 12; Internal Rule 108(6).
[161] Request for Extension **F39/1.1**, para. 2 and footnote 5; KHIEU Samphân's Reply and Response to the Prosecution on Extension of Time and Number of Pages for Notices of Appeal, 23 April 2019, **F41/1**, para. 2 and footnote 5; KHIEU Samphân Reply to Civil Parties on Extension of Time and Page Limits for Notices of Appeal, 25 April 2019, **F42/1**, para. 2 and footnote 5; Notice of Appeal **E465/4/1**, para. 3 and footnote 6.
[162] Decision on Request for Annulment **E465/1/5**.
[163] Compare: Request for Annulment, **E463/1/4**, paras 7-8 and Decision on Request for Annulment, **E465/1/5**, para. 5.
[164] Compare: Request for Annulment **E463/1/4**, para. 8 and footnote 15 and Decision on Request for Annulment, **E465/1/5**, para. 6 (regarding the fact that the Chamber deliberates, and the decision is taken before it is finalized in writing, which takes time).
[165] Decision on Request for annulment, **E465/1/5**, para. 4.

CONCLUSION

114. The factual and legal grounds argued above call into question the impartiality of the challenged judges. A reasonable and duly informed observer would find the existence of actual bias and, at the very least, the existence of a reasonable appearance of bias undeniable. To reach another conclusion would be to question the fact that justice is human. It is impossible for judges to ignore findings they themselves have reached on the same facts and concerning the same Accused. This is a risk that cannot be taken at this critical stage of the proceedings. The stakes both in terms of principles and the judicial legacy of the ECCC are too high.

115. The fundamental rights of KHIEU Samphân as well as the integrity of the proceedings in Case 002/02 are at stake. The interests of justice must outweigh all other considerations. The disqualification of the challenged judges would not cause any delay in the proceedings; it does not have suspensive effect and the appeal deadlines already set remain applicable. Only such disqualification will uphold the presumption of innocence as part of KHIEU Samphân's right to an effective appeal, which is a prerequisite for his right to a fair trial.

116. **FOR THESE REASONS**, unless the judges voluntarily step down, pursuant to Internal Rule 34(5), the Defence requests the Supreme Court:

- TO HOLD a public adversarial hearing,

- DISQUALIFY the six judges referred to in the Application for Disqualification pursuant to Internal Rule 34.

KONG Sam Onn	Phnom Penh	[signed]
Anta GUISSÉ	Paris	[signed]

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