ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: **Judge THOU Mony, President**
Judge Rowan DOWNING
Judge Chang-ho CHUNG
Judge HUOT Vuthy
Judge PRAK Kimsan

Date: **30 January 2015**
Original language(s): **Khmer/English/French**
Classification: **PUBLIC**

REASONS FOR DECISION ON APPLICATIONS FOR DISQUALIFICATION

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1. INTRODUCTION

1. This special panel of the Trial Chamber (the "Special Panel") was convened by the President of the Judicial Administration Committee ("JAC") pursuant to Internal Rule 34(6) in order to determine applications to disqualify Judges of the Trial Chamber from Case 002/02.

2. On 25 August 2014, KHIEU Samphan filed an application which requested that the Trial Chamber halt Case 002/02 until the completion of the appellate proceedings in Case 002/01. As an alternative remedy, he requested that Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE, YOU Ottara and Claudia FENZ be disqualified from Case 002/02 ("KHIEU Samphan's Application").[1] The Co-Prosecutors responded to KHIEU Samphan's Application on 4 September 2014.[2]

3. On 29 September 2014, NUON Chea filed an application which requested that: (i) Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE and YOU Ottara be disqualified from any further proceedings against him; (ii) those Judges "step down voluntarily pursuant to Rule 34(5)" while his application is determined; (iii) Case 002/02 evidentiary hearings be postponed until his application is determined; and (iv) his application be treated as a matter of urgency ("NUON Chea's Application").[3] The Co-Prosecutors responded to NUON Chea's Application on 10 October 2014 in English; the Khmer translation was provided on 30 October 2014.[4]

4. On 10 October 2014, KHIEU Samphan filed what he described as a renewed application. Among other things, it sought to adopt the submissions in NUON Chea's Application and noted that Judge Silvia CARTWRIGHT had ceased to be a Judge at the ECCC ("KHIEU Samphan's Renewed Application").[5]

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[1] Mr. KHIEU Samphan's Request for Reconsideration of the Need to Await Final Judgement in Case 002/01 Before Commencing Case 002/02 and the Appointment of a New Panel of Trial Judges, E314/1, 25 August 2014.

[2] Co-Prosecutor's Response to KHIEU Samphan's Request for Stay of Proceedings or Disqualification of Judges, E314/3, 4 September 2014 ("Co-Prosecutors' Response to KHIEU Samphan's Application").

[3] NUON Chea Application for Disqualification of Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE, and YOU Ottara, E314/6, 29 September 2014.

[4] Co-Prosecutors' Response to NUON Chea's Disqualification Application, E314/9, 10 October 2014 ("Co-Prosecutors' Response to NUON Chea's Application").

[5] Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who Are to Hear Case 002/02, E314/8, 10 October 2014. Where it is considered appropriate to refer to NUON Chea's Application

5. On 14 November 2014, the Special Panel held that the Disqualification Applications were admissible; unanimously dismissed KHIEU Samphan's requests to disqualify Judge Claudia FENZ; and dismissed by majority, Judge DOWNING dissenting, NUON Chea's Application and KHIEU Samphan's Applications insofar as they concerned Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE and YOU Ottara.[6] The reasons for that decision are now provided.

6. The Disqualification Applications stem in large part from the severance of Case 002 and the Trial Chamber's intention to proceed to hear Case 002/02 having already convicted NUON Chea and KHIEU Samphan in Case 002/01. A brief overview of the procedural history of Case 002 is therefore provided. On 15 September 2010, the Co-Investigating Judges charged KHIEU Samphan and NUON Chea with crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of Cambodia's Penal Code of 1956.[7] On 13 January 2011, the Pre-Trial Chamber confirmed the Closing Order with amendments.[8] On 22 September 2011, the Trial Chamber issued a severance order limiting the scope of a first trial in Case 002, which it referred to as Case 002/01, to factual allegations described in the Closing Order as movement of population phases one and two, and crimes against humanity alleged to have been committed at those times.[9] Opening statements began

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together with KHIEU Samphan's Application and Renewed Application, they are referred to below as the "Disqualification Applications".

[6] Decision on Applications for Disqualification of Trial Chamber Judges, E314/12, 14 November 2014. *See* also, Decision on Interlocutory Requests Related to Applications for Disqualification, E314/11, 14 November 2014, which formalised earlier decisions in relation to applications: (i) for extensions of page limits and to file in one language; (ii) to halt Case 002/02 until the completion of appellate proceedings in Case 002/01; and (iii) to hold an oral hearing on the Disqualification Applications. The Special Panel convened under Internal Rule 34(6) originally included Judge PEN Pichsaly rather than Judge PRAK Kimsan (*see* Decision of the JAC Regarding the Constitution of Bench Following Disqualification Motions, E314/4, 4 September 2014). On 6 October 2014, however, NUON Chea requested that Judge PEN Pichsaly be disqualified (*see* NUON Chea Application for Disqualification of Judge PEN Pichsaly, E314/4/1, 6 October 2014). On 10 October 2014, Judge PEN Pichsaly informed the Judges of the Special Panel that he had decided to exclude himself. On 14 October 2014, the JAC therefore appointed Judge PRAK Kimsan to replace Judge PEN Pichsaly (*see* Decision of the JAC to Appoint a National Judge to Replace Judge Pen Pichsaly, E314/4/5, 14 October 2014).

[7] Closing Order (OCIJ), D427, 15 September 2010, para. 1613.

[8] *See* Decision on IENG Thirith and NUON Chea's Appeal Against the Closing Order (PTC), D427/2/12, 13 January 2011; Decision on KHIEU Samphan's Appeal Against the Closing Order (PTC), D427/4/14, 13 January 2011.

[9] Severance Order Pursuant to Internal Rule 89*ter*, E124, 22 September 2011; Annex: List of Paragraphs and Portions of the Closing Order relevant to Case 002/01, Amended further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), E124/7.3.

on 21 November 2011. The Trial Chamber later expanded the scope of Case 002/01 to include executions of former Khmer Republic officials at Tuol Po Chrey.[10]

7. On 8 February 2013, the Supreme Court Chamber annulled the Trial Chamber's severance of Case 002 ("SCC's First Severance Decision").[11] On 29 March 2013, the Trial Chamber severed Case 002 again, on the same basis as before.[12] On 23 July 2013, the Supreme Court Chamber dismissed appeals against the Trial Chamber's decision to sever Case 002 again ("SCC's Second Severance Decision").[13] The Trial Chamber finished hearing evidence in Case 002/01 on 23 July 2013.

8. On 4 April 2014, the Trial Chamber issued a decision on the additional severance of Case 002 in which it outlined the scope of what it referred to as Case 002/02.[14] On 29 July 2014, the Supreme Court Chamber dismissed KHIEU Samphan's appeal against the scope of Case 002/02 ("SCC's Third Severance Decision").[15]

9. The Disqualification Applications were made following the issuance of the Trial Judgement in Case 002/01 on 7 August 2014 (the "Case 002/01 Judgement").[16] The Trial Chamber convicted KHIEU Samphan and NUON Chea of crimes against humanity and sentenced both to life imprisonment.[17] The Disqualification Applications contend, among other things, that findings in the Case 002/01 Judgement reveal actual bias on the part of the challenged Judges and/or raise a reasonable apprehension of bias in relation to future proceedings. On the same day as the Case 002/01 Judgement, the Trial Chamber issued its Final Decision on Witnesses, Experts and Civil Parties to be heard in Case 002/01 (the "Final

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[10] Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs (TC), E163/5, 8 October 2012.

[11] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01 (SCC), E163/5/1/13, 8 February 2013.

[12] T. 29 March 2013, pp. 2-4; full reasons are contained in the Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

[13] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, Summary of Reasons (SCC), E284/4/7, 23 July 2013; full reasons are contained in the Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 (SCC), E284/4/8, 25 November 2013.

[14] Decision on Additional Severance of Case 002 and Scope of Case 002/02 (TC), E301/9/1, 4 April 2014 ("Decision on Additional Severance of Case 002").

[15] Decision on KHIEU Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02 (SCC), E301/9/1/1/3, 29 July 2014 ("SCC's Third Severance Decision").

[16] Case 002/01 Judgement, E313, 7 August 2014 ("Case 002/01 Judgement").

[17] *See* Case 002/01 Judgement, E313, 7 August 2014, paras 940-942; 1053-1054; 1106-1107; and pp. 622-623.

Witness Decision").[18] The Final Witness Decision outlined the Trial Chamber's approach to "the identification and selection of individuals considered necessary to hear" during Case 002/01.[19] The Trial Chamber was unable to reach a consensus on NUON Chea's requests to summons two witnesses: HENG Samrin and OUK Bunchhoen.[20] Whereas Judges Silva CARTWRIGHT and Jean-Marc LAVERGNE concluded that those persons should be summonsed, Judges NIL Nonn, YA Sokhan and YOU Ottara concluded that they should not be, with the result that neither person gave evidence in Case 002/01.

10. KHIEU Samphan and NUON Chea have both appealed the Case 002/01 Judgement.[21] NUON Chea's appeal includes a challenge to the Trial Chamber's failure to summons HENG Samrin and OUK Bunchhoen.[22]

2. SUBMISSIONS

a. KHIEU Samphan's Application

11. KHIEU Samphan's Application requests disqualification as an alternative remedy to a stay on the basis that, if Case 002/02 is to start immediately, it should be heard by Judges who have not yet ruled on KHIEU Samphan's criminal responsibility in relation to matters falling within Case 002/02.[23] KHIEU Samphan submits that the Case 002/01 Judgement includes findings on his criminal responsibility in relation to matters to be adjudicated in Case 002/02.[24] He focuses on two submissions. First, a submission that the Case 002/01 Judgement exceeded the permissible scope of that trial by adjudicating matters which were not part of Case 002/01, but which are part of Case 002/02.[25] Secondly, irrespective of whether the Case 002/01 Judgement remained within the correct scope, a "problem of overlap" is said to arise

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[18] Final Decision on Witnesses, Experts and Civil Parties to Be Heard in Case 002/01, E312, 7 August 2014 ("Final Witness Decision").
[19] Final Witness Decision, para. 2.
[20] *See* Final Witness Decision, paras 86-111 and 115-120 where HENG Samrin is referred to by the pseudonym TCW-223 and OUK Bunchhoeun is referred to by the pseudonym TCW-494. Their names are identified in paras 72 and 124 respectively.
[21] NUON Chea's Notice of Appeal Against the Judgement in Case 002/01, E313/1/1, 29 September 2014; *Déclaration d'appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, 29 September 2014, E313/2/1.
[22] NUON Chea's Notice of Appeal Against the Judgement in Case 002/01, E313/1/1, 29 September 2014, p. 2, Ground 6. *See also,* KHIEU Samphan's Renewed Application, footnote 10, referring to *Déclaration d'appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, E313/2/1, 29 September 2014, para. 11 and para. 40, footnote 43.
[23] KHIEU Samphan's Application, para. 48.
[24] KHIEU Samphan's Renewed Application, para. 11.
[25] KHIEU Samphan's Application, paras 6, 10-43, 45, 47 and 53-54.

in relation to matters that are common to Case 002/01 and Case 002/02, such as historical background, administrative and communications structures and the Accused's roles and functions.[26] The findings in the Case 002/01 Judgement are said to lift the presumption of impartiality which professional Judges otherwise enjoy.[27]

12. In relation to the submission that the Case 002/01 Judgement exceeded the permissible scope, KHIEU Samphan submits that the Trial Chamber limited Case 002/01 to an examination of the history of the Communist Party of Kampuchea ("CPK") and the history of two of the five policies outlined in the Closing Order: movements of population and the targeting of former Khmer Republic officials.[28] By contrast, in a section of the Case 002/01 Judgement titled 'Historical Background', there are findings on the three further policies alleged in the Closing Order: policies to: (i) create cooperatives and worksites; (ii) re-educate bad-elements and kill enemies; and (iii) regulate marriage.[29] KHIEU Samphan contends that the Trial Chamber relied on these findings in order to determine the existence of a joint criminal enterprise[30] and to infer that his conduct was criminal.[31] KHIEU Samphan also submits that the Trial Chamber relied on matters prior to the ECCC's temporal jurisdiction.[32]

13. KHIEU Samphan's Application extends to Judge FENZ on the basis that she "sat on the bench on several occasions during Case 002/01 and participated in some deliberations".[33] KHIEU Samphan's Renewed Application identifies occasions when Judge FENZ replaced Judge CARTWRIGHT or Judge LAVERGNE during Case 002/01 such that, despite being the reserve judge, it is submitted that she should be disqualified from Case 002/02.[34]

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26 KHIEU Samphan's Application, para. 47.
27 KHIEU Samphan's Application, paras 42 and 51.
28 KHIEU Samphan's Application, para. 19.
29 KHIEU Samphan's Application, paras 20-28, which refer to the Case 002/01 Judgement: Section 3.3.2, Establishment of Cooperatives and Worksites pre-April 1975, in particular para. 116; Section 3.3.3, Re-education of bad elements and killing of enemies, in particular para. 117; Section 3.3.5, The Regulation of Marriage, in particular para. 128.
30 KHIEU Samphan's Application, paras 34-35, which refer to the Case 002/01 Judgement, para. 725.
31 KHIEU Samphan's Application, paras 28-29, which refer to the Case 002/01 Judgement, footnote 195 and para. 35, and submit that the section of the Case 002/01 Judgement titled 'Criminal Responsibility of KHIEU Samphan' is based on an overall analysis of the Khmer Rouge movement and the Democratic Kampuchea regime through the development and implementation of all five policies.
32 KHIEU Samphan's Application, paras 34-35.
33 KHIEU Samphan's Application, para. 48.
34 KHIEU Samphan's Renewed Application, para. 12.

b. Co-Prosecutors' Response to KHIEU Samphan's Application

14. The Co-Prosecutors respond that KHIEU Samphan's Application does not comply with Internal Rule 34 because disqualification is never an alternative remedy.[35] The Co-Prosecutors submit that disqualification is not warranted in any event because professional Judges can try a number of cases arising out of the same events.[36] The Co-Prosecutors rely on case law from the European Court of Human Rights ("ECtHR") which they contend demonstrates that Judges are permitted to rule on a number of cases arising out of the same facts unless the findings in earlier judgements "actually prejudge" a person's guilt.[37] The Co-Prosecutors submit that impermissible prejudgment requires a determination "of all the relevant criteria necessary to constitute the offence and [a finding that the accused is] guilty, beyond a reasonable doubt, of having committed such an offence."[38] The Co-Prosecutors submit that, although the Case 002/01 Judgement contains findings on issues that will reappear in Case 002/02, the Case 002/01 Judgement does not make findings on KHIEU Samphan's responsibility in relation to Case 002/02 crimes.[39] The Co-Prosecutors also rely on case law from the United States where they submit that Judges routinely hear multiple cases against the same defendant.[40]

c. NUON Chea's Application

15. NUON Chea's Application advances numerous grounds on which he contends that the involvement of the challenged Judges in Case 002/02 will violate his right to a fair trial by an independent and impartial tribunal.[41] NUON Chea submits that Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE and YOU Ottara should be disqualified because of their findings in the Case 002/01 Judgement.[42] He further submits that Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE should be disqualified because of their findings in the Case

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[35] Co-Prosecutors' Response to KHIEU Samphan's Application, paras 8-9.
[36] Co-Prosecutors' Response to KHIEU Samphan's Application, para. 12.
[37] Co-Prosecutors' Response to KHIEU Samphan's Application, paras 12-13, relying on *Poppe v The Netherlands,* Judgement, ECtHR, Application No. 32271/04, 24 March 2009 ("*Poppe v The Netherlands* Judgement") paras 26 and 28; and *Schwarzenberger v Germany,* Judgement, ECtHR, Application No. 75737/01, 10 August 2006 ("*Schwarzenberger v Germany* Judgement"), para. 43.
[38] Co-Prosecutors' Response to KHIEU Samphan's Application, para. 13, quoting *Poppe v The Netherlands* Judgement, para. 28.
[39] Co-Prosecutors' Response to KHIEU Samphan Application, paras 14, 15 and 20.
[40] Co-Prosecutors' Response to KHIEU Samphan's Application, paras 18-19.
[41] NUON Chea's Application, para. 136.
[42] NUON Chea's Application, Section D, paras 61-70; Section E, paras 71-92; Section F, paras 93-114; Section H, para. 122; and Section I, paras 123-133.

001 Judgement.[43] In particular, NUON Chea submits that the Judges who made findings in the Case 002/01 Judgement[44] and Case 001 Judgement[45] have pre-determined issues which bear on his alleged guilt in Case 002/02, or pre-formed an unfavourable view of his defence, such that a reasonable observer would apprehend an unacceptable appearance of bias.[46]

16. In relation to the Case 001 Judgement, NUON Chea contends that the rejection of a disqualification application that he made in February 2011 against the Judges actively involved in that case resulted from an erroneous interpretation of the law.[47] He cites the submissions made in his previous application, which he characterises as having focused on chapeau elements, particular crimes against humanity and grave breaches of the Geneva Conventions.[48] He then adds a "new focus" on a further six factual findings in the Case 001 Judgement which he contends have pre-determined the following issues in Case 002/02: (i) executions at S-21; (ii) the possibility of release from S-21; (iii) an alleged "smashing policy"; (iv) interrogations; (v) torture; and (vi) the execution of children.[49]

17. In relation to the Case 002/01 Judgement, NUON Chea submits that the Trial Chamber examined all five alleged CPK policies when only two of them fell within the scope of Case 002/01. He submits that the judges' findings as to the existence, establishment and development of those policies, and their relation to the alleged joint criminal enterprise, predetermine issues critical to his alleged guilt in Case 002/02.[50] He submits that the Case 002/01 Judgement contains extensive findings on the policy of targeting enemies, in particular 'New People' and Khmer Republic officials, thus pre-determining those issues in Case 002/02.[51] The Case 002/01 Judgement also contains findings on NUON Chea's role in formulating and implementing CPK policies.[52] NUON Chea submits that such findings pre-determine essential issues bearing on his guilt in Case 002/02.[53] NUON Chea further submits

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[43] *KAING Guek Eav* Trial Judgement, E188, 26 July 2010 ("Case 001 Judgement"); NUON Chea's Application, Section G, paras 115-121; Section H, para. 122.
[44] NUON Chea's Application, paras 93, 114.
[45] NUON Chea's Application, para. 121.
[46] NUON Chea's Application, paras 29-32.
[47] NUON Chea's Application, para. 116.
[48] NUON Chea's Application, paras 119 and 121
[49] NUON Chea's Application, Section G, paras 116-121.
[50] NUON Chea's Application, Section F (i)-(ii), paras 93-100.
[51] NUON Chea's Application, Section F (iii), paras 101-105.
[52] NUON Chea's Application, Section F (iv), paras 106-111.
[53] NUON Chea's Application, para. 110.

that the Judges have formed an unfavourable view of the CPK and some of his key arguments and pre-determined issues against him resulting in an unacceptable appearance of bias.[54]

18. NUON Chea also submits that the Case 002/01 Judgement contains errors which reveal an appearance of bias. He focuses on alleged erroneous findings in relation to: (i) the structure of the CPK; (ii) the existence of a policy to regulate marriage; (iii) references to demographic analyses; and (iv) the Trial Chamber's definition of "smash" with reference to the Case 001 Judgement.[55]

19. NUON Chea further submits that certain "language techniques" in the Case 002/01 Judgement give rise to an appearance of bias, namely: (i) sceptical adjectives such as "purported" or "perceived" to describe evidence; (ii) ironic quotation marks indicating that the Judges disagreed with the literal meaning of a word they used, such as "enemies"; (iii) selective use of quotation marks to signal scepticism towards evidence; and (iv) pejorative nouns such as *façade*.[56] NUON Chea asserts that these techniques demonstrate a lack of openness on the following issues: (i) the threat from internal and external enemies; (ii) CPK policies and actions; (iii) the actions and politics of the LON Nol regime; and (iv) the role of NORODOM Sihanouk.[57]

20. NUON Chea further submits that the combination of findings made by the relevant Judges in the Case 001 Judgement and Case 002/01 Judgement amount to a reversal of the burden of proof in Case 002/02.[58] He asserts that his submissions show that the challenged Judges possess an unacceptable lack of professional integrity and that the process leading to the Case 002/01 Judgement was a "mere farce".[59] He asserts that the Case 002/01 Judgement over-relied on Anglo-French experts who he alleges are colonialist and imperialist and that the international Judges come from countries sharing the same ideological tradition, thus giving rise to an appearance of bias.[60]

21. In relation to the Final Witness Decision, NUON Chea submits that the failure to summons HENG Samrin indicates bias on the part of the Cambodian Judges.[61] He links the

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54 NUON Chea's Application, Section F(v), paras 111-114.
55 NUON Chea's Application, Section E, paras 71-92.
56 NUON Chea's Application, Section D, paras 61-70.
57 NUON Chea's Application, Section D, paras 63-67.
58 NUON Chea's Application, Section H, para. 122.
59 NUON Chea's Application, Section I, paras 123-133.
60 NUON Chea's Application, Section I, para. 129
61 NUON Chea's Application, Section B, paras 38-53.

Cambodian judges' decision to corruption, influence by the Cambodian Co-Prosecutor and limited independence of Cambodian Judges generally.[62] He submits that the Cambodian judges' decision not to summons HENG Samrin was not based on a genuine assessment of the law and facts and reveals a pre-formed view that NUON Chea's request to summons HENG Samrin in Case 002/02 is a trial tactic rather than genuine.[63] He also submits that Judge LAVERGNE demonstrated a lack of professional integrity because the failure to summons HENG Samrin should, he submits, have led Judge LAVERGNE to enter an acquittal.[64]

22. NUON Chea's Application also relies on matters pre-dating 7 August 2014 which he contends have become contextually relevant. In addition to the Case 001 Judgement,[65] NUON Chea relies on public remarks made by Judge CARTWRIGHT at the Aspen Institute in November 2013[66] and a book published in January 2013 by former International Co-Investigating Judge LEMONDE[67] in support of his submission that the Cambodian Judges might not be impartial because of their personal experiences and/or alleged connections to the Cambodian government. He submits that Cambodian Judges lack security of tenure, are dominated by the executive and that the Cambodian Co-Prosecutor sits on the body responsible for appointing, disciplining and removing judges[68] such that there are insufficient safeguards against external pressure.[69]

d. Co-Prosecutors' Response to NUON Chea's Application

23. The Co-Prosecutors respond that NUON Chea's Application fails to establish actual bias or an appearance of bias. On the allegations of prejudgment, the Co-Prosecutors contend that NUON Chea fails to establish prejudgment of every element of a charged crime which they say is necessary in order to give rise to an unacceptable appearance of bias.[70] They submit that the Trial Chamber refrained from making findings which evince the attribution of criminal

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62 NUON Chea's Application Motion, Section B, paras 43-49.
63 NUON Chea's Application, Section B, para. 52.
64 NUON Chea's Application, Section I, paras 130-132.
65 NUON Chea's Application, para. 117.
66 NUON Chea's Application, Section C, paras 53-60.
67 NUON Chea's Application, paras 11, 37 and 45
68 NUON Chea's Application, para. 46.
69 NUON Chea's Application, para. 49.
70 Co-Prosecutors' Response to NUON Chea's Application, paras 34 and 46.

responsibility in relation to the charges in Case 002/02 such that no actual or reasonable apprehension of bias is established.[71]

24. In relation to alleged erroneous findings, the Co-Prosecutors submit that none of the points identified in NUON Chea's Application disclose an appearance of bias, determine criminal responsibility in Case 002/02 and/or that such arguments are a matter for appeal rather than disqualification.[72] In relation to language techniques, the Co-Prosecutors contend that NUON Chea's submissions are frivolous and that, in any event, the language techniques in the Case 002/01 Judgement do not give rise to an appearance of bias.[73] In relation to the Trial Chamber's reliance on expert evidence, the Co-Prosecutors respond that such reliance does not establish actual bias and would not cause a reasonable observer to apprehend bias.[74]

25. In relation to the failure to summons HENG Samrin, the Co-Prosecutors submit that NUON Chea does not point to any facts to which HENG Samrin would have testified that could have led to an acquittal in Case 002/01.[75] They further submit that the ECCC's Cambodian Judges are insulated from the broader Cambodian justice system and benefit from functional immunity.[76] Further, in the hypothetical event that the Cambodian Judges faced disciplinary action, the Co-Prosecutors submit that they would face a disciplinary panel in which the Cambodian Co-Prosecutor would play no part.[77] The Co-Prosecutors submit that NUON Chea's submissions in relation to Judge LAVERGNE are devoid of merit and amount to an unfounded personal attack which fails to establish bias.[78] In relation to Judge CARTWRIGHT's remarks at the Aspen Institute in November 2013, the Co-Prosecutors submit that they neither show actual bias nor a reasonable apprehension of bias on the part of the Cambodian Judges.[79]

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71 Co-Prosecutors' Response to NUON Chea's Application, paras 30- 46.
72 Co-Prosecutors' Response to NUON Chea's Application, paras 37-43.
73 Co-Prosecutors' Response to NUON Chea's Application, paras 48-52.
74 Co-Prosecutors' Response to NUON Chea's Application, para. 47.
75 Co-Prosecutors' Response to NUON Chea's Application, para. 29.
76 Co-Prosecutors' Response to NUON Chea's Application, para. 53.
77 Co-Prosecutors' Response to NUON Chea's Application, para. 56.
78 Co-Prosecutors' Response to NUON Chea's Application, para. 28.
79 Co-Prosecutors' Response to NUON Chea's Application, para. 27.

3. FINDINGS

a. Admissibility

26. Pursuant to the Internal Rules, a disqualification application must "clearly indicate the grounds and shall provide supporting evidence" and "be filed as soon as the party becomes aware of the grounds in question."[80]

27. KHIEU Samphan's Application seeks disqualification as an alternative to his preferred remedy of a stay of Case 002/02 until the Supreme Court Chamber has ruled on the appeals relating to Case 002/01.[81] KHIEU Samphan's Renewed Application, however, appears to seek disqualification outright and limits his request for a stay to the time when his application is fully determined.[82] KHIEU Samphan does not explain the basis on which disqualification is an alternative remedy or the rationale for the different position adopted in his Renewed Application. Nor does he justify why the points raised in his Renewed Application were not included in his original Application. KHIEU Samphan's submissions, however, are focused on findings in the Case 002/01 Judgement, which was issued on 7 August 2014.

28. NUON Chea submits that his application is admissible because it is based on the Case 002/01 Judgement and the Final Witness Decision, both of which were issued on 7 August 2014. NUON Chea further submits, relying on a decision by the Pre-Trial Chamber, that he is entitled to present past evidence to "further elaborate and support" new evidence when past evidence only becomes contextually relevant as a result of recent events.[83] NUON Chea's Application relies on: the Case 001 Judgement, which was delivered on 26 June 2010;[84] comments by former International Co-Investigating Judge LEMONDE in a book published in January 2013;[85] public remarks made by Judge CARTWRIGHT at the Aspen Institute in November 2013;[86] his and others' assessments of Cambodia's governance system;[87] and his concerns over the judges' nationalities and the "ideological tradition" of the countries they

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80 Internal Rule 34(3).
81 KHIEU Samphan's Application, para. 54.
82 KHIEU Samphan's Renewed Application, p. 5.
83 NUON Chea's Application, paras 34 and 37, which rely on Decision on KHIEU Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde (PTC) Document 7, 14 December 2009 ("Decision on Disqualification of Judge Lemonde"), para. 20.
84 NUON Chea's Application, Section G, paras 115-121; Section H, para. 122; Section I, para. 123.
85 NUON Chea's Application, Section B, paras 41, 45; Section I, para. 123.
86 NUON Chea's Application, Section C, paras 53-57; Section D, paras 68-69 ; Section I, para. 127.
87 NUON Chea's Application, Section B, paras 44-49, which includes reference to a report issued by Transparency International in September 2014.

come from.[88] NUON Chea submits that such matters have become "contextually relevant" because of the Case 002/01 Judgement and Final Witness Decision.[89] KHIEU Samphan's Renewed Application concurs with NUON Chea's reliance on Judge LEMONDE's book, Judge CARTWRIGHT's comments and the Final Witness Decision.[90]

29. In the decision relied upon by NUON Chea, the Pre-Trial Chamber found as follows:

> a party may present past apparently disparate evidence which is seen as contextually relevant for the first time as a result of more recent events. In order to fall within the purview of Internal Rule 34(3) they present such evidence as soon as the context becomes apparent to them as founding or supporting a ground which they advance.[91]

30. There is considerable doubt as to whether the Case 002/01 Judgement and Final Witness Decision means that the further matters which the Disqualification Applications seeks to rely upon should be accepted to be contextually relevant for the first time. The Case 001 Judgement was a ground used by NUON Chea, unsuccessfully, in a prior disqualification application. He also states that Judge CARTWRIGHT's comments "gave rise to immediate concern" but he "refrained from reacting immediately" without "further substantiating evidence".[92] NUON Chea does not suggest that he learned of Judge LEMONDE's book only recently, or that the judges' nationalities and the "ideological tradition[s]" of the countries from where they come is recent information. If such matters were considered to be capable of giving rise to an appearance of bias, an application should have been made much earlier – as it was in relation to the Case 001 Judgement.

31. In relation to the Case 002/01 Judgement, the President of the Trial Chamber announced on 20 December 2013 that he would not recommend appointing a second panel of Judges to hear the charges remaining in Case 002 after Case 002/01.[93] The parties have therefore long known of the Trial Chamber's intention to proceed with the same Judges in Case 002/02. Indeed, at a hearing on the scope of Case 002/02 on 11 February 2014, counsel for NUON Chea submitted as follows:

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88 NUON Chea's Application, Section C, para. 58; and Section I, para. 129.
89 NUON Chea's Application, paras 37, 117.
90 KHIEU Samphan's Renewed Application, para. 9.
91 Decision on Disqualification of Judge Lemonde, para. 20.
92 NUON Chea's Application, para. 54.
93 President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002, E301/4, 20 December 2013.

> the Case 001 Judgement against Duch is reason enough to disqualify this Chamber from adjudicating NUON Chea's responsibility for S-21. But even so, the Case 001 Judgement is only the beginning. This Chamber will shortly issue a judgement in Case 002/01. We do not know what that judgement will say. But many of the conclusions urged upon this Chamber in Case 002/01 about the structure of the CPK, NUON Chea's role, and the supposed politics – policies of Democratic Kampuchea – would directly impact this Chamber's impartiality in Case 002/02 [...]. The impartiality problem is also substantial in regards of the rest of the Closing Order. If the Chamber convicts NUON Chea for crimes charged in Case 002/01, if it holds that he acted with criminal intent to harm hundreds of thousands of people, how can it be seen to approach NUON Chea's liability in Case 002/02 in impartial manner?[94]

32. 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.[95] That said, many of the grounds in the Disqualification Applications rely on specific findings made in the Case 002/01 Judgement and Final Witness Decision, which obviously could only be known once published on 7 August 2014. Despite misgivings in relation to NUON Chea's reliance on various historical matters and the confused approach in KHIEU Samphan's Application and Renewed Application, overall it is in the interests of justice to admit the Disqualification Applications in their entirety and address the various submissions advanced.

b. Legal Framework

33. The right to a fair trial includes the right to be tried by an independent and impartial tribunal.[96] Internal Rule 34(2) provides that "[a]ny 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."[97] The Supreme Court Chamber has adopted the following framework in relation to an appearance of bias:

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[94] T. 11 February 2014, E1/239.1, pp. 48-50.

[95] *Prosecutor v Mladić*, ICTY President, Case No. IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, 15 May 2012 ("*Mladić* Disqualification Decision in relation to Judge Orie"), Judge Orie Report pursuant to Rule 15 (B), Public Redacted Annex, para. 4.

[96] Article 14(1) of the International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 ("ICCPR"); Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, (TC), E5/3, 28 January 2011, para. 5.

[97] *See* all the discussion in *Prosecutor v Radoslav Brđanin and Momir Talić*, ICTY Trial Chamber II, Case IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Brđanin and Talić* Disqualification Decision"). Judge Hunt noted in relation to a similarly worded provision in the ICTY's Rules of Procedure that, on one view, the provision referred only to the existence of actual bias. Judge Hunt concluded, however, that the provision was intended to reflect a wider basis for

> The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias. An appearance of bias is established if (a) a Judge is a party to a case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.
>
> The reasonable observer in this test must be "informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold." As has been noted in previous ECCC jurisprudence, the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment. The moving party bears the burden of displacing that presumption, which imposes a high threshold.[98]

34. As outlined below, the parties advance competing submissions in relation to aspects of the relevant legal framework. The Disqualification Applications rely on international and some national cases to support the submission that the Judges challenged are actually biased or that a reasonable observer would perceive bias should those Judges sit on Case 002/02. The Co-Prosecutors respond that the severance of Case 002 has created a "unique"[99] or "*sui generis*"[100] situation in that never before have accused persons at an international or internationalised criminal tribunal been subject to a second trial based on allegations that are part of the same charging document. They submit that international jurisprudence provides limited guidance as to whether an accused can be tried by the same Judges in both trial proceedings; instead they rely on decisions from national jurisdictions, in particular the United States.[101] They submit that much of the [international] jurisprudence is inapposite because it involves Judges having heard previous cases on related facts when the current accused was not a party, where the danger is that Judges reach a concluded view without

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disqualification on the basis of a reasonable apprehension of bias. Judge Hunt concluded that this broader basis for disqualification is recognised in common law and civil law systems and under the European Convention on Human Rights. *See* paras 8, 14, 19. *See also Prosecutor v Furundžija*, ICTY Appeals Chamber, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 189.

[98] Decision on IENG Thirith's Application to Disqualify Judge SOM Sereyvuth for Lack of Independence (SCC), I/4, 3 June 2011 ("Decision on IENG Thirith's Application to disqualify Judge SOM Sereyvuth"), para. 10, adopting the Trial Chamber's Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualifications of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean Marc LAVERGNE and THOU Mony, E55/4, 23 March 2011 ("Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification"), paras 11-12.

[99] Co-Prosecutors' Response to KHIEU Samphan's Application, paras 17.

[100] Co-Prosecutors' Response to NUON Chea's Application, para. 14.

[101] Co-Prosecutors' Response to KHIEU Samphan's Application, paras 17-18; Co-Prosecutors' Response to NUON Chea's Application, paras 15-16.

having given the accused an opportunity to challenge it. By contrast, NUON Chea and KHIEU Samphan participated in Case 002/01.

(1) The Presumption of Impartiality

35. NUON Chea submits that there is no presumption of impartiality to be rebutted in relation to allegations of an appearance of bias.[102] This submission is rejected. NUON Chea's Application relies on one paragraph from a decision from the SCSL Appeals Chamber.[103] In that decision, the SCSL Appeals Chamber considered whether an objective appearance of bias could reasonably be ascertained on the facts and concluded that it could not.[104] In so doing, it applied cases which clearly state that the reasonable observer presumes Judges to be impartial and that an allegation that a reasonable observer would apprehend bias must be "firmly established" by evidence.[105] That high threshold is required because it is as much of a threat to the interests of the impartial and fair administration of justice for Judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself.[106] Absent evidence to the contrary, it is presumed that Judges can disabuse their

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[102] NUON Chea's Application, para. 19.

[103] *Prosecutor v Sesay et al.*, SCSL Appeals Chamber, SCSL-04-15-T, Appeal Against Decision on Sesay, Kallon and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008 ("*Sesay* Appeal Decision on Disqualification of Justice Thompson"), para. 13.

[104] *Sesay* Appeal Decision on Disqualification of Justice Thompson, para. 14 ("The next question for the Appeals Chamber is whether this error invalidates the Trial Chamber's decision. The Appeals Chamber finds that no objective appearance of bias can reasonably be ascertained from Justice Thompson's Separate Opinion.").

[105] *See* cases cited in footnote 25 of *Sesay* Appeal Decision on Disqualification of Justice Thompson, for example, *Prosecutor v Norman,* SCSL Appeals Chamber, SCSL-2004-14-AR72(E), Decision on Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 25 ("the starting point for any determination [of a claim of an appearance of bias] is a presumption of impartiality which attaches to a judge [because of] their oath of office and the qualifications [of] appointment, [which] places a high burden on the party moving for the disqualification to displace that presumption"); *Prosecutor v Delalić et al.,* ICTY Appeals Chamber, IT-96-21-A, Judgement, 20 February 2001, para. 707 ("there is a high threshold to reach to rebut the presumption of impartiality [because, just as any real appearance of bias undermines] confidence in the administration of justice, [judges should not] disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias"); *Furundžija* Appeal Judgement, para. 197 ("There is a high threshold to rebut the presumption of impartiality"); *Prosecutor v Radoslav Brđanin*, ICTY Bureau, IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, paras 7-8 (the reasonable observer "must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality [...and] the fact that impartiality is one of the duties that judges swear to uphold"; "to rebut the presumption of impartiality, the reasonable apprehension of bias must be firmly established"); *Prosecutor v Karemera et al.*, ICTR Bureau, ICTR-98-44, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, paras 8-10 ("Judges [...] enjoy a presumption of impartiality based on their oath of office and qualifications").

[106] See *Prosecutor v Karadžić,* ICTY Chamber Convened by Order of the Vice-President, IT-95-5/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice President Pursuant to Rule 15(B)(ii), 22 July 2009 ("*Karadžić* Disqualification Decision") para. 17 and authorities cited therein.

minds of any irrelevant personal beliefs or predispositions and rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.[107]

(2) Allegations of Bias Based on Judicial Decisions

36. When allegations of bias are based on judges' decisions, it is insufficient for a party to merely allege that the decisions were erroneous. A disagreement with the substance of a decision is a matter for appeal rather than an application for disqualification.[108] What must be shown is that the decisions are, or would reasonably be perceived to be, a result of a pre-disposition against the application rather than the genuine application of the law, on which there may be more than one possible interpretation, or to the judges' assessment of facts.[109] 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 the Judges are actually biased, or that a reasonable observer with knowledge of the relevant circumstances would reasonably apprehend bias.[110] A mere suspicion of bias on the part of an accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.[111]

(3) Prejudgment, Predetermination or Preformation?

37. NUON Chea contends[112] that the jurisprudence shows that an appearance of bias can be demonstrated by: (i) prejudgment of guilt, in relation to which he relies on the ECtHR's judgements in *Ferrantelli and Satangelo v Italy*[113] and *Poppe v Netherlands* and submits that the rejection of his previous disqualification application was premised on a misinterpretation of *Poppe v Netherlands*; (ii) predetermination of issues bearing on guilt, in relation to which he relies on a dissenting opinion by Justice Buergenthal on the composition of the court in the ICJ case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

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[107] *Furundžija* Appeal Judgement, para. 197; *Prosecutor v Akayesu*, ICTR Appeals Chamber, ICTR096-4-A, Judgement, 1 June 2001, para. 269.
[108] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 13; Decision on Disqualification of Judge Lemonde, para. 35.
[109] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 13; Decision on Disqualification of Judge Lemonde, para. 34.
[110] *Prosecutor v Seromba*, ICTR Bureau, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006, para. 12.
[111] *Prosecutor v Bagosora et al.*, ICTR Bureau, ICTR-98-41-T, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 7.
[112] NUON Chea's Application, paras 29 – 32.
[113] *Ferrantelli and Santangelo v Italy*, ECtHR Application No. 19874/92, Judgement, 7 August 1996 ("*Ferrantelli and Santangelo v Italy* Judgement").

Territory;[114] or (iii) preformation of an unfavourable view of a party's case, in relation to which he relies on the ECtHR's judgements in *Buscemi v Italy*[115] and *Kyprianou v Cyprus.*[116]

38. In relation to (i), prejudgment of guilt, NUON Chea and the Co-Prosecutors put forward different interpretations of when guilt is prejudged. NUON Chea contends that it is not necessary for a Judge to prejudge each and every element of the crime with which the accused is charged.[117] He submits that it is sufficient if the Judge has pre-formed a "general view of the qualification of the accused's involvement, criminal or otherwise."[118] The Co-Prosecutors respond that a "prejudgment of each and every element of a charged crime is required in order to give rise to an unacceptable appearance of bias."[119] These competing interpretations both rely on the ECtHR case of *Poppe v Netherlands.*

39. *Poppe v Netherlands* involved a complaint of prejudgment because two of the Judges sitting on the applicant's trial for drugs-related offences had earlier convicted his accomplices and in so doing referred to the applicant's involvement.[120] The ECtHR held, by majority, that the findings in the earlier judgement did not actually prejudge the applicant's guilt. NUON Chea and the Co-Prosecutors rely on different aspects of the following paragraph:

> In both judgments the names of the applicant and others are mentioned in passing, merely to illustrate and clarify the leading role played in the criminal organisation by the persons convicted, that is to say C3 and C4 respectively. Whether the applicant's involvement with C3 and D fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence was not addressed, determined or assessed by the trial judges whose impartiality the applicant now wishes to challenge. There is no specific qualification of the involvement of the applicant or of acts committed by him, criminal or otherwise. In this the facts of the applicant's case differ from those of *Ferrantelli and Santangelo* and *Rojas Morales*. It cannot therefore be said that any fears of bias on the part of the Regional Court which the applicant might have had are objectively justified.[121]

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[114] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Order of 30 January 2004, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, p. 9, para 13.
[115] *Buscemi v Italy,* Judgement, ECtHR Application No. 29569/95, 16 September 1999 (*"Buscemi v Italy* Judgement").
[116] *Kyprianou v Cyprus*, Judgement, ECtHR, Application No. 73797/01, 15 December 2005.
[117] NUON Chea's Application, para. 30. In this regard, NUON Chea takes issue with the Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 15.
[118] NUON Chea's Application, paras 30, 116.
[119] Co-Prosecutors' Response to NUON Chea Disqualification Application, para. 34
[120] *Poppe v The Netherlands* Judgement.
[121] *Poppe v The Netherlands* Judgement, para. 28. The SCC's Third Severance Decision, footnote 199, also refers to *Ferrantelli and Santangelo v Italy*. In that case, the ECtHR found that one of the Judges who convicted

40. The rejection of NUON Chea's previous disqualification application in relation to findings in the Case 001 Judgement relied in part on the same paragraph of *Poppe v Netherlands,* stating as follows:

> The ECHR, whose case law is cited by the NUON Chea Defence, has similarly held that judges are permitted to preside over two criminal cases arising from the same set of facts unless in a prior decision the court has 'actually prejudged' the guilt of the accused. Such a conclusion would involve a determination in the prior opinion 'of all the relevant criteria necessary to constitute a criminal offence and … whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence.'[122]

41. *Poppe v Netherlands* has also been considered by Judges at the ICTY. In the *Mladić* case, the accused sought to disqualify Judge Orie because he sat on the *Galić* and *Krajišnik* cases and made prejudicial findings on matters at issue in the *Mladić* case. The ICTY President considered Judge Orie's report that findings on overlapping issues did not predetermine Mladić's guilt and found Mladić's application to be unmeritorious.[123] Judge Orie's report stated that *Poppe v Netherlands* required that the court must "take into account" the presence or absence of findings on all the relevant criteria necessary to constitute a criminal offence and whether the applicant was said to be guilty, beyond reasonable doubt, of having committed such an offence.[124] Judge Orie noted subsequent ECtHR case law emphasising that a professional judge is better prepared to disengage from their experience in previous proceedings (compared to a lay Judge or juror), which supports their ability to examine a case without bias.[125]

42. In another disqualification application, Mladić sought to disqualify Judge Flugge because of findings in the *Tolimir* case and raised further challenges to Judge Orie because of findings in the *Stanišić and Simatović* case. Judges Orie and Flugge provided reports which were forwarded to the ICTY President. Both reports referred to *Poppe v Netherlands.* Judge Orie noted findings in *Stanišić and Simatović* that Mladić's subordinate controlled a

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the applicants for murder was biased as, firstly, he previously issued a judgement in respect of the same offence containing "numerous references to the applicants and their respective roles" in the commission of the crime at issue and referring to the applicants as the "co-perpetrators" and, secondly, the judgement ultimately convicting the applicants contained "numerous extracts" from the previous judgement.

[122] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 21, quoting *Poppe v The Netherlands* Judgement, paras 26 and 28.

[123] *Mladić* Disqualification Decision in relation to Judge Orie, p.3

[124] *Mladić* Disqualification Decision in relation to Judge Orie, Annex: Judge Orie Report pursuant to Rule 15(B), para. 30.

[125] *Mladić* Disqualification Decision in relation to Judge Orie, Annex: Judge Orie Report pursuant to Rule 15(B), para. 31 which refers to *Miminoshvili v Russia*, Judgement, ECtHR, Application No. 20197/03, 28 June 2011 ("*Miminoshvili v Russia* Judgement").

paramilitary unit but concluded that a fear of bias can only be objectively justified if the previous proceedings "fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence."[126] Judge Flugge's report accepted that there was "significant factual overlap between the findings in the *Tolimir* Trial Judgement and the evidence and allegations in the *Mladić* case" including "the alleged subordinate/superior relationship between Messrs Tolimir and Mladić."[127] He noted that Mladić is "mentioned frequently in the *Tolimir* Trial Judgement, including in the factual and legal findings presented therein."[128] Judge Flugge concluded, however, that:

> in no instance is Mladić's involvement with Mr Tolimir or others discussed or presented so as to fulfil all the relevant criteria necessary to constitute a criminal offence for which he might be liable. Moreover, the *Tolimir* Trial Judgement does not contain any determination or assessment of any criminal liability on the part of Mr Mladić beyond a reasonable doubt.[129]

43. Judge Flugge noted further that there was no discussion of Mladić's *mens rea* in relation to those criminal offences.[130] Having considered Judge Orie's and Judge Flugge's reports, the ICTY President concluded that Mladić had not demonstrated that a reasonable observer, properly informed, would reasonably apprehend bias.[131]

44. Considering the foregoing, NUON Chea's submissions mischaracterise the sentence of *Poppe v Netherlands* upon which he relies. The ECtHR did not conclude that a "general view" of the qualification of a person's involvement is sufficient to establish bias. Rather, the ECtHR considered it important, on the facts, that there was no specific qualification of the involvement of the applicant or of acts committed by him. The ECtHR in *Poppe v Netherlands* distinguished *Ferrantelli and Santangelo v Italy*, which NUON Chea also relies

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[126] *Prosecutor v Mladić*, ICTY President, IT-09-92-T, Decision Concerning Defence Motions to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Christoph Flugge, 22 January 2014 ("*Mladić* Disqualification Decision in relation to Judge Flugge"), Annex B (public) para. 29.

[127] *Mladić* Disqualification Decision in relation to Judge Flugge, Annex A (public), para. 32.

[128] *Mladić* Disqualification Decision in relation to Judge Flugge, Annex A (public), para. 32.

[129] *Mladić* Disqualification Decision in relation to Judge Flugge, Annex A (public), para. 36. Judge Flugge's report at paras 16 and 33 relies on a decision in the *Popović et al* case, apparently to the effect that the presumption of impartiality applies regardless of whether a judge previously made positive or negative assessments of the credibility of evidence in a previous case (*Prosecutor v Popović et al,* ICTY President, IT-05-88-A, Decision on Drago Nikolić Motion to Disqualify Judge Liu Daqun, 20 January 2011). The Co-Prosecutors' Response to NUON Chea's Application, paras 13, 35, relies on the decision in the *Popović et al.* The Co-Prosecutors failed, however, to provide the Special Panel with a full copy of the *Popović* decision, which does not appear to be publicly available. In those circumstances, no reliance can be placed on it. In any event, the result described by Judge Flugge appears to be consistent with the case law from the *ad hoc* tribunals.

[130] *Mladić* Disqualification Decision in relation to Judge Flugge, Annex A (public)para. 38.

[131] *Mladić* Disqualification Decision in relation to Judge Flugge, p.3.

upon. The latter case involved prior findings about the active role of the applicants in the same crime for which they were later convicted.[132] Subsequent ECtHR case law holds that if, despite making statements in an earlier case as to a person's character and role in a crime, the court understands that it is not pronouncing on the guilt of the accused concerning that offence, an appearance of bias is not established.[133] Moreover, in *Thomann v Switzerland* the ECtHR held that the same Judges who convicted an accused in absentia could sit on the retrial in the accused's presence. The ECtHR held that this did not cast doubt on the impartiality of the Judges in question because they would undertake a fresh consideration of the whole case.[134]

45. Nor do the other authorities upon which NUON Chea relies establish that, in the case of judicial findings, an appearance of bias is demonstrated by (ii) predetermination of issues bearing on guilt; or (iii) preformation of an unfavourable view of a party's case. In relation to (ii), NUON Chea's reliance on a single dissenting opinion from a case at the ICJ is unpersuasive. Judge Buergenthal dissented from the majority of 13 Judges on the basis of a press interview given by the challenged judge.[135] In relation to (iii), *Buscemi v Italy* involved a "heated exchange of views" between a Judge and a party in the press before trial,[136] and *Kyprianou v Cyprus* involved contempt proceedings when a lawyer's conduct was aimed at the Judges personally and those same Judges took the decision to prosecute, try the issue and imposed an immediate sentence of imprisonment of the highest possible severity.[137] These examples do not establish that judicial findings against a party mean that issues are "pre-determined" or views "pre-formed" such as to disqualify a Judge from future proceedings involving that party.

46. NUON Chea's Application identifies two examples when international criminal courts have disqualified Judges for an appearance of bias.[138] Judge Harhoff was disqualified from the *Šešelj* case because of a letter he wrote which referred to a "set practice" of convicting military commanders and expressed his dissatisfaction with a change he perceived in the

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[132] *Ferrantelli and Santangelo v Italy* Judgement, para. 59.
[133] *Schwarzenberger v Germany* Judgement, para. 43; and *Miminoshvili v Russia* Judgement, para.116.
[134] *Thomann v Switzerland,* Judgement, ECtHR, Application No. 17602/91, 10 June 1996, para. 35; distinguished on the facts by *San Leonard Band Club v Malta*, Judgement, Application No. 77562/01, 29 October 2004, para. 64.
[135] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Order of 30 January 2004, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, paras 7-8.
[136] *Buscemi v Italy* Judgement, para. 43.
[137] *Kyprianou v Cyprus*, Judgement, ECtHR, Application No. 73797/01, 15 December 2005.
[138] Nuon Chea's Application, footnote 109.

Tribunal's direction in that regard.[139] The ICTY panel held, by majority, that a reasonable observer would apprehend "bias in favour of conviction without reference to an evaluation of the evidence in the individual case".[140] In *Sesay et al.,* the SCSL Appeals Chamber disqualified Justice Robertson from matters involving the RUF because of graphic passages about the RUF in a book that he had published earlier, which expressed the view that the RUF and its leadership was guilty of atrocities on a scale that amounted to crimes against humanity.[141] Neither of these cases involved judicial findings or suggest that the presumption of impartiality is lifted at the lower thresholds for which NUON Chea contends, namely when judicial opinions decide issues bearing on guilt in subsequent cases or express an unfavourable view about aspects of a party's case.

47. Consistent with this conclusion is the *Karadžić* case, where the accused sought to disqualify Judge Picard on various bases, including her previous role as President of the Human Rights Chamber of Bosnia and Herzegovina ("HRC") and findings that body made as to the responsibility of Republika Srpska for crimes. A special chamber of the ICTY held that a fair-minded observer would understand the different jurisdictions of the HRC and ICTY and that the legal tests to be applied "would be materially and fundamentally different."[142] Further, the factual and legal issues in the cases were "evidently distinct from the issues of Karadžić's individual criminal liability."[143] There were important differences between the HRC's findings of the responsibility of the government of Republika Srpska and Karadžić's responsibility as President and Supreme Commander of the armed forces.[144] Although the HRC's summary of historical background referred to the ICTY's findings in various trials, the

> fair minded and informed observer would recognise that the HRC's careful references to such findings made by the Tribunal for the sole reason of providing a historical background to its applications underlined the HRC's cognizance of its temporal and human rights mandate.[145]

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[139] *Prosecutor v Šešelj,* ICTY Chamber Convened by Order of Vice-President, IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to Vice-President, 28 August 2013, para. 12 ("*Šešelj* Decision in relation to the disqualification of Judge Harhoff").
[140] *Šešelj* Decision in relation to the disqualification of Judge Harhoff, para. 13.
[141] *Prosecutor v Sesay et al,* SCSL Appeals Chamber, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, paras 14-18.
[142] *Karadžić* Disqualification Decision in relation to Judge Picard, para. 19.
[143] *Karadžić* Disqualification Decision in relation to Judge Picard, para. 20.
[144] *Karadžić* Disqualification Decision in relation to Judge Picard, para. 21.
[145] *Karadžić* Disqualification Decision in relation to Judge Picard, para. 23.

48. The panel held that, even if the HRC had made findings on matters of relevance to the *Karadžić* trial, professional Judges can be relied upon to apply their mind to the evidence in the particular case.[146]

(4) The SCC's Third Severance Decision

49. Both Disqualification Applications rely on the SCC's Third Severance Decision, in particular paragraphs 45, 83 and 85 thereof.[147] The relevant paragraphs of the SCC's Third Severance Decision are set out below, with the text of internal citations omitted.

> [45] Each severed case can be considered and determined by the same judges or by different judges; the original nexus, however, causes it to come at a price, namely that changes in the bench after the advancement of the main hearing disturb continuity in direct cognisance of evidence. Where, however, the same judges consider and determine multiple counts against the same accused, questions arise regarding 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 fact relevant to the other case, a concern, as previously signalled, contemplated in international jurisprudence and municipal systems.[92] Hence, in most legal systems, severance depends on the divisibility of the case, which albeit concerns mainly the postulate not to disturb the identity of complex criminal acts, also encompasses the duty to pre-empt problems that may be posed by the commonality of the factual panoply. In systems that use trial by jury, the concern about potential prejudice may even warrant severance in and by itself;[93] in other instances there is a question of establishing a new jury or releasing the jury from trying a severed part of the case.[94] In systems that do not use juries, the standard to doubt impartiality is higher; still, the interest of justice criterion will encompass relevant concerns, upon which the trying court is obligated to reflect *ex officio*.[95]
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> [83] However, a problem does arise from severance on the evidentiary base, that is with respect to possibly prejudicial findings on matters commonly relevant. The Supreme Court Chamber notes that, at the international *ad hoc* tribunals, there is a strong presumption of impartiality of professional judges, even in cases that have overlapping evidence or fact patterns, which allowed dismissing objections regarding repeated adjudication on contextual elements of crimes against humanity, on other factual elements of events, on specific legal issues and on the use of specific means of evidence.[197] This body of jurisprudence, however, originates from cases that had neither a common main hearing nor common accused. Two elements marking differences with the severance of Case 002 are notable: (1) at the *ad hoc* tribunals, impartiality was

[146] *Karadžić* Disqualification Decision in relation to Judge Picard, para. 24.
[147] NUON Chea's Application, paras 26-28, 94; KHIEU Samphan's Application, paras 9, 50-51.

confirmed upon an assumption that there is an autonomous body of evidence in each case, and that the judges are not only trained to, but will, rely solely and exclusively on the evidence adduced in each particular case;[198] and, (2) objections were rejected because the judges' prior findings had never determined issues of criminal responsibility of the relevant accused. Conversely, where prior findings would have pronounced on criminal responsibility, this jurisprudence confirms that the presumption of impartiality would have been lifted.[199] The ICTY Chambers in the *Milošević* and *Mladić* Decisions, which dealt with the same accused and charges arising from the same alleged common plan, also raised the issue of impartiality in their test that led to refusal to sever the case. In a nutshell, two solutions were mentioned: exclude the evidence to which the judges had been exposed,[200] or exclude the judges who had been exposed to evidence.[201]

[85] Noting the controversy surrounding the notion of "general foundation", the Supreme Court Chamber stresses that it will not, in any event, be acceptable for the Trial Chamber to import any attribution of criminal responsibility, should such follow in Case 002/01, into any future trials, before the finality of a conviction. Even though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 must be established anew. In the event that the verdict in Case 002/01 leads to a conviction, there is a risk of an overlap of findings that determine individual criminal responsibility with the question of individual criminal responsibility in subsequent trials. In abstract terms, this risk increases with a further fragmentation of the case, but the problem is valid for Case 002/02, irrespective of severance. Given the dismissal of the motions to wait for the finality of Case 002/01 and, at the same time, a refusal to create a second panel within the Trial Chamber, two propositions, either one of which would serve to alleviate this concern, the Supreme Court Chamber can only assume that the Trial Chamber will not make findings in Case 002/01 which would evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent cases. At this stage, however, without a verdict in hand, the question of overlap posed by the Appeal does not yet arise as a concrete prejudice.

50. NUON Chea submits that, according to the Supreme Court Chamber, when overlapping cases share a common accused and common evidence, the requirement of impartiality dictates that either prejudicial evidence already heard by the Judges must be excluded from later cases, or the Judges themselves must be excluded.[148] KHIEU Samphan submits that the Supreme Court Chamber identified a harm which has materialised, namely that the Case 002/01 Judgement predetermines his responsibility on issues to be determined in Case 002/02.[149] The

[148] NUON Chea's Application, para. 26, 94, which rely on SCC's Third Severance Decision, para. 83.
[149] KHIEU Samphan's Application, paras 9-10, 50-51, which rely on SCC's Third Severance Decision, paras 45, 83 and 85.

Co-Prosecutors did not address the above passages in Supreme Court Chamber's Third Severance Decision.

51. In the passages relied upon in the Disqualification Applications, the Supreme Court Chamber highlighted the possibility that, when Judges determine multiple charges against the same accused, questions might be raised regarding judicial impartiality.[150] The Supreme Court Chamber avoided, however, suggesting the answer to such questions, either in general or in this particular case. The examples relied upon by the Supreme Court Chamber in paragraph 83 of its Third Severance Decision (*Milošević* and *Mladić*) are similarly cautious.

52. In the *Milošević* case, the prosecution requested that the ICTY Appeals Chamber join separate indictments in order to have one single trial. The Appeals Chamber allowed the prosecution's appeal. When discussing the possibility of separate trials, however, the ICTY Appeals Chamber allowed for the possibility that the same Judges could have sat on both.[151] The ICTY Appeals Chamber did not suggest that evidence led in the first trial would be inadmissible *per se* in a second trial.[152] Rather, it is clear from footnote 200 of the SCC's Third Severance Decision that the Supreme Court Chamber's reference to the exclusion of evidence relates to the ability of professional Judges to exclude from their minds extraneous material which is not admitted into evidence in a second case, and decide that case solely on the evidence admitted in it.[153]

53. In the *Mladić* case, the prosecution sought severance in order to have two successive trials against the same accused. In rejecting the prosecution's application, the ICTY Trial

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[150] The SCC's Third Severance Decision refers to its Second Severance Decision, which in turn states in relevant part that, in the event of multiple trials rather than a single trial, there may be "legal and managerial concerns if the same panel of Judges are assigned to the first and second cases, including the possibility that partiality and an appearance of partiality of the chamber may be raised". The SCC's Second Severance Decision summarises the approach taken in certain national jurisdictions to severance in the context of the desirability of avoiding conflicting verdicts. Finally, the Supreme Court Chamber noted that the Trial Chamber's Second Severance Decision did not discuss real or perceived judicial bias in subsequent trials, should Case 002/01 result in any convictions. The SCC's Second Severance Decision did not state, however, that Judges are precluded from hearing successive cases against the same accused.

[151] *Prosecutor v Milošević*, ICTY Appeals Chamber, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision") para. 29: "If evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional Judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial."

[152] *Milošević* Decision, para. 30: "If there were to be two separate trials, there would necessarily be a large amount of evidence which would have to be repeated in each."

[153] SCC's Third Severance Decision, footnote 200, referring to *Milošević* Decision, para. 28-29, which clarify that prejudicial evidence from one case would be excluded from judges' *minds* in another case, rather than be inadmissible as evidence *per se*.

Chamber acknowledged the possibility that Judges assigned to a first trial might also be assigned to the second trial, then stated that there would be "significant legal and managerial concerns under this scenario. The partiality and appearance of partiality of the Chamber could be raised if the same Chamber were to hear both cases."[154] This limited finding, without reference to authority, was weighed as one factor among several others militating against the severance of that particular case.[155] The ICTY Trial Chamber did not proceed to consider whether, in the event of severance, the participation of the same Judges in both cases would establish actual bias or the appearance of bias.

54. Contrary to NUON Chea's assertions, the Supreme Court Chamber did not decide that successive cases involving common accused and common evidence entail a binary choice between (i) excluding Judges or (ii) excluding evidence such that it is inadmissible. Neither the Supreme Court Chamber nor the authorities that it cited impose such a choice. Rather, the Supreme Court Chamber identified the test for bias in relation to judicial findings in a prior case: do they "evince attributing criminal responsibility" in relation to the later case?[156]

(5) The Basis for the Standard Identified by the Supreme Court Chamber

55. The Supreme Court Chamber identified three authorities *(Galić, Ntawukulilyayo* and *Kabashi*) in support of the standard that it identified, namely whether findings evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent cases.[157]

56. In the *Galić* case[158] the accused sought to disqualify Judge Orie because he had confirmed the *Mladić* indictment, which named Galić as a participant in the same alleged joint criminal enterprise. The ICTY Bureau dismissed Galić's application on the basis that a reasonable observer, properly informed, would recognise that Judge Orie's confirmation of the *Mladić* indictment in no way represented an improper pre-judgment of Galić's guilt that

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[154] *Prosecutor Mladić*, ICTY Trial Chamber, IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011 ("*Mladić*, Decision on Consolidated Motion"), para. 34.

[155] *Mladić*, Decision on Consolidated Motion, paras 31-38, where the Trial Chamber considered various factors including the burden on the Accused, the possible impact on the pace of proceedings and the potential burden on witnesses testifying twice.

[156] SCC's Third Severance Decision, para. 85.

[157] SCC's Third Severance Decision, footnote 199.

[158] *Prosecutor v Galić*, ICTY Bureau, IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003 ("*Galić* Disqualification Decision").

would prevent the judge from approaching Galić's trial with an open mind.[159] This was distinguished from the situation where Judges make a ruling "on the ultimate issue of an individual's culpability in a connected prosecution."[160]

57. In the *Ntawukulilyayo* case,[161] Judge Robinson denied an application to disqualify four Judges from an appeal because of their previous involvement in another appeal, which upheld findings implicating Ntawukulilyayo and accepted the reliability of two witnesses common to both cases but whom Ntawukulilyayo sought to challenge. Judge Robinson accepted that the Judges had "expressed certain conclusions" and made "reference to Ntawukulilyayo's conduct", namely that his promises of safe refuge were false. Judge Robinson concluded, however, that such matters did not "evince a pronouncement on his culpability".[162]

58. The case of *Kabashi*[163] was a contempt case following a witness's refusal to answer questions in the first trial in *Haradinaj et al.*. Mr Kabashi left the Netherlands before the start of his contempt trial.[164] He was then called to testify in the retrial of *Haradinaj et al.*. The contempt proceedings continued in parallel to the retrial. The bench assigned to the contempt trial comprised Judge Orie, who had presided over the first trial in *Haradinaj et al.*, and Judges Moloto and Delvoie, who were both sitting on the retrial.[165] In the week beginning 22 August 2011, Mr Kabashi was scheduled both to give evidence in the retrial and then make the initial appearance in his contempt case. Giving evidence in the retrial, Mr Kabashi said that he was unable to answer certain questions. This gave rise to various applications made by the prosecution and defence, in particular in relation to the status of the transcripts of Mr Kabashi's evidence from yet another case *(Limaj et al.)*. At the prosecution's request, the Trial Chamber admitted into evidence the transcript of Mr Kabashi's testimony from *Limaj et*

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[159] *Galić* Disqualification Decision, para. 14.
[160] *Galić* Disqualification Decision, para. 16. Galić raised similar arguments on appeal. The ICTY Appeals Chamber confirmed that a fair-minded observer knows that judges' training and professional experience engrains them with the capacity to decide a case solely based on the evidence presented at trial. *See Prosecutor v Galić,* ICTY Appeals Chamber, IT-98-29-A, Judgement, 30 November 2006, para. 44.
[161] *Prosecutor v Ntawukulilyayo,* ICTR Appeals Chamber, ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011 ("*Ntawukulilyayo* Disqualification Decision").
[162] *Ntawukulilyayo* Disqualification Decision, paras 16-18.
[163] *Prosecutor v Shefqet Kabashi,* ICTY Trial Chamber, IT-04-84-R77.1, Sentencing Judgement, 16 September 2011 ("*Kabashi* Sentencing Judgement").
[164] *See Kabashi* Sentencing Judgement, para. 1; and *Prosecutor v Haradinaj et al.,* ICTY Trial Chamber, IT-04-84-T, Judgement, 3 April 2008, para. 27.
[165] *Kabashi* Sentencing Judgement , para. 5.

al.. When Mr Kabashi later said that he was unable to answer questions from defence counsel, the defence applied to exclude the transcript from *Limaj et al.*.[166]

59. On 25 August 2011, when Mr Kabashi made his initial appearance in his contempt case, the applications were still pending in the *Haradinaj et al.* retrial. Judge Orie ruled that his involvement in the first trial in *Haradinaj et al.*, during which the alleged contempt arose, did not disqualify him from sitting on the *Kabashi* contempt trial.[167] Judges Moloto and Delvoie withdrew themselves from the contempt case because of the developments in the *Haradinaj et al* retrial. They both gave short explanations for their respective decisions. Judge Moloto explained his decision as not only a question of actual impartiality, but the appearance of impartiality.[168] Judge Delvoie stated that his concern was the integrity and progression of the retrial.[169]

60. The brevity of the reasoning provided by Judges Moloto and Delvoie make it difficult to discern any clear principle from this example. The surrounding circumstances do not, however, suggest that professional Judges are to be excluded, perhaps like lay Judges or jurors, from ruling upon an accused's culpability in respect of two different proceedings. When the ICTY Appeals Chamber ordered the retrial in *Haradinaj et al.*, it gave no directions as to the composition of the Trial Chamber – in particularly it did not state that the Judges involved in the first trial should be disqualified from the retrial.[170] Rather, when assigning Judges to the retrial, the ICTY President considered the trial management and case distributions needs of the tribunal, not any particular judge's prior involvement with the case or related proceedings.[171]

61. It is therefore unlikely that the Supreme Court Chamber considered the *Kabashi* case to suggest that professional Judges are necessarily precluded from ruling upon the guilt of the same accused in different proceedings. Consistent with that conclusion, in the *Šešelj* case, the accused has been tried for contempt on more than one occasion for publications which revealed the details of protected witnesses. He argued that two Judges should be disqualified

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[166] See *Prosecutor v Haradinaj et al.*, ICTY Trial Chamber, IT-04-84bis-T, Decision on Joint Defence Oral Motion Pursuant to Rule 89(D), 28 September 2011, para. 1.
[167] *Prosecutor v Shefqet Kabashi,* Case No. IT-04-84-R77.1-S, T. (EN), 26 August 2011, pp. 63-65 ("*Kabashi* Initial Appearance").
[168] *Kabashi* Initial Appearance, p. 68.
[169] *Kabashi* Initial Appearance, p. 69.
[170] *Prosecutor v Haradinaj et al.,* ICTY Appeals Chamber, IT-04-84-A, Judgement, 19 July 2010, p. 114.
[171] *Prosecutor v Haradinaj et al.,* ICTY President, IT004-84-PT*bis*, Order Assigning Judges to a Case Before a Trial Chamber, 21 July 2010, p. 2.

from his second contempt case because they were on the bench which convicted him in a first contempt case. The Chamber appointed to decide Šešelj's challenge, which significantly included Judge Delvoie, rejected Šešelj's submissions on the basis that, even though those Judges had convicted Šešelj previously, he failed to show that they harboured a predisposition against him that would establish actual bias or lead a reasonable observer to apprehend bias.[172] Asserting that Judges are biased because they ruled in particular way in relation to an accused is an insufficient basis for disqualification.[173]

62. This is consistent with case law to the effect that, when a judge's involvement in earlier proceedings is relied upon as a ground to establish a reasonable apprehension of bias, the test is not whether the Judge would merely decide issues in the same way as they were decided in earlier proceedings, but whether the Judge will bring an impartial and unprejudiced mind to the present case.[174] A pre-disposition towards a certain resolution, when revealed through a judicial opinion, does not necessarily amount to bias.[175] Therefore, in *Karemera et al.,* the ICTR Bureau rejected a motion to disqualify two Trial Chamber Judges from deciding vacated decisions afresh in the same case. The Bureau held that "[T]he possibility that, having previously decided the relevant issues on the merits, Judges Byron and Kam are pre-disposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality."[176] Even though those Judges had already reached findings on issues in that same case, this did not establish that a reasonable observer would doubt their impartiality.

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[172] *Prosecutor v Vojislav Šešelj,* ICTY Chamber Convened by Order of the President, IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010 ("*Šešelj* Disqualification Decision in relation to Judges O-Gon Kwon and Kevin Parker"), paras 25-29.

[173] *Šešelj* Disqualification Decision in relation to Judges O-Gon Kwon and Kevin Parker, paras 28-29 (approving *Brđanin and Talić* Disqualification Decision, para. 18: "There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.").

[174] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 15 and authorities cited therein.

[175] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 15, citing *Prosecutor v Karemera et al.*, ICTR Bureau, ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para. 15. *See also*, *Furundžija* Appeal Judgement, paras 189-190.

[176] *Prosecutor v Karemera et al.,* ICTR Bureau, ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para. 15.

63. Further guidance can be drawn from the *Katanga* case. The Plenary of Judges at the ICC rejected an application from the victims' representatives to disqualify Judge Van den Wyngaert from considering reparations after she had issued a dissenting opinion on the question of Katanga's guilt.[177] Disqualification was sought on the ground, among others, that the judge's dissenting opinion (which incidentally NUON Chea's Application relies upon in another context[178]) criticised the majority's evaluation of the evidence and dismissed the credibility of witnesses who were also victims, thus prejudging the credibility or reliability of their testimony when it came to reparations.[179] Although the application was found to be inadmissible, the Plenary of Judges indicated its unanimous view that the "expression of a minority opinion does not render a Judge biased or partial in further proceedings."[180] The Plenary noted that if it were to accept the reasoning in the application, then any time that a decision is taken on the guilt or innocence of an accused, whether by majority or unanimously, the same bench could never proceed to sit in reparations proceedings. The Plenary rejected that logic.[181]

64. Contrary to the submissions advanced by NUON Chea, there is therefore no basis to conclude that the test for bias in relation to a judge's prior decision related to the guilt of a person should be anything other than that identified by the Supreme Court Chamber, including the authorities *(Galić, Ntawukulilyayo* and *Kabashi*) upon which it relied.

(6) Cases Involving "Autonomous Bodies of Evidence"

65. The Supreme Court Chamber also referred to a "body of jurisprudence" rejecting applications to disqualify Judges which proceeds on the assumption that there is an "autonomous body of evidence" in each case to which Judges are trained to focus their minds.[182] The Supreme Court Chamber considered that this marked a difference with Case 002 and highlighted three cases in particular: *Stanišić and Župljanin, Renzaho* and *Nahimana et al.*.[183]

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[177] *Prosecutor v Katanga,* ICC Plenary of Judges, ICC-01/04-01/07-3504-Anx, Decision of the Plenary of Judges on the Application of the Legal Representatives for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of Prosecutor v Germain Katanga, 22 July 2014 ("*Katanga* Disqualification Decision").
[178] NUON Chea's Application, paras 39, 124-125, 127, 130-131.
[179] *Katanga* Disqualification Decision, para. 18.
[180] *Katanga* Disqualification Decision, para. 51.
[181] *Katanga* Disqualification Decision, para. 52.
[182] SCC's Third Severance Decision, para. 83.
[183] SCC's Third Severance Decision, footnote 197.

66. In the *Stanišić and Župljanin* case, both accused were convicted by a Trial Chamber that included Judge Harhoff.[184] They appealed and the bench assigned to determine their appeals included Judge Liu Daqun. Later, in the *Šešelj* trial, a Chamber held, Judge Liu Daqun dissenting, that Judge Harhoff should be disqualified from that case.[185] Župljanin then (i) applied to the Appeals Chamber requesting that it vacate the Trial Judgement in his case and (ii) filed a motion requesting that Judge Liu Daqun be disqualified from deciding that application because, he submitted, the Judge had already expressed his views on Judge Harhoff's letter in his dissent in the *Šešelj* case such that he would not be in a position to adjudicate the motion to vacate without being predisposed to a particular outcome. In dismissing Župljanin's motion to disqualify Judge Liu Daqun, the Acting President of the Tribunal, Judge Agius, acknowledged the overlap between the basis for Šešelj's application to disqualify Judge Harhoff and Župljanin's motion to vacate his Trial Judgement. He concluded, however, that a disqualification application was "substantially different" from the question of whether to vacate a trial judgement. It was not shown that Judge Liu Daqun would not bring an impartial mind to the relevant issues of fact and law.[186] Although not cited by the Supreme Court Chamber, Judge Agius's approach was later confirmed by a panel of Judges appointed, upon Župljanin's request, to adjudicate his request to disqualify Judge Liu Daqun.[187] The panel described the arguments for disqualification as "insubstantial".[188]

67. Turning to the *Renzaho* case, all three Judges also sat on the *Karera* case and two of them had also sat on the case of *Bagosora et al.* The ICTR Appeals Chamber rejected a submission that a Judge hearing two cases must be disqualified when a witness in the first case gives evidence implicating the accused in the second case. The ICTR Appeals Chamber held that:

> Judges are not disqualified from hearing two or more cases arising out of the same series of events and involving similar evidence. Consequently, Judges hearing similar evidence may hear the same witness in more than one trial. As previously recalled, in the absence of evidence to the contrary, Judges are presumed to be impartial when

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184 *Prosecutor v Stanišić and Župljanin*, ICTY Trial Chamber, IT-08-91-T, Judgement, 27 March 2013.
185 *Šešelj* Disqualification Decision in relation to Judge Harhoff.
186 *Prosecutor v Stanišić* and *Župljanin*, ICTY President, IT-08-91-A, Decision on Motion Requesting Recusal, 3 December 2013, para. 23.
187 Prosecutor v *Stanišić* and *Župljanin*, ICTY Panel Convened by the Acting President, IT-08-91-A, Decision on Motion Requesting Recusal of Judge Liu from Adjudication of Motion to Vacate Trial Judgement, 24 February 2014 ("*Stanišić* and *Župljanin* Disqualification Decision in relation to Judge Liu").
188 *Stanišić* and *Župljanin* Disqualification Decision in relation to Judge Liu, para. 15.

> ruling on the issues before them, relying solely and exclusively on the evidence adduced in each particular case.[189]

68. In the case of *Nahimana et al.,* the ICTR Appeals Chamber held that a Judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he or she is exposed to evidence relating to those events in both cases.[190] The Appeals Chamber dismissed allegations of bias because of prior findings about the incendiary nature of radio broadcasts and a newspaper with which the accused in *Nahimana et al.* were alleged to be involved. The Appeals Chamber concluded that the earlier findings in the *Akayesu* case only marginally mentioned propaganda and certain articles and cartoons or broadcasts, whereas that was the focus of an entire section of the trial judgement in *Nahimana et al.*.[191] The Appeals Chamber concluded that the Judge had carefully assessed the evidence at trial in *Nahimana* and made factual findings based on that evidence.[192] The Appeals Chamber also dismissed submissions that findings in the *Ruggiu* Trial Judgement concluded that Nahimana incurred criminal responsibility in respect of the crimes charged. Despite those findings, the Appeals Chamber was not convinced that the presumption of impartiality had been rebutted because the Judges had made their findings based on the evidence in the case.[193]

69. The Supreme Court Chamber did not explain what it meant by an "autonomous body of evidence". It is, however, apparent from the above overview of the authorities that it cited, and its earlier reference to cases with overlapping evidence or fact patterns, that it did not mean completely different or unrelated evidence. For example, the application to vacate the Trial Judgement in *Stanišić and Župljanin* involved the same evidence as provided the basis for disqualification in *Šešelj*, namely Judge Harhoff's letter. That was insufficient to establish, however, that Judge Liu Daqun would be unable to bring an independent mind to Župljanin's application. The trials in *Renzaho, Karera* and *Bagosora et al.* involved "similar evidence", including many of the same witnesses. In *Nahimana et al.*, previous findings on the criminal nature of newspaper articles or radio broadcasts did not a preclude Judges from evaluating the accused's responsibility for those publications in the subsequent case.

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[189] *Prosecutor v Renzaho*, ICTR Appeals Chamber, ICTR-97-31-A, Judgement, 1 April 2011, para. 43. Similarly, in *Karera,* the ICTR Appeals Chamber rejected a submission that Judges should have been disqualified because they heard the *Renzaho* trial while, at the same time, deliberating on the verdict in *Karera*. *See Prosecutor v Karera,* ICTR Appeals Chamber, ICTR-01-74-A, Judgement, 2 February 2009, para. 378.

[190] *Prosecutor v Nahimana et al.*,ICTR Appeals Chamber, ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 78.

[191] *Nahimana* Appeal Judgement, para. 79.

[192] *Nahimana* Appeal Judgement, para. 79.

[193] *Nahimana* Appeal Judgement, paras 84-85.

70. The Supreme Court Chamber's reference to an "autonomous body of evidence" therefore implies that each case is considered to be independent and a Judge should not be influenced by extraneous matters, including previous findings in another case. In light of this, it is unlikely that the Supreme Court Chamber was of the view that rulings by Judges Moloto and Delvoie on Mr Kabashi's contempt would have excluded them from deciding upon the admissibility of the *Limaj et al.* transcripts in *Haradinaj et al.* retrial: presumably a trial and retrial involve autonomous bodies of evidence. Rather, the crucial point identified by the Supreme Court Chamber appears to remain whether findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases. Accordingly, that is the test to be applied.

c. Merits of the Disqualification Applications

71. The various submissions advanced in the Disqualification Applications are grouped together where appropriate and addressed in the following order. First, KHIEU Samphan's request to disqualify Judge FENZ. Secondly, submissions that a reasonable observer would perceive bias because of alleged errors in the Case 002/01 Judgement and/or the language used by the Trial Chamber Judges and/or reliance on certain expert evidence. Thirdly, submissions that the Case 001 Judgement prejudges Case 002/02. Fourthly, submissions that the Case 002/01 Judgement prejudges Case 002/02. Fifthly, submissions that the various findings amount to a reversal of the burden of proof in Case 002/02 and/or demonstrate a lack of judicial integrity. Sixthly, submissions that a reasonable observer would perceive bias based on the failure to summons HENG Samrin and/or the independence of the Cambodian judiciary generally. Lastly, submissions that the Cambodian Judges have a personal interest in Case 002/02 such that they should be disqualified.

(1) KHIEU Samphan's Request to Disqualify Judge FENZ

72. Whereas both Disqualification Applications target Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE and YOU Ottara, KHIEU Samphan's Application and Renewed Application additionally target Judge Claudia FENZ, one of the reserve Judges on Case 002/01. KHIEU Samphan's Application submits that Judge FENZ "sat on the bench on several occasions during Case 002/01 and participated in some deliberations".[194] KHIEU Samphan's Renewed Application seeks to substantiate that submission by listing a number of

[194] KHIEU Samphan's Application, para. 48.

hearings during Case 002/01 when Judge FENZ replaced either Judge CARTWRIGHT or Judge LAVERGNE.[195]

73. However, KHIEU Samphan's request for disqualification is based on alleged errors contained in, and alleged prejudgment resulting from, the Case 002/01 Judgement. The Case 002/01 Judgement was not signed by Judge FENZ.[196] As a result, Judge FENZ did not make any judicial determinations and there can be no suggestion that she has actually prejudged KHIEU Samphan's guilt in Case 002/02. Moreover, a Judge's prior judicial contact with the facts of a case (or indeed with the accused) alone is generally insufficient to find an unacceptable appearance of bias. A fair-minded observer would know that a Judge's role can differ from one judicial context to another.[197] KHIEU Samphan does not explain the basis on which Judge FENZ's occasional performance of her duties as a Reserve Judge during the Case 002/01 trial means that she should be disqualified from Case 002/02. KHIEU Samphan's request to disqualify Judge FENZ is therefore dismissed.

(2) Alleged Errors in the Case 002/01 Judgement

74. Both Disqualification Applications assert that the Case 002/01 Judgement contains erroneous findings giving rise to an appearance of bias. All of the findings identified have been reviewed, not to determine whether they are erroneous, which is a matter for appeal, but to assess whether a reasonable observer would apprehend bias as a result of those findings.

CPK Policies

75. Both Disqualification Applications assert that the Case 002/01 Judgement went beyond the permissible scope of that trial by making findings on alleged CPK policies to (i) create cooperatives and worksites, (ii) re-educate bad elements and kill enemies, and (iii) regulate marriage. These findings are contained in the section of the Case 002/01 Judgement titled "Historical Background" which starts by explaining that the "existence of each of these policies is examined in this section in order to provide a full picture of the situation prior to 17 April 1975." The Trial Chamber then noted that two of the five policies were "the subject of

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[195] KHIEU Samphan's Renewed Application, footnote 14.
[196] Case 002/01 Judgement, p. 623.
[197] *In the Case Against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin,* STL Panel Designated Pursuant to Rule 25(D), STL-14-06/PT/OTH/R25, Decision on the Motion for Disqualification of Judge Lettieri, 5 September 2014, para. 21.

charges within Case 002/01" and would be "consequently examined in greater detail."[198] The Trial Chamber explained the basis for its consideration of the background to the three policies in question in a sub-section titled "Development of CPK Policies." It again noted that only two policies were the subject of the charges in Case 002/01, but stated that the existence of the other policies was "also relevant."[199] The Trial Chamber explained that statement based on previous decisions during the course of the trial, when it stated that it would examine the "existence" of all five policies during Case 002/01, but would not examine the "implementation" of the three policies which would be looked at for "background purposes only."[200]

76. The Disqualification Applications contend that the Trial Chamber's examination of the three policies said to be beyond the scope of Case 002/01 was impermissible and/or that the Trial Chamber's findings demonstrate that it was not feasible to separate an examination of the existence of a policy from its implementation. These are matters for appeal rather than a disqualification application. Even if the Trial Chamber erred when it examined the three policies in question, this would not in itself give rise to any appearance of bias. Similarly, the submissions that the Trial Chamber relied on the three policies not subject of Case 002/01 in order to infer the existence of the alleged joint criminal enterprise are a matter for appeal rather than disqualification. In any event, the section of the Case 002/01 Judgement titled "Joint Criminal Enterprise" begins by identifying the two policies in Case 002/01.[201] The section includes detailed findings on the "Population Movement Policy"[202] and the "Targeting Policy".[203] There is no such analysis or reliance on the other three policies. The Trial Chamber's references to the other policies elsewhere in the Case 002/01 Judgement provide no basis to apprehend bias.

The Structure of the CPK

77. In relation to the structure of the CPK, NUON Chea contends that the Trial Chamber's "most egregious error" was the rejection of evidence and submissions that Zones were autonomous.[204] The "next most significant error" is, he submits, a failure by the Trial

198 Case 002/01 Judgement, para. 79.
199 Case 002/01 Judgement, para. 103.
200 Case 002/01 Judgement, footnote 287.
201 Case 002/01 Judgement, para.723.
202 Case 002/01 Judgement, paras 779-810.
203 Case 002/01 Judgement, paras 811-837.
204 NUON Chea's Application, para. 73.

Chamber to address submissions regarding internal divisions within the CPK.[205] In particular, he disputes findings that he participated in a joint criminal enterprise with individuals who he characterises as a "rival internal faction", in particular SAO Phim, ROS Nhim, VORN Vet and KOY Thuon.[206]

78. In relation to the responsibility of the Zones, Section 15.2 of the Case 002/01 Judgement expressly considered and rejected NUON Chea's contention that the Zones acted independently concerning population movements and the targeting of Khmer Republic officials.[207] There is no basis to conclude that the Trial Chamber's findings would cause a reasonable observer to apprehend bias. The proper avenue for challenging this finding lies on appeal.

79. In relation to internal divisions within the CPK, the Case 002/01 Judgement contains specific findings on the participation in the joint criminal enterprise by the individuals who NUON Chea identifies as a rival faction.[208] The Case 002/01 Judgement contains findings that, during the evacuation of Phnom Penh, SAO Phim, KOY Thuon and VORN Vet sought and received instructions from NUON Chea and others.[209] The Trial Chamber further found that it would not have been possible for Zone commanders to act against or outside the broad policy consensus which had been laid down by the Centre.[210] In relation to movement of population (phase two) the Trial Chamber considered evidence of meetings and communications between ROS Nhim, SAO Phim, VORN Vet and NUON Chea among others.[211] In relation to Tuol Po Chrey, the Trial Chamber found that there was a policy to target former Khmer Republic officials which involved the murder and extermination of former Khmer Republic officials at Tuol Po Chrey.[212] It found that ROS Nhim presided over the meeting at which the execution of former Khmer Republic officials was directed[213] and that that decision was taken pursuant to a plan reached at meetings which NUON Chea attended in June 1974 and April 1975.[214] It found that ROS Nhim and NUON Chea had an

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205 NUON Chea's Application, para. 73.
206 NUON Chea's Application, para. 77.
207 Case 002/01 Judgement, para. 859.
208 Case 002/01 Judgement, para. 777.
209 Case 002/01 Judgement, para. 739.
210 Case 002/01 Judgement, para. 894.
211 Case 002/01 Judgement, paras 772, 773.
212 Case 002/01 Judgement, para. 835.
213 Case 002/01 Judgement, para. 836.
214 Case 002/01 Judgement, para. 1041.

ongoing working relationship from long before 17 April 1975.[215] It found that, although there was no evidence that NUON Chea knew of the specific nature of the crimes at Tuol Po Chrey, he knew about an ongoing pattern of targeting Khmer Republic officials.[216]

80. The Trial Chamber's findings may be the subject of appeal. There is, however, no basis to contend that the Trial Chamber's approach to the internal workings of the CPK would cause a reasonable observer to apprehend bias in Case 002/02, given that the Trial Chamber based its conclusions on the evidence before it in Case 002/01.

Demographic Analyses

81. The Trial Chamber's references to demographic analyses are found in a section of the Case 002/01 Judgement titled "General Overview: 17 April 1975 – 6 January 1979." The Trial Chamber summarised extensive and divergent expert evidence on the number of people who died "as a result of Khmer Rouge policies and actions."[217] The Trial Chamber noted a broad range of estimates between 600,000 and 3 million people then stated that "experts accept estimates falling between 1.5 million and 2 million excess deaths as the most accurate."[218] A lengthy footnote identifies the basis for this statement. As to NUON Chea's suggestion that the Trial Chamber omitted to discuss contrary arguments as to timings or cause of deaths, the evidence referred to by the Trial Chamber expressly discusses differing causes and emphasises the difficulty of arriving at a precise figure.[219] No reasonable observer would apprehend bias from the Trial Chamber's approach.

82. The Case 002/01 Judgement contains more precise findings in relation to the Case 002/01 crimes. In relation to the evacuation of Phnom Penh, the Trial Chamber noted that evidence suggested that between 2,000 and 20,000 people died.[220] In relation to subsequent population movements, the Trial Chamber found that the exact number of deaths was unknown[221] but that people died on a massive scale.[222] In relation to Tuol Po Chrey, the Trial

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215 Case 002/01 Judgement, para. 933.
216 Case 002/01 Judgement, para. 854.
217 Case 002/01 Judgement, para. 174.
218 Case 002/01 Judgement, para. 174.
219 Case 002/01 Judgement, footnote 523. *See*, for example, T.25 July 2012 (David CHANDLER), pp. 9-12 (answering a question as to whether it is possible to distinguish and attribute deaths to the Democratic Kampuchea regime).
220 Case 002/01 Judgement, para. 521.
221 Case 002/01 Judgement, para. 646.
222 Case 002/01 Judgement, para. 647.

Chamber found that a minimum of 250 people were executed.[223] No reasonable observer would apprehend bias from the Trial Chamber's consideration of broad demographic evidence and its subsequent, more specific, findings in relation to the crimes for which the Accused were convicted.

Reliance on Case 001 Judgement to Define "Smash"

83. When considering the meaning of "smash", the Case 002/01 Judgement refers to the Case 001 Judgement in two footnotes.[224] The references identified by NUON Chea are found in the Trial Chamber's discussion of one of the three policies said to be outside the scope of Case 002/01, namely "Re-education of bad elements and killing of enemies."[225] NUON Chea submits that the Case 001 Judgement is not "evidence" and that the Trial Chamber's reference to the Case 001 Judgement shows that the Judges failed to rely solely and exclusively on the evidence in Case 002/01.[226]

84. It is technically correct that a judgement is not evidence. However, the Accused in Case 001, KAING Guek Eav, testified in Case 002 and the footnotes which NUON Chea identifies also refer to KAING Guek Eav's testimony in Case 002 and/or Case 001 (which was admitted as evidence in Case 002), during which he discussed the meaning of "smash". Moreover, the paragraphs of the Case 001 Judgement to which the Trial Chamber referred in turn rely on KAING Guek Eav's testimony in that case. In those circumstances a reasonable observer would not consider there to be anything unusual about Judges referring to an earlier judgement against an individual whose testimony was admitted as evidence in the case before them. A reasonable observer would not apprehend that the Trial Chamber was unable to rely solely and exclusively on the evidence in Case 002/01.

Language Techniques

85. NUON Chea submits that the Trial Chamber's use of words like "purported" or "perceived" when discussing the CPK's enemies, or "façade" when discussing the GRUNK administration, and/or its use of quotation marks when referring to, for example, "enemies", "bad elements" or "traitors", would cause a reasonable observer to apprehend bias. [227] He

[223] Case 002/01 Judgement, para. 681.
[224] NUON Chea's Application, Section E, para. 90, identifying footnote 326 and 330 in the Case 002/01 Judgement.
[225] Case 002/01 Judgement, para. 117.
[226] NUON Chea's Application, Section E, paras 91-92.
[227] NUON Chea's Application, paras 62-64.

contends that, in view of the manner in which the Case 002/01 Judgement is expressed, portions of Judge CARTWRIGHT's public comments at the Aspen Institute become relevant.[228] Some of the language challenged by NUON Chea refers to explicit factual findings made by the Trial Chamber. For example, the complaint that the Case 002/01 Judgement employed "pejorative nouns such as *façade*" relates to an explicit factual finding. The Trial Chamber found that that "the GRUNK administration in Cambodia was a façade".[229]

86. The fact that NUON Chea does not agree with the Trial Chamber's assessment does not substantiate an allegation of bias. For example, whereas NUON Chea's Application characterises Oudong as "indeed, a classic military success"[230], the Trial Chamber found that Khmer Republic officials were executed *en masse* immediately after the seizure of Oudong[231] and that the population was forcibly displaced, mistreated and many were executed.[232] As to the Trial Chamber's use of quotation marks when referring to, for example, "enemies", "bad elements" or "traitors", the Trial Chamber plainly sought to employ the terminology of the Khmer Rouge and the parties' submissions without necessarily endorsing those descriptions. The Trial Chamber explained its approach in the Case 002/01 Judgement.[233] Finally, there is nothing in the Trial Chamber's use of words such as "purported" or "perceived" which would cause a reasonable observer to apprehend bias. One example challenged is a reference to the "activities of purported internal and external enemies."[234] In this paragraph, the Trial Chamber recalls the contents of several Zone Reports to the Party Centre, which mention enemies. By referring to "purported" enemies, the Trial Chamber denotes that it is recounting the content of the Zone Reports and the authors' assessments of the described individuals or groups as enemies rather than making any determination that such individuals or groups were indeed enemies.

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[228] NUON Chea's Application, para. 68.
[229] Case 002/01 Judgement, para. 100.
[230] NUON Chea's Application, para. 66.
[231] Case 002/01 Judgement, para. 918.
[232] Case 002/01 Judgement, para. 999.
[233] Case 002/01 Judgement, footnote 288 ("The Chamber notes that the term "evacuate" was used by the Khmer Rouge themselves to describe their own policy. While this word suggests the idea of moving people from a dangerous place or of providing a safer venue, the Chamber only uses this term to describe the movement of the population of cities and of Phnom Penh in particular. The proper characterisation of the movements is addressed in the judgement but the Chamber does not endorse the meaning indicated by Khmer Rouge usage of this term.") and footnote 384 ("The Chamber notes the term "liberate" was used by the Khmer Rouge themselves to describe overcoming Khmer Republic forces, capturing areas held by them, and bringing people under their own control. The proper characterisation of these events is addressed in the judgement but the Chamber does not endorse the meaning indicated by Khmer Rouge usage of this term.").
[234] Case 002/01 Judgement, para. 278.

87. Judges have considerable discretion in respect of the manner in which they choose to express their reasoning and there is nothing in NUON Chea's Application to substantiate the submission that a reasonable observer would apprehend bias from the manner in which the Case 002/01 Judgement is expressed. In view of this conclusion, it is unnecessary to address NUON Chea's submissions seeking to link Judge CARTWRIGHT's remarks at the Aspen Institute to the manner in which the Case 002/01 Judgement is expressed.

Other Alleged Errors

88. KHIEU Samphan's submissions that the Case 002/01 Judgement exceeded the ECCC's temporal jurisdiction are matters for appeal rather than a disqualification application, as are NUON Chea's submissions that the Case 002/01 Judgement relies excessively on expert evidence. There is no basis upon which to conclude that any of the alleged errors resulted from pre-dispositions against the Accused or anything other 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 submissions in the Disqualification Applications in relation to alleged errors in the Case 002/01 Judgement are therefore dismissed.

(3) Allegations of Prejudgment Based on the Case 001 Judgement

89. The panel of Judges convened to address NUON Chea's previous disqualification application based on the Case 001 Judgement dismissed his submissions, noting that Judges are not prohibited from presiding over two separate criminal proceedings arising from the same set of facts, even if the cases involve overlapping questions of fact or law.[235] NUON Chea failed to demonstrate that the Case 001 Judgement predetermined his guilt in relation to the charges against him in Case 002.[236] NUON Chea now argues that the rejection of his previous disqualification application resulted from an erroneous and restrictive interpretation of the law, but his contention for a lower standard was dismissed above.[237] In any event, if NUON Chea contends that the rejection of his previous disqualification application resulted from an error of law, that is a matter for appeal.

90. In relation to issues identified as NUON Chea's "new focus" on the Case 001 Judgement, the issues in Case 002/02 are matters to be determined by the Trial Chamber

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[235] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, para. 15.
[236] Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification, paras 20-25.
[237] *See* paras 37-48 above.

based upon the evidence presented in that case. Professional Judges will not be unduly influenced by evidence and findings from another case. The Supreme Court Chamber confirmed the body of case law on this point.[238] NUON Chea therefore fails to demonstrate that a reasonable observer would apprehend bias on the part of Judges NIL Non, YA Sokhan and Jean-Marc LAVERGNE by virtue of findings in Case 001. In any event, none of the findings to which NUON Chea points pronounce on his criminal responsibility on any matter or evince attributing criminal responsibility to him in relation to charges to be adjudicated in Case 002/02. NUON Chea's submissions are therefore dismissed.

(4) Allegations of Prejudgment Based on the Case 002/01 Judgement

91. KHIEU Samphan submits that the Case 002/01 Judgement includes findings which prejudge his guilt in Case 002/02.[239] In contrast, NUON Chea does not appear to contend that the Case 002/01 Judgement actually prejudged his guilt in relation to the charges to be adjudicated in Case 002/02. Rather, he requests disqualification on the basis that the Trial Chamber Judges have predetermined issues "bearing on his guilt" and/or "preformed a view" of his case.[240] NUON Chea's submissions fall short of the relevant test for prejudgment identified by the Supreme Court Chamber, namely whether judicial findings "evince attributing criminal responsibility [...] in relation to charges to be adjudicated in subsequent cases."[241]

92. The question of whether judicial findings actually prejudge guilt depends on the individual circumstances of each case. Nonetheless, guidance may be drawn from the approach of other international or internationalised courts to disqualification applications alleging that previous judicial findings prejudge a person's guilt. Such case law is preferred to isolated examples from national jurisdictions concerning cases with a completely different subject matter and type of jurisdiction compared to the ECCC.

93. Cases 002/01 and 002/02 result from severance of the Closing Order and involve the same Accused. However, they concern substantially different events. In Case 002/01, NUON Chea and KHIEU Samphan were found to be responsible for crimes against humanity committed during the evacuation of Phnom Penh in 1975, the movement of the population

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238 SCC's Third Severance Decision, para. 83.
239 KHIEU Samphan's Renewed Application, para. 10.
240 NUON Chea's Application, paras 29-32, 54-55, 70, 92, 93, 100, 105, 110-111, 116.
241 SCC's Third Severance Decision, para. 85.

from the Central (Old North), Southwest, West and East Zones from September 1975 to 1977 and executions of former Khmer Republic officials at Tuol Po Chrey in April 1975.[242] In contrast, Case 002/02 concerns charges relating to: the genocide of the Vietnamese; the genocide of the Cham (and religious persecution during the forced movement of the Cham); forced marriages nationwide and other inhumane acts through rape at specific locations in the context of forced marriage; internal purges (limited to underlying offenses committed at identified crime sites); and crimes against humanity and war crimes allegedly committed at S-21 Security Centre, the 1st January Dam Worksite, the Tram Kok Cooperatives, the Kraing Ta Chan Security Centre, the Kampong Chhnang Airport Construction site, the Au Kanseng Security Centre, the Phnom Kraol Security Centre and the Trapeang Thma Dam Worksite.[243] The Case 002/01 Judgement did not attribute criminal responsibility in relation to the different crimes at issue in Case 002/02. Although there are overlapping issues relevant to both Case 002/01 and Case 002/02, the cases are therefore substantially different.

94. Nor are these differences limited to what might be described as crime-base evidence. Although the Case 002/01 Judgement contains prejudicial findings on KHIEU Samphan and NUON Chea's participation in the joint criminal enterprise and, in the case of NUON Chea, his effective control over Khmer Rouge cadre, the Case 002/01 Judgement does not, for example, assess or determine KHIEU Samphan's or NUON Chea's *mens rea* in relation to the Case 002/02 crimes. For example, whereas the Case 002/01 Judgement concludes that KHIEU Samphan and NUON Chea shared the intent to commit the other inhumane acts of forcible transfer and attacks against human dignity, murder committed during population movements (phase one and two) as well as murder and extermination at Tuol Po Chrey and the intent to discriminate in relation to the crime of persecution committed during population movements (phases one and two),[244] their *mens rea* in relation to the Case 002/02 crimes is not addressed. Nor did the Trial Chamber make findings on whether the joint criminal enterprise resulted in and/or involved the Case 002/02 crimes. Taking into account the absence of findings, express or implied, on the ultimate issue of culpability in relation to Case 002/02, the Disqualification Applications fail to establish bias or a reasonable apprehension of bias.

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[242] Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.
[243] Decision on Additional Severance of Case 002.
[244] Case 002/01 Judgement, para. 995 in relation to KHIEU Samphan and para. 876 in relation to NUON Chea.

95. The Disqualification Applications also fail to establish that a reasonable observer would consider that Judges cannot be impartial in relation to a party against whom they have made prejudicial findings. Some of the case law from other tribunals concerns different cases with what the Supreme Court Chamber described as "autonomous bodies of evidence". Although Case 002/01 and Case 002/02 both result from the severance of Case 002, there will be substantial differences between the evidence before the Trial Chamber in each case. The parties have filed sizeable lists of documents[245] and witnesses, Civil Parties and experts[246] in relation to Case 002/02. Even a cursory review of these lists indicates that significant amounts of material will be before the Trial Chamber in Case 002/02 which was not before the Trial Chamber in Case 002/01.

96. Furthermore, the Supreme Court Chamber confirmed in advance of the Case 002/01 Judgement that common factual elements in all cases must be established anew.[247] The Supreme Court Chamber recognised overlap between Case 002/01 and Case 002/02 and that there may possibly be "prejudicial findings on matters commonly relevant".[248] The Supreme Court Chamber did not hold, nor does the case law considered above suggest, that prejudicial findings concerning a party mean that a Judge should not be considered to be impartial thereafter.

97. Turning to the specific findings in the Case 002/01 Judgement upon which the Disqualification Applications rely, the Disqualification Applications contend that the Trial Chamber's findings on the five policies in Case 002/01 prejudge Case 002/02.[249] However, in relation to three of the five policies, the Trial Chamber expressly limited its findings to the existence of those policies prior to 1975. It expressly and repeatedly stated that the nature and implementation of those policies post-1975 was a matter for Case 002/02. The

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[245] *See* Co-Prosecutors' Rule 80(3) Trial Document List, E305/13, 13 June 2014; Civil Party Lead Co-Lawyers' Rule 87(4) Request to Admit into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, E307/6, 29 July 2014; NUON Chea's Initial Document List for Case 002/02, E307/5, 24 July 2014; Documents proposes par La Defense de M. KHIEU Samphan pour le process 002/02, E305/12, 13 juin 1014.

[246] *See* Co-Prosecutors' Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02 (with 5 Confidential Annexes I, II, IIA, III and IIIA), E305/6, 9 May 2014;Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, E307/3/2, 28 July 2014; Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, E305/7, 9 May 2014; NUON Chea's Updated Lists and Summaries of Proposed Witnesses, Civil Parties and Experts, E305/4, 8 May 2014; NUON Chea's New Witness, Civil Party and Expert List for Case 002/02, E307/4, 24 July 2014; Temoins et experts proposes par la Defense de M. KHIEU Samphan pour le process 002/02, E305/5, 9 Mai 2014.

[247] SCC's Third Severance Decision, para. 85.

[248] SCC's Third Severance Decision, para. 83.

[249] NUON Chea's Application, para. 100.

Disqualification Applications contend that the Trial Chamber's approach was erroneous, but there is nothing to suggest that such findings evince the attribution of criminal responsibility towards the crimes with which the Accused are charged in Case 002/02.

98. NUON Chea's Application contends that the Case 002/01 Judgement prejudges the policy of targeting enemies. He identifies findings in the Case 002/01 Judgement on the targeting of 'New People' and Khmer Republic officials.[250] However, the findings on the policy of re-educating bad elements and killing enemies were limited to the period before 1975.[251] The Trial Chamber stated that "Evidence concerning the nature and implementation of the policy of re-education of bad elements and killing of enemies, and its extent, will be the subject of Case 002/02."[252] Whereas Case 002/01 concerned the targeting of Khmer Republic officials at Tuol Po Chrey, Case 002/02 concerns the targeting of Khmer Republic officials at the following locations: Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre. There are substantial differences between Case 002/01 and Case 002/02 and NUON Chea fails to establish that a reasonable observer would consider a Judge to be biased just because they have made findings against a party in previous proceedings.

99. As to NUON Chea's submission that the Trial Chamber made findings on the CPK policy of targeting 'New People', this is not a policy charged in the Closing Order. The Case 002/01 Judgement, however, includes findings on CPK Policy which singled out 'New People' for "refashioning"[253] and findings in relation to the persecution of city people or 'New People' during movement of population phase one[254] and two, in relation to which the Trial Chamber concluded that political persecution was established in relation to the harsher treatment of 'New People' effected through forced transfer and enforced disappearances.[255] These findings are distinct from the question of NUON Chea's responsibility for allegations in Case 002/02. Indeed, Case 002/01 Judgement stated that "the welcome experienced by the evacuees varied depending on their destination."[256]

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250 NUON Chea's Application, paras 103-105.
251 Case 002/01 Judgement, paras 117-118.
252 Case 002/01 Judgement, para. 118.
253 Case 002/01 Judgement, para. 653.
254 Case 002/01 Judgement, para. 574.
255 Case 002/01 Judgement, paras 652-657.
256 Case 002/01 Judgement, para. 516.

100. In relation to NUON Chea's role in formulating and implementing CPK Policies, NUON Chea's Application identifies a number of general and specific findings in the Case 002/01 Judgement which, he contends, amount to a predetermination of issues bearing on his guilt, namely his responsibility for "the alleged genocide of the Vietnamese and Cham; the execution of detainees at S-21 Security Centre; and internal purges."[257]

101. In relation to the genocide charges, the Trial Chamber expressly declined to examine the policy of targeting the Cham and Vietnamese on the basis that "limited evidence has been heard to date."[258] The Trial Chamber did not proceed with any examination of the underlying facts for these charges. In relation to the S-21 Security Centre, the Trial Chamber expressly declined to make any findings "concerning NUON Chea's responsibility in connection with the operations of S-21 Security Office" because those allegations "were severed from Case 002/01 and will be considered in future proceedings."[259]

102. In relation to "internal purges", the Trial Chamber found that NUON Chea was "involved in the purges of cadres and military, particularly in the East Zone."[260] However, the paragraph in which this finding appears is three sentences long and it is abundantly clear that the paragraph is limited to a finding that, at a meeting in 1978, NUON Chea "spoke of the arrest of several members of the East Zone."[261] Nowhere in the Case 002/01 Judgement did the Trial Chamber consider or decide whether internal purges extended beyond arrests to the crimes alleged in Case 002/02: murder, extermination, enslavement, unlawful imprisonment, torture, persecution on political grounds and other inhuman acts through attacks against human dignity and enforced disappearances of CPK members, cadres and military[262] alleged to have been committed at the S-21 Security Centre, the Kraing Ta Chang Security Centre, the Au Kanseng Security Centre, the Phnom Kraol Security Centre and the Kampong Chhnang Airport.[263] To the contrary, the Trial Chamber stated that it would not discuss the implementation of the alleged policy to re-educate bad elements or kill enemies, and its extent, because that is the subject of Case 002/02.[264] The limited findings in the Case 002/01

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[257] NUON Chea's Application, para. 110.
[258] Case 002/01 Judgement, para. 119.
[259] Case 002/01 Judgement, para. 346.
[260] Case 002/01 Judgement, para.340.
[261] Case 002/01 Judgement, para. 340.
[262] Decision on Additional Severance of Case 002, Annex, para. 5 (ii), read in conjunction with Closing Order, paras 193-203.
[263] Decision on Additional Severance of Case 002, Annex, paras 2(iii) and 3(v-ix), and footnote 9.
[264] Case 002/01 Judgement, para. 118.

Judgement do not actually prejudge NUON Chea's guilt in relation to matters to be addressed in Case 002/02.

103. NUON Chea further takes issue with five factual findings in the Case 002/01 Judgement. First, a finding that the majority of the new ruling class had very little formal education and were disciplined and indoctrinated to deceive people and behave secretively. Secondly, that the CPK used the spectre of US bombing as a pretext to evacuate Phnom Penh. Thirdly, that subsequent mass relocations were justified on a pretext of caring for the population. Fourthly, that the CPK assembled Khmer Republic officials by deceptive means before executing them. Fifthly, that lies used to control the situation and the people were the very fabric of the regime.[265] He submits that the Judges have already formed an unfavourable view of the CPK and some of his key arguments.

104. NUON Chea does not identify his "key arguments" and misrepresents a number of the Trial Chamber's findings. A review of the paragraphs of the Case 002/01 Judgement to which NUON Chea refers reveals that many of the findings are expressly limited to the evacuation of Phnom Penh,[266] or the capture and execution of Khmer Republic soldiers and officials in the days that immediately followed.[267] The findings in relation to subsequent mass relocations touch upon Case 002/02 to a limited degree, but the issue of the persecution of the Cham raises distinct issues.[268] The statement that lies were the "very fabric" in fact begins with the phrase: "Witness Francois PONCHAUD and Expert Philip SHORT testified that...."[269] Such a summary of evidence does not judge guilt and therefore cannot substantiate an allegation of a reasonable apprehension of bias.

105. In any event, the fact that the Trial Chamber found some arguments advanced by NUON Chea unconvincing when examining the charges in Case 002/01 does not substantiate any apprehension that the Judges will not examine the charges in Case 002/02 with an impartial and unprejudiced mind. NUON Chea's submissions do not displace the presumption of impartiality which attaches to Judges or establish that a reasonable observer would consider that the Trial Chamber Judges will not be impartial in Case 002/02.

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265 NUON Chea's Application, para. 112.
266 *See, e.g.,* Case 002/01 Judgement, paras 530, 548, *referred to* in NUON Chea Motion, fn. 214.
267 *See, e.g.,* Case 002/01 Judgement, paras 120, 511, 853, 954, *referred to* in NUON Chea Motion, fn. 214.
268 Case 002/01 Judgement, para. 634, 803, *referred to* in NUON Chea Motion, fn. 214.
269 Case 002/01 Judgement, para. 834, *referred to* in NUON Chea Motion, fn. 214.

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 based on the evidence in Case 002/01. NUON Chea's and KHIEU Samphan's submissions that the Case 002/01 Judgement prejudges their guilt in relation to Case 002/02 are therefore dismissed.

(5) The Burden of Proof, Judicial Integrity and Ideologies

107. NUON Chea submits that the findings in the Case 001 Judgement and Case 002/01 Judgement "effectively result" in a reversal of the burden of proof in Case 002/02.[270] He does not explain the relevance of this submission to an application for disqualification based on bias. His submissions based on the findings in the Case 001 and Case 002/01 Judgements have already been dismissed. NUON Chea's further submissions in relation to the burden of proof are therefore dismissed. His assertions that the findings in the Case 002/01 Judgement and Final Witness Decision demonstrate a lack of judicial integrity are a matter for appeal against the Case 002/01 Judgement. Finally, his submissions linking what he describes as the "ideological tradition" of the countries from which certain international Judges originate, and the reliance in the Case 002/01 Judgement on what he describes as "Anglo-French" expert evidence, are unpersuasive as a basis for disqualification. The Case 002/01 Judgement contains detailed findings. If NUON Chea disagrees with those findings, then the proper avenue is to pursue an appeal.

(6) Allegations of Bias Based on the Failure to Summons HENG Samrin

108. NUON Chea's submissions in relation to the Final Witness Decision focus on the failure to summons HENG Samrin. He does not appear to submit that any appearance of bias arises from the failure to summons OUK Bunchhoeun, about which the Cambodian and international Judges also disagreed. Irrespective of that apparent lack of detail in respect of the submission, the opinions of the Cambodian and international Judges have been reviewed

[270] NUON Chea's Application, Section H, para. 122.

in order to determine whether a reasonable observer would apprehend bias. The purpose of that review is not to decide whether the decision not to summons HENG Samrin or OUK Bunchhoeun was erroneous, but to assess whether it could be said to result from something other than a genuine application of the law and assessment of the facts.

109. NUON Chea submits that the Cambodian Judges stated that "summonsing senior members of the government, like HENG Samrin, as witnesses would 'lead to [...] difficulties' that the Cambodian Judges were 'not prepared' 'to face'".[271] In deciding not to summons HENG Samrin, the Cambodian Judges directed themselves to Internal Rule 87 and jurisprudence that subpoenas should not be issued lightly and that the compulsive mechanism should not be abused or used as a trial tactic.[272] The Cambodian Judges summarized pre-trial attempts to summons HENG Samrin and concluded that it had been left to the Trial Chamber to decide whether to employ coercive measures.[273] They evaluated the reasons why NUON Chea sought to summons HENG Samrin in Case 002/01. They rejected most of the reasons advanced but accepted that HENG Samrin was relevant to certain aspects of Case 002/01.[274] They then weighed their assessment of the importance of HENG Samrin's testimony in Case 002/01 against what they described as the practical reality, namely that the Trial Chamber had been invited to compel his testimony through criminal sanctions.[275]

110. The "difficulties" that the Cambodian Judges said they were not prepared to face were described as the legal and practical difficulties raised by parliamentary immunity. They stated that "[i]f testimony is necessary for the conduct and overall fairness of the trial, we consider that a summons should be issued and enforced".[276] They were not persuaded that HENG Samrin's testimony was sufficiently important to Case 002/01 and therefore concluded that compulsive measures should not be used.[277] They further considered whether their refusal to summons HENG Samrin could be said to prejudice NUON Chea and concluded that, in their view, it did not.[278] NUON Chea disagrees with the Cambodian judges' assessment as to the importance of testimony from HENG Samrin in Case 002/01. This is a matter to be raised on

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271 NUON Chea's Application, para. 14.
272 Final Witness Decision, para. 89.
273 Final Witness Decision, paras 90-91.
274 Final Witness Decision, para. 96.
275 Final Witness Decision, para. 97.
276 Final Witness Decision, para. 89.
277 Final Witness Decision, para. 97.
278 Final Witness Decision, para. 98.

appeal. Even if the Cambodian Judges erred in their assessment, there is no basis to conclude that a reasonable observer would perceive bias as a result of their approach.

111. The Cambodian Judges also evaluated NUON Chea's request to summons HENG Samrin as his only character witness. They expressed a concern that this request was "suggestive of trial tactics" and made "in an attempt to generate controversy – a further attempt to invite coercive measures against a member of Cambodia's Parliament – rather than a genuine and reasonable belief that testimony from [HENG Samrin] would materially assist NUON Chea."[279] They explained their assessment that the request would have likely prolonged proceedings and that they had the impression that NUON Chea's approach to the question of character evidence was tactical, such that the request should be rejected.[280]

112. The Cambodian Judges had earlier identified "trial tactics" as a relevant consideration in the jurisprudence on whether compulsive mechanisms should be deployed. NUON Chea's Application does not dispute that such a factor is a relevant consideration. Given that NUON Chea's motion to summons HENG Samrin as his sole character witness was made in February 2013, shortly before the end of trial, and that the Cambodian Judges explained their reasons for doubting the relevance of HENG Samrin's testimony on NUON Chea's character, there is no basis on which to suggest that a reasonable observer would perceive bias from the Cambodian judges' statements.

113. Nor did the Cambodian Judges predetermine whether or not to summons HENG Samrin or OUK Bunchhoen in Case 002/02. To the contrary, the Cambodian Judges' opinion is expressly limited to Case 002/01. For example, they expressed their view that proposed testimony from HENG Samrin on the role of Vietnam was "not relevant to Case 002/01"[281] and that testimony from OUK Bunchhoeun on the conflict between the Eastern Zone and the Centre in the late 1970s was "of very low importance to the issues in Case 002/01."[282] Indeed, NUON Chea's Application stresses the greater importance of such topics in relation Case 002/02.[283] The Cambodian Judges have not predetermined the relevance or importance of HENG Samrin's or OUK Bunchhoen's testimony to matters at issue in Case 002/02, including in relation to NUON Chea's character, because he is free to seek to persuade the

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279 Final Witness Decision, para. 117.
280 Final Witness Decision, para. 118.
281 Final Witness Decision, para. 93.
282 Final Witness Decision, para. 101.
283 NUON Chea's Application, para. 40.

Cambodian Judges that there are reasons why such a request, made at an appropriate time, would materially assist his defence in Case 002/02.

114. Given that there is no basis for the submission that the Cambodian judges' refusal to summons HENG Samrin "extinguishes an appearance of independence or gives rise to an appearance of bias", it is unnecessary to address NUON Chea's submissions related to the alleged lack of judicial independence in Cambodia generally. In any event, the Supreme Court Chamber has held that a disqualification application targeting an individual Judge is not the appropriate mechanism to address putative shortcomings in the legal system of Cambodia as a whole.[284]

115. Finally, NUON Chea attacks Judge LAVERGNE's "judicial moral integrity" on the basis that the failure to summons HENG Samrin should have led him to acquit NUON Chea altogether.[285] He does not, however, explain the basis on which such an acquittal necessarily follows. He further asserts that Judge LAVERGNE reached a "cowardly conclusion" when he declined to express a view on the issue of the fairness of the trial proceedings raised by the Cambodian Judges.[286] The fairness issue raised by the Cambodian Judges was their assessment of the notes of an interview that Ben KIERNAN had conducted with HENG Samrin which NUON Chea had relied upon.[287] The Cambodian Judges expressed a view, having regard to the entirety of the interview notes which NUON Chea had based his submission upon, that it was not plausible that testimony from HENG Samrin would materially advance NUON Chea's case in Case 002/01.[288] Judge LAVERGNE declined to express a view on that assessment, as was his right as an independent judge. It is not possible to infer anything improper in respect of which a reasonable observer would question Judge LAVERGNE's integrity, and by implication suggest an appearance of bias, as a result. NUON Chea's challenges to Judge LAVERGNE are therefore dismissed.

(7) Allegations of Bias Based on the Cambodian Judges' Alleged Personal Interests

116. NUON Chea seeks to disqualify the Cambodian Judges from future proceedings against him on the basis that they lived through the DK regime and their alleged reactions during the course of Case 002/01. He relies on public comments made by Judge CARTWRIGHT at the

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284 Decision on IENG Thirith's Application to disqualify Judge SOM Sereyvuth, para. 15.
285 NUON Chea's Application, paras 132-133.
286 NUON Chea's Application, para. 132.
287 Final Witness Decision, para. 98.
288 Final Witness Decision, para. 98.

Aspen Institute to contend that the Cambodian Judges involved in Case 002/01 Judgement have a personal interest in the case against him. He suggests that Judge CARTWRIGHT stated that one of the Cambodian Judges was mistakenly arrested as a LON Nol soldier when in Phnom Penh but was later released; that he used to work on a dam site, the head of which was allegedly killed at S-21; and is in an arranged marriage. He further suggests that Judge CARTWRIGHT stated that another of the Cambodian Judges was made to work in a children's brigade during the DK period.[289]

117. NUON Chea has not provided a Khmer or English transcript of the comments he seeks to rely upon. NUON Chea's Application accepts, however, that the mere fact the Cambodian Judges have direct experience of matters at issue in Case 002 does not automatically lead to their disqualification.[290] Rather, he submits that, having reviewed the Case 002/01 Judgement and Final Witness Decision, he is "forced to conclude" that it was not possible for the Cambodian Judges to fulfil their duty of impartiality.[291] He highlights the following matters as demonstrating the Cambodian judges' inability to be impartial: (i) language techniques in the Case 002/01 Judgement; (ii) the dismissal of his submissions regarding internal CPK divisions; (iii) erroneous findings on the existence of a CPK policy to regulate marriage; (iv) inappropriate findings in relation to demographic evidence; and (v) improper references to the Case 001 Judgement in order to define "smash".[292] Each of these matters has been considered in detail above and rejected. There is therefore no basis to suggest that the Cambodian Judges' approach to these matters suggests that they were unable to fulfil their duty of impartiality.

118. In support of his submissions, NUON Chea quotes from the *Eichmann* case and cites the example of Judge Jaranilla during the trial proceedings at the Tokyo International Military Tribunal, who "recused himself from hearing evidence concerning the 'Bataan death march', a forcible transfer he experienced as an alleged victim."[293] However, NUON Chea's quotation from *Eichmann* is unduly selective. It is worth recalling the entirety of the presiding judge's ruling in that case, which rejected an application to disqualify Judges because they were sons of Jewish people and citizens of Israel.

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289 NUON Chea's Application, para. 53.
290 NUON Chea's Application, para. 54.
291 NUON Chea's Application, para. 55.
292 NUON Chea's Application, para. 55.
293 NUON Chea's Application, paras 54, 56.

> With regard to the argument of disqualification, Dr. Servatius said that the Accused was apprehensive lest the judges should not be able to try this case without bias. The fear is expressed not against any of the judges in particular but against all three, on the grounds that they are sons of the Jewish people and citizens of the State of Israel. There are grounds for apprehension, so Counsel argues, that the recollection of the Holocaust in which millions of their people were destroyed, that Holocaust which constitutes the background to the crimes attributed in the indictment to the Accused, will adversely affect the impartiality of the judges and their ability to do justice. He also requested each of the Judges to ask himself whether his personal suffering or that of members of his family in the years of the Holocaust affect his ability to judge the Accused in this case.
>
> To these arguments we reply: The subject of the charges in this case is the responsibility of the Accused for the acts described in the indictment. In the examination of this question it will not be difficult for us to maintain the guarantees ensured to the Accused in any case conducted according to our criminal law procedure, namely that every man is deemed to be innocent and that his case must be tried only on the basis of the evidence brought before the Court. Those charged with the task of judging are professional judges accustomed to weighing evidence and they will be carrying out their task under the critical gaze of the public; learned and experienced lawyers are defending the Accused.
>
> As for the Accused's fear concerning the background against which this trial will be heard we can only repeat the principles which apply to every judicial system worthy of the name; that indeed while on the bench a judge does not cease to be flesh and blood, possessed of emotions and impulses. However he is required by law to subdue these emotions and impulses, for otherwise a judge will never be fit to consider a criminal charge which arouses feelings of revulsion, such as treason, murder or any other grave crime. It is true that the memory of the Holocaust shocks every Jew to the depth of his being, but when this case is brought before us we are obliged to overcome these emotions while sitting in judgment. This duty we shall fulfil.[294]

119. Nor is the example of Judge Jaranilla particularly persuasive. NUON Chea contends that the Judge excused himself from hearing evidence on the Bataan death march, a forcible transfer he experienced as an alleged victim. NUON Chea does not contend, however, that Judge Jaranilla was or should have been disqualified from the entire proceedings.

120. NUON Chea makes further submissions, relying on an academic article, that at the ICTY's first judicial election, Russia's nominee was not appointed because of fears that he would be partial.[295] NUON Chea omits to mention that there is now a Russian Judge at the

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[294] *Israel v Adolf Eichmann*, District Court of Jerusalem, Aff 40/61, Session No. 6, 1 Iyar 5721 (17 April 1961), Decision No. 3.
[295] NUON Chea's Application, para. 58.

ICTY. In the *Martić* case, the ICTY Appeals Chamber confirmed that a Judge may be considered impartial even when he or she might be called upon to consider acts of the State of which he is a national.[296] In the *Šešelj* case, the ICTY Bureau held that the nationalities and religions of Judges are, and must be, irrelevant to their ability to hear cases before them impartially.[297] NUON Chea's submissions that the Cambodian Judges are actually biased or would be perceived by a reasonable observer to be biased are therefore dismissed.

Phnom Penh, 30 January 2015

THOU Mony

Chang-ho CHUNG | HUOT Vuthy | PRAK Kimsan

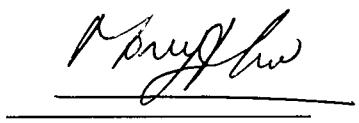
[296] *Prosecutor v Martić*, ICTY Vice-President, IT-95-11-A, Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal – Annex: Report to the Vice President Pursuant to Rule 15(b)(ii) Concerning Defence Motion to Disqualify Judge Schomburg from Sitting on Appeal, 23 October 2007.
[297] *Prosecutor v Šešelj*, ICTY Bureau, IT-03-67-PT, Decision on Motion for Disqualification 10 June 2003, para. 3.

SEPARATE OPINION FROM JUDGE THOU MONY

1. As the Presiding Judge of the Special Panel appointed to decide the Disqualification Applications, I wish to note that Judge DOWNING declined to circulate to me his dissenting opinion as appears below.

2. I consider that the interests of justice are better served if a Judge shares his or her full written reasoning with colleagues in advance of publication. The sharing of full reasons allows the differences in the approach taken by the different Judges to be clarified, which might assist those seeking to understand the decision. It is possible that a Judge misunderstands or mischaracterises another Judge's approach, either inadvertently or perhaps because the language of an opinion could be better expressed. This risk is greater at a court which operates in multiple languages via translations. Such risks can, and in my view should, be mitigated so far as Judges are able. In this case, the unfortunate position is that I have not seen Judge DOWNING's full written reasons.

Phnom Penh, 30 January 2015



THOU Mony

PARTLY DISSENTING OPINION OF JUDGE ROWAN DOWNING

I - Introduction

1. I have benefited from reading the Reasons for Decision on Applications for Disqualification of the majority of judges composing the Special Panel (the "Majority"). I concur with the Majority in respect of all of their conclusions other than that dismissing the applications to disqualify President NIL Nonn and Judges YA Sokhan, Jean-Marc Lavergne and YOU Ottara from Case 002/02 on the basis of their previous findings in the Case 002/01 Judgement on factual issues relevant to Case 002/02 (Ground F of the NUON Chea Application, incorporated by reference in KHIEU Samphan's Renewed Application). I am of the view 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.

2. I find KHIEU Samphan's application to disqualify Judge Claudia FENZ to be without merit, given that her participation as a sitting judge in Case 002/01 was minor and any decisions made by her were merely procedural. During the Case 002/01 proceedings and deliberations, Judge FENZ was a Reserve Judge of the Trial Chamber. Pursuant to Internal Rule 79(3), Reserve Judges "shall not have the right to express any opinion or to make any decision unless and until appointed to replace a sitting judge." KHIEU Samphan does not substantiate how a reasonable observer, properly informed, would apprehend bias on the part of a Reserve Judge who did not participate in the judicial deliberations on the verdict against an accused sitting in a subsequent case involving the same accused. I consider her involvement in Case 002/01 to be *de minimis* and, as such, it does not give rise to an apprehension of bias. Accordingly, I would dismiss KHIEU Samphan's Application in so far as it relates to Judge FENZ.

3. At the outset, I would emphasise that the circumstances of the present case, which are due to the severance of Case 002, are unique. 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. In the Case 002/01 trial Judgement, the challenged judges made findings, beyond reasonable doubt, on a number of factual issues which the applicants argue are fundamental to the determination of their alleged responsibility in Case 002/02. The question to be resolved is whether the judges' determinations in the Case 002/01 Judgement on factual issues bearing on the responsibility of the Accused in Case 002/02, which involves the same parties, would lead a reasonable observer to apprehend bias. I am of the view that the Majority, by seeking to rely strictly on precedents from international tribunals which are not directly on point, overlooked the particular circumstances of the present case.

II- Context and Consequences of the Severance

4. Before addressing the merits of the arguments raised by the Applicants, I will briefly recall the context and procedural consequences of the severance, which are in my view fundamental to the determination of the present matter.

5. The Closing Order in Case 002 was issued on 15 September 2010 and charges the Accused with criminal acts allegedly committed during the period of Democratic Kampuchea ("DK") by Khmer Rouge forces. The Accused are not alleged to have physically committed any of the crimes charged but are alleged to be criminally responsible for such by virtue of their role within the DK regime, *inter alia* through their participation in a joint criminal enterprise. The Closing Order is based upon the assertion that the leaders of the Communist Party of Kampuchea ("CPK") shared the common purpose "to implement rapid socialist revolution in Cambodia through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary".[1] To achieve this common purpose, the CPK leaders are alleged to have designed and implemented the five following policies:

- The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
- The establishment and operation of cooperatives and worksites;
- The re-education of 'bad elements' and killing of 'enemies', both inside and outside the Party ranks;

[1] Closing Order, para. 156.

- 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
- The regulation of marriage.[2]

Each of the crimes charged in the Closing Order are alleged to have been committed in furtherance of one of these five policies.[3]

6. On 22 September 2011, before the opening of the evidentiary hearing in Case 002, the Trial Chamber severed the case pursuant to Internal Rule 89*ter* into discrete trials, each comprising finite portions of the Indictment. Each trial was intended to conclude with a verdict and sentence in the event of a conviction.[4] The Trial Chamber decided that the first trial, Case 002/01, would be limited to: the history and structure of Democratic Kampuchea; the roles of the Co-Accused prior to and during the regime of Democratic Kampuchea; when their roles were assigned, what their responsibilities were, and the extent of their authority; the lines of communication; the movement of the population from Phnom Penh in 1975 ("Phase 1"); the movement of the population from the Central (Old North), Southwest, West and East Zones from September 1975 to 1977 ("Phase 2"); and, five types of crimes against humanity (murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances), but only insofar as they pertain to Phases 1 and 2.[5] The scope of Case 002/01 was later expanded to include the execution of former Khmer Republic officials at Tuol Po Chrey.[6] Large portions of the Closing Order were included in the scope of Case 002/01.[7] The parties brought several challenges to the severance and it became final on 23 July 2013,[8] at the closing of the evidentiary hearing in Case 002/01.

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[2] *Ibid.*, para. 157.
[3] *Ibid.*, paras 221-861.
[4] Severance Order Pursuant to Internal Rule 89*ter*, E124, 22 September 2011 ("First Severance Order"), paras 2, 6.
[5] First Severance Order; Annex: List of Paragraphs and Portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), E124/7.3 ("List of Paragraphs Relevant to Case 002") (emphasis added).
[6] Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs (TC), E163/5, 8 October 2012, p. 1.
[7] List of Paragraphs Relevant to Case 002.
[8] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013.

7. On 4 April 2014, the Trial Chamber severed the remainder of Case 002 and decided to include in the scope of Case 002/02 the charges relating to: the genocide of the Cham (and related religious persecution in the forced movement of the Cham minority); the genocide of the Vietnamese; forced marriages and rape nationwide; internal purges; S-21; the Kraing Ta Chan Security Centre; the Au Kanseng Security Centre; the Phnom Kraol Security Centre; the 1st January Dam Worksite; the Kampong Chhnang Airport Construction site; the Trapeang Thma Dam Worksite; the Tram Kok Cooperatives; the treatment of Buddhists (limited to Tram Kok Cooperatives); and, political persecution/targeting of former Khmer Republic Officials (implementation limited to Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre).[9]

8. The Trial Chamber issued inconsistent rulings on the procedural consequences of the Case 002 severance[10] and did not explain how the overarching themes of the Closing Order would be affected, in terms of the commonality of evidence and findings between the severed cases.[11] The Trial Chamber suggested on a number of occasions that the severed cases would be continuous rather than separate, as initially announced.[12] In particular and most importantly, the Trial Chamber indicated on 18 October 2011 that Case 002/01 would "provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials" and "a basis for the consideration of the mode of liability of joint criminal enterprise".[13] In line with this approach, the Trial Chamber decided to consider the roles and responsibilities of the Accused in relation to the five policies relevant to the whole Indictment in Case 002/01, even though the detailed factual consideration would be focused mainly on those two policies directly relevant to the crimes tried in Case 002/01.[14] On 17 November 2011, the Trial Chamber specified that the first trial would examine "in general terms" the development

[9] Decision on Additional Severance of Case 002 and Scope of Case 002/02, E301/9/1, 4 April 2014 ("Trial Chamber Decisionon Additional Severance of Case 002").
[10] *See* Decision on KHIEU Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, E301/9/1/1/3, 29 July 2014 ("Supreme Court Chamber Decision on Additional Severance of Case 002"), paras 70-74.
[11] *Ibid.*, para. 84.
[12] *Ibid.*, para. 71.
[13] Decision on the Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and related Motions and Annexes, E124/7, 18 October 2011 ("Decision on Request for Reconsideration of Severance"), para. 10. *See also* Trial Chamber Memorandum entitled "Clarification regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02", E302/5, 7 February 2014 ("Clarification Memo"), para. 7.
[14] Decision on Request for Reconsideration Severance, para. 11.

and establishment of the five policies but the implementation of these policies would be examined in each severed cases.[15] On 7 February 2014, addressing requests by the parties on the admissibility of evidence adduced in Case 002/01 in Case 002/02, the Trial Chamber stated that, "The effect of the Trial Chamber's severance of Case 002 was to separate the charges which would normally be adjudicated in a single trial into two or more manageable phases, not to create two separate and distinct trials".[16]

9. On 29 July 2014, the Supreme Court Chamber clarified the procedural consequences of the severance and its impact on Case 002/02. The Supreme Court Chamber rejected the notion that Cases 002/01 and Case 002/02 would be 'continuous' or two phases of a same trial and found that the two cases took on lives of their own when the severance became final, that is, after the closing of the evidentiary hearing.[17] As a consequence, the Supreme Court Chamber held that, "Even though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 must be established anew".[18]

10. The Case 002/01 Judgement, which is 622 pages long, was issued a few days later, on 7 August 2014, in three languages. It is apparent from the timing of the delivery of the Judgement and the approach adopted therein that the Trial Chamber proceeded upon the basis of its previous assumption that findings in Case 002/01 would serve as a foundation for future trials.

III- Applicable Law

11. The Accused have a fundamental right to be tried by an impartial tribunal, a right that is guaranteed by Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR") and applies before the ECCC.[19] The right to an impartial tribunal is an essential

[15] Trial Chamber Memorandum entitled "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011", E141, 17 November 2011, p. 2.
[16] Clarification Memo, para. 5.
[17] Supreme Court Chamber Decision on Additional Severance of Case 002, paras 42; 43 and 74.
[18] *Ibid.*, para. 85.
[19] Article 31 of the Constitution of the Kingdom of Cambodia; Article 12(1) of the Agreement; Article 33*new* of the ECCC Law; Internal Rule 34(2).

component of a fair trial;[20] it is "an absolute right that is not subject to any exception".[21] As explained by the Human Rights Committee:

> The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[22]

In other words, "the requirement of impartiality is violated not only where a judge is actually biased, but also where there is an appearance of bias".[23] Consideration of Ground F of NUON Chea's Application concerns the second aspect, namely an appearance of bias stemming from previous judicial rulings issued by the challenged judges.

12. An appearance of bias is established if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[24] The test requires an objective approach, which finds its modern origins in the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" expressed by Lord Hewart CJ in *R. v. Sussex Justices ex p McCarthy*.[25] The test has evolved since its first formulation in 1923 and the common law jurisprudence is now in line with that of the ECtHR under Article 6(1) of the European Convention of Human rights,[26] which mirrors Article 14(1) of the ICCPR.[27] In

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[20] Manfred NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR* Commentary, 2d ed., 2005, at p. 321, para. 27.
[21] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 19, *citing Gonzalez del Rio v. Peru*, Communication No. 263/1987, para. 51.
[22] *Ibid*, para. 21 (references omitted).
[23] Decision on IENG Thirith's Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, I/4, 3 June 2011 ("Supreme Court Chamber Disqualification Decision"), para. 10, *adopting* Trial Chamber's Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvya CARTHWRIGHT, YA Sokhan, Jean-Marc Lavergne and THOU Mony, E55/4, 23 March 2011 ("Trial Chamber Disqualification Decision"), para. 11.
[24] *Ibid.*
[25] [1924] 1 KB 256, [1923] All.E.R. 233. Lord Hewart CJ continued stating: "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".
[26] *See, e.g., Metropolitan Properties Co. v. Lannon* [1969] 1 Q.B. 577 (CA) at 599 (where Lord Denning held that a judge should not sit in a case "if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part"); *R. v. Gough* [1993] A.C. 646 at 670 (where the House of Lord, per Lord Goff, stated "[I] prefer to state the test in terms of real danger rather than likelihood, to ensure that the court is thinking in terms

Kyprianou v. Cyprus, the ECtHR explained in plain terms the objective approach to examining allegations of a lack of impartiality, which it distinguished from the subjective approach:

> The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused. To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.[28]

13. The fact that a judge has previously ruled upon a factual issue relevant to the case is not, in and of itself, a cause for disqualification; however, it may, in some circumstances, substantiate an objective fear that a judge would not bring an impartial and unprejudiced mind to the case.[29] The crux of the matter lies in the impact that previous factual findings may be seen to have on the determination of the case at issue. The international criminal tribunals have held that a judge is not prohibited from presiding over two separate criminal trials arising from the same set of facts, even if the cases involve overlapping questions of fact or law,[30] unless he or she previously

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of possibility rather than probability of bias.") and *Porter v. Magill* [2002] 2AC 357, 670 (where the House of Lords, per Lord Hope, aligned the test developed in the common law with the approach developed by the ECtHR: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." Lord Hope went on to reiterate that the basis of the considerations are "the overriding public interest that there should be confidence in the integrity of the administration of justice".)

[27] Article 6(1) of the European Convention on Human Rights provides, in its relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[28] Application No. 73797/01, 15 December 2005, para. 118 (references omitted).

[29] Supreme Court Chamber Decision on Additional Severance of Case 002, para. 45.

[30] *See, e.g.*, Supreme Court Chamber Decision on Additional Severance of Case, para. 83 ("even in cases that have overlapping evidence or fact patterns, [the presumption of impartiality] allowed dismissing objections regarding

made findings pronouncing on the criminal responsibility of the accused.[31] Similarly, the European Court of Human Rights ("ECtHR") held in *Poppe v. The Netherlands* that, "The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. It is, however, a different matter if the earlier judgments contain findings that actually prejudge the *question of the guilt of an accused* in such subsequent proceedings."[32] Relying upon this jurisprudence, the Supreme Court Chamber suggested, when examining KHIEU Samphan's concerns about the consequences of the severance on the Trial Chamber judges' ability to hear Case 002/02, that the Trial Chamber judges' presumption of impartiality would be lifted if they made findings in Case 002/01 "which would evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent cases".[33]

14. The Co-Prosecutors submit that an apprehension of bias would only arise if the Trial Chamber judges have prejudged the guilt of the Accused in respect of the charges to be tried in Case 002/02, which they claim would require findings on "all of the relevant criteria necessary to constitute a criminal offence and [...] whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[34] This test is disputed by NUON Chea Defence, who argues that a judge preforming a "general view" of the "*qualification* of the *involvement* of the applicant [...], *criminal or otherwise*" would be sufficient to warrant disqualification.[35] In my view, the narrow interpretation of the Supreme Court Chamber Decision on Additional

repeated adjudication on contextual elements on crimes against humanity, on other factual elements of events, on specific legal issues and the use of specific means of evidence"); Disqualification Decision of 23 March 2011, para. 15 ("a judge is not prohibited from presiding over two separate criminal prosecutions arising from the same set of facts").

[31] *See, e.g., Prosecutor v. Galić*, IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), ICTY Bureau, 28 March 2003 ("*Galić* Disqualification Decision"), para. 16; *Prosecutor v. Karadžić*, IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), ICTY Chamber Convened by Order of the Vice-President, 22 July 2009 ("*Karadžić* Disqualification Decision"), para. 21; *Ntawukulilyayo v. The Prosecutor*, ICTR-05-82-A, Decision on Motion for Disqualification of Judges, ICTR Appeals Chamber, 8 February 2011 ("*Ntawukulilyayo* Disqualification Decision"), paras 17-18; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Motion for Disqualification of Judge Fausto Pocar, ICTR Appeals Chamber, 2 October 2012 ("*Nyiramasuhuko* Disqualification Decision"), para. 15. *See also* Supreme Court Chamber Decision on Additional Severance of Case 002, para. 85 *and* Trial Chamber Disqualification Decision, para. 20.

[32] Application No. 32271/04, Judgement, 24 March 2009 ("*Poppe* Judgement"), para. 26.

[33] Supreme Court Chamber Decision on Additional Severance of Case 002, para. 85. *See also* para. 83.

[34] Co-Prosecutors' Response to NUON Chea Disqualification Application, E314/9, 10 October 2014, para. 46, *quoting Poppe* Judgement, para. 28.

[35] NUON Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara, E314/6, 29 September 2014 ("NUON Chea Disqualification Application"), para. 30.

Severance of Case 002 proposed by the Co-Prosecutors and adopted by the Majority does not find support in international jurisprudence and, importantly, fails to take into account the particular circumstances of the present case.

15. In support of their submissions, the Co-Prosecutors rely upon an excerpt from the *Poppe* Judgement, in which the ECtHR dismissed the applicant's argument that two of the judges who sat on his trial for drug-related offences lacked impartiality because they had previously passed judgement against the applicant's accomplices:

> In both judgments the names of the applicant and others are mentioned in passing, merely to illustrate and clarify the leading role played in the criminal organisation by the persons convicted, that is to say C3 and C4 respectively. Whether the applicant's involvement with C3 and D fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence was not addressed, determined or assessed by the trial judges whose impartiality the applicant now wishes to challenge. There is no specific qualification of the involvement of the applicant or of acts committed by him, criminal or otherwise. In this the facts of the applicant's case differ from those of Ferrantelli and Santangelo and Rojas Morales. It cannot therefore be said that any fears of bias on the part of the Regional Court which the applicant might have had are objectively justified.[36]

16. I consider that the ECtHR's reference to "all the relevant criteria necessary to constitute a criminal offence" is merely illustrative and does not establish a dispositive test for prejudgment. The central question for determining an appearance of judicial bias, by reason of prejudgment or otherwise, remains whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. While factors such as whether a judge has prejudged each and every element of the crime will be instructive in assessing whether a reasonable observer would reasonably apprehend bias, their absence is not determinative. Indeed, in a number of cases where judges were involved in previous rulings that concerned an applicant's involvement in the crimes at issue but did not pronounce on each and every element of the crimes, the ECtHR has found a violation of the right to an impartial tribunal. For instance, in *Rojas Morales v. Italy*, the ECtHR found that the judges who presided over the applicant's trial for charges involving participation in a criminal organisation (*association de malfaiteurs*) aimed

[36] *Poppe* Judgement, para. 28.

at international drug trafficking lacked an appearance of impartiality. The judges had previously rendered a judgement against the applicant's co-accused that contained several references to the applicant's role within the criminal organisation and described the applicant as being the "planner or instigator" of the alleged drug trafficking.[37] Similarly, in *Ferrantelli and Santangelo v. Italy*, the Court found that one of the judges who had convicted the applicants for murder was biased because: first, he had previously issued a judgement in respect of the same offence which contained "numerous references to the applicants and their respective roles" in the commission of the crime at issue and referred to the applicants as "co-perpetrators"; and secondly, the judgement which ultimately convicted the applicants contained "numerous extracts" from the previous judgement.[38] By contrast, in *Schwarzenberger v. Germany*, the ECtHR rejected the applicant's claim that the two of the three judges sitting on his murder trial were not impartial as a result of having passed judgement on the applicant's accomplice. The ECtHR found that although the previous judgement contained passages on the applicant's role in the murder, there was no previous assessment of the applicant's guilt as the applicant did not testify and the Regional Court had emphasised that its judgement was based only on the accomplice's testimony and that it had not yet examined the case from the applicant's point of view.[39] The ECtHR's case law demonstrates that there is no all-encompassing rule when it comes to examining whether an apprehension of bias is objectively justified: each case needs to be examined on its own merits, taking into account all the circumstances, including, *inter alia,* the extent of prior examination of the accused's involvement in the crime(s) at issue, any process of legal characterisation and the specific context in which previous rulings were made.

17. In turn, I consider that the jurisprudence of the international criminal tribunals is of limited assistance in determining how factual findings touching upon the involvement of the accused in the crime(s) at issue may give rise to an apprehension of bias. Most disqualification decisions from the ICTY and ICTR concern other factual issues, such as the existence of an armed conflict,[40] the credibility of key witnesses[41] and factual events that do not touch upon the conduct

[37] Application No. 39676/98, Judgement, 16 November 2000, paras 29, 33-34.
[38] Application No. 19874/92, Judgement, 7 August 1996, para. 59.
[39] Application No. 75737/01, Judgement, 10 August 2006, para. 43.
[40] *See, e.g., Prosecutor v. Brđanin and Talić*, IT-99-36-T, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber II, 18 May 2000, para. 15.
[41] *See, e.g., Prosecutor v. Krajišnik*, IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, ICTY Trial Chamber, 22 January 2003, para. 6; *Prosecutor v. Katanga*, ICC-01/04-01/07-3504-Anx,

of the accused.[42] Among those few cases concerning previous consideration of facts related to an accused's involvement in the crimes at issue and which contain an examination of whether previous rulings attributed criminal responsibility to the accused, I would emphasise that the *Galić*,[43] *Nyiramasuhuko*,[44] *Ntawukulilyayo*[45] decisions do not involve findings of facts by the challenged judges but involvement in the case of a different nature, namely confirmation of an indictment and appellate review, respectively. Disqualification applications in those cases were dismissed precisely because the challenged judges had not been involved in making factual findings beyond reasonable doubt in respect of the accused's conduct, but had made rulings pursuant to a different and lower standard of proof.[46] Only the *Mladic* case and the previous request from NUON Chea to disqualify the Trial Chamber judges based on their participation in the Case 002/01 Judgement considered allegations of bias stemming from previous findings at trial that allegedly prejudged the guilt of the accused. These decisions will be addressed in turn.

Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine Van den Wingaert from the Case of The Prosecutor v. Germain Katanga, 22 July 2014, para. 18.

[42] *See, e.g., Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision of the Bureau, ICTY Bureau, 4 May 1998 (*Kordić* Disqualification Decision"), pp. 1-2; *Karadžić* Disqualification Decision, para. 21; *Nahimana et al. v. The Prosecutor*, ICTR Trial Chamber II, ICTR-99-52-A, Judgement, ICTR Appeals Chamber, 28 November 2007 (*Nahimana* Appeal Judgement"), para. 78.

[43] *Galić* Disqualification Decision, para. 13 (Galić sought disqualification of Judge Orie from his trial on the basis of his previous confirmation of the indictment against Ratko Mladić, in which Galić was named as a JCE participant. In rejecting Galić's claim that Judge Orie had prejudged his guilt, the Bureau insisted that because the tasks of confirmation of an indictment and reaching a verdict at trial "involve different attitudes toward the evidence and different standards of judgement", "confirmation of an indictment does not involve any improper pre-judgement on an accused's guilt".) *See also Prosecutor v. Galić*, IT-98-29-A, Appeal Judgement, ICTY Appeals Chamber, 30 November 2006, para. 44.

[44] *Nyiramasuhuko* Disqualification Decision, para. 15 (The Accused moved to disqualify Judge Pocar from hearing the appeal against his genocide conviction on the basis that he previously issued a dissenting opinion on the *Kalimanzira* Appeal where he referred to a call made by the Accused to kill Tutsis. The ICTR Appeals Chamber found that Judge Pocar's opinion evaluating the reasonableness of findings of facts by the Trial Chamber does not amount to attribution of criminal responsibility to the Accused and, therefore, does not warrant disqualification.)

[45] *Ntawukulilyayo* Disqualification Decision, paras. 13; 17-18 (Ntawukulilyayo moved to disqualify Judges Güney, Vaz, Meron, and Agius from his trial due to their prior confirmation of Kalimanzira's conviction in appeal which was based on two witnesses statements incriminating Ntawukulilyayo. The judges were not disqualified from trial because they were not required to assess evidence beyond reasonable doubt, but just the reasonableness of the *Kalimanzira* Trial Chamber's findings. The Appeals Chamber emphasised that, "The standard by which the Appeals Chamber assesses the reasonableness of a Trial Chamber's findings is different from the standard of proof beyond reasonable doubt by which Trial Chambers are required to enter their findings.")

[46] *See* three precedent footnotes.

18. *Mladić* sought the disqualification of Judge Orie from his trial on the basis of findings he had previously made in the *Galić* and *Krajišnik* judgements.[47] In his response to the disqualification motion, Judge Orie identified a number of findings in the *Krajišnik* judgement that touched upon Mladić's involvement in the crimes at issue and his participation in a joint criminal enterprise together with Galić and Krajišnik, but stressed that the Trial Chamber did not "determine whether Mladić's conduct fulfilled all the relevant criteria of a crime under the Statute, or whether Mladić was guilty beyond reasonable doubt for any such crime."[48] The President of the ICTY found Mladić's request for Judge Orie's disqualification to be unmeritorious and declined to form a reporting panel; however, the President did not articulate the reasons for his decision or indicate whether he agreed with Judge Orie's opinion.[49] The lack of reasoning from the judge called upon to rule on the request for disqualification limits the persuasive value of this decision.

19. In a previous matter before another Special Panel of this Trial Chamber, NUON Chea sought to disqualify the Trial Chamber judges based, *inter alia,* on their previous findings in the Case 001 Judgement allegedly "linking" him with the crimes found to have been committed at S-21.[50] That Special Panel appears to have applied a standard similar to one proposed by the Co-Prosecutors in the present case and examined whether all the constitutive elements of the crimes charged had been the subject of prior determination.[51] In dismissing the application, the Special Panel found, firstly, that some excerpts of the Case 002 Judgement relied upon by NUON Chea merely recalled Duch's testimony so they do not constitute findings of fact; and, secondly, that findings concerning "NUON Chea's formal position within the CPK hierarchy" "could not reasonably be perceived to reflect a judgement of guilt against [him]".[52] I consider that this decision does not set a determinative precedent to resolve the present case, for two main reasons.

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[47] *Prosecutor v. Mladić*, IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, President of the ICTY, 15 May 2012 ("*Mladić* Disqualification Decision").
[48] Internal Memorandum from Judge Orie to the President of the ICTY entitled "Report pursuant to Rule 15 (B)", 14 May 2012, filed as an annex to *Mladić* Disqualification Decision, paras 34-37.
[49] *Mladić* Disqualification Decision, p. 3. A similar scenario occurred when Mladić sought again to disqualify Judge Orie, this time because of findings in *Stanisić and Simatović*, as well as Judge Flugge, because of findings in *Tolimir*. *See Prosecutor v. Mladić,* IT-09-92-T, Decision Concerning Defence Motions to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Christoph Flügge, 22 January 2014, President of the ICTY, p. 3.
[50] Trial Chamber Disqualification Decision, para. 5.
[51] *Ibid.*, paras 21, 24.
[52] *Ibid.*, para. 24.

First, there was no finding of fact in that case which touched upon NUON Chea's involvement in the crimes committed at S-21 but merely discussion about his role within the DK period, in general terms; and, secondly, the Case 001 Judgement focused on the criminal responsibility of Duch, NUON Chea was not a party to that case and did not even testify.

20. I consider the fact that the cases discussed above concern different accused to be a significant difference from the case at hand, which cannot be ignored. In setting and applying the test mentioned above, international criminal tribunals were guided by two overarching considerations: first, necessity stemming from the fact that international criminal tribunals, because of the nature of their jurisdiction, have to deal with cases which inevitably overlap in circumstances where they have a very limited number of judges;[53] and secondly, an assumption that professional judges, by virtue of their training and experience, will rule fairly on the issues before them "relying solely and exclusively on the evidence adduced in the particular case."[54]

21. I am of the view that the first consideration must be considered in light of the absolute right to an impartial tribunal. Indeed, the ECtHR explicitly warned against considerations of necessity when examining violation of the requirement of impartiality and insisted that each case be reviewed on its own merits:

> The Court takes note of the Government's argument that the work of the criminal courts, as a matter of practice, frequently involves judges presiding over various trials in which a number of co-accused persons stand charged. The Court considers that the work of criminal courts would be rendered impossible if, by that fact alone, a judge's impartiality could be called into question. However, in proceedings originating in an individual application the Court has to confine itself, as far as possible, to an examination of the concrete case before it. Moreover, the Court reiterates that the Contracting States are under the obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 § 1, impartiality being unquestionably one of the

[53] *See Kordić* Disqualification Decision, pp. 2-3 ("The nature of the Tribunal's jurisdiction is such that the cases before it inevitably overlap. On the one hand, the same issues and the same evidence are often involved. On the other hand, the Tribunal possesses a finite number of judges. On a view opposite to that reached in this case, the work of the Tribunal would soon grind to a halt."); *Nahimana* Appeal Judgement, para. 78 (*ibid.*).
[54] *See, e.g., Nahimana* Appeal Judgement, para. 78 ("by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case"), 84 ("the Judges in a particular case reach their decision solely and exclusively on the basis of the evidence adduced in that case"); *Galić* Disqualification Decision, para. 16.

> foremost of those requirements. The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention.[55]

22. As to the second consideration, I note that it is based upon a decision of Judge Mason of the High Court of Australia in *Re JRL; Ex parte CJL*,[56] which has been adopted by the international criminal tribunals:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established' [...]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[57]

I emphasise that the challenge to the impartiality of the judges in the present case is not based on an "expectation" that the judges may decide adversely to the Accused but on the fact that they have already done so. The challenged judges previously ruled on factual issues, beyond reasonable doubt, in respect of the same Accused and based on the same, or at least partly the same, evidence. I consider that a reasonable observer, properly informed, would apprehend that judges who have been persuaded in one case of certain matters at the highest standard, that being beyond reasonable doubt, may not bring a mind free of the effect of the prior conclusion in dealing with the same accused's responsibility in later cases, even though they are professionally

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[55] *Poppe* Judgement, para. 23 (references omitted).
[56] (1986) 161 CLR 342 at 352.
[57] *Prosecutor v. Brdjanin & Talic*, IT-99-36-T, Decision on application by Momir Talic for the disqualification and withdrawal of a judge, ICTY Trial Chamber II, 18 May 2000, para. 18.

trained. Any prior finding in the present case necessarily has a more significant impact on the judges' appearance of impartiality, and this must be taken into consideration when assessing apprehension of bias. I note in this respect that the ICTY Trial Chamber envisaged that severance of a case, resulting in two trials against the same accused, may trigger issues of impartiality if the same judges sit on the severed cases.[58]

23. In the light of the foregoing, I find that an appearance of bias is essentially a matter of fact, which requires the consideration of all the circumstances of the case, including the nature of the case; the relative importance of the factual issue(s) that have been subject to prior determination for the resolution of the case; the legal process in which the challenged judge was previously involved; the standard of proof upon which prior rulings were made; the fact that the accused was, or was not, involved in the prior process; and the commonality, or not, of the evidence. 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

24. In the present case, the Indictment, which is common to both cases, is essentially based upon an allegation that the Accused are responsible for the crimes committed by Khmer Rouge forces due to their participation in a joint criminal enterprise (and through other modes of liability). The issue of attribution of criminal responsibility is central to the determination of the Accused's guilt for the Case 002/02 charges and, indeed, the main point of contention in this case. Determinative findings in this respect may create a reasonable apprehension of bias even if secondary factual issues have yet to be adjudicated. In this respect, I note that the Supreme Court Chamber used the term "attributing criminal responsibility" rather than "pronouncing",[59] thereby insisting on the effect that those findings establishing a connection between the Accused and the crimes charged may have on the Trial Chamber judges' ability to try Case 002/02 with impartiality rather than suggesting that only a previous judgement on the overall issue of the

[58] *Prosecutor Mladić*, IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011, ICTY Trial Chamber I, para. 35 ("Further, if the indictment were severed and there were two trials, the Chamber and bench of judges assigned to the current case may aslo be assinged to the second case [...]. The Chamber considers that there are significant legal and managerial concerns under this scenario. The partiality and appearance of partiality of the Chamber could be raised if the same Chamber were to hear both cases.")

[59] Supreme Court Chamber Decision on Additional Severance of Case 002, para. 85.

Accused's guilt would warrant disqualification. Ultimately, I shall examine, *in concreto*, whether the overall effect of factual findings in the Case 002/01 Judgement would cause a reasonable observer to apprehend that the challenged judges would not bring an independent an unprejudiced mind to Case 002/02. In doing so, I will examine the complaints raised by the Applicants in respect of predetermination of factual issues and, when necessary and appropriate, consider additional matters *ex officio*. In this respect, I note that although the Applicants have complied with the general tenor of Internal Rule 34.3 in "clearly indicating the grounds" of their applications, they have on some points not been entirely specific. While KHIEU Samphan has asserted that he subscribes to the arguments and case law identified by NUON Chea, he does not attempt to support these arguments with examples particular to his alleged responsibility.[60] I find it necessary, in accordance with international human rights standards, noting the fundamental right to a fair trial is of such significance that there is effectively a positive duty on a court to ensure the assertion of the right, to examine the specific circumstances of the general assertions *ex officio*.[61]

VI – Analysis

25. I have examined the Case 002/01 Judgement and consider that the Trial Chamber made findings 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 to be tried in Case 002/02. I set out the findings of principal concern

[60] Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who are to Hear Case 002/02, E314/8, 10 October 2014, para. 9.

[61] Supreme Court Chamber Decision on Additional Severance of Case 002, para. 45. *See also* Human Rights Committee, *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992), para. 7.2: ("Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."); *Remli v. France,* Application No. 16839/90, Judgement, ECtHR, 23 April 1996, para. 48 ("Like the Commission, the Court considers that Article 6 para. 1 (art. 6-1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision (art. 6-1) where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit."); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Order of 30 January 2004, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, p. 9, para 11 ("The fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done. In my view, all courts of law must be guided by this principle, whether or not their statutes or other constitutive documents expressly require them to do so. That power and obligation is implicit in the very concept of a court of law charged with the fair and impartial administration of justice.")

to me below. I have also appended an Annex to this opinion which contains excerpts from the Closing Order on matters to be adjudicated in Case 002/02 and identifies corresponding findings from the Case 002/01 Judgement.

(i) Individual Criminal Responsibility

26. The Trial Chamber made findings which are foundational to the alleged responsibility of both Accused in Case 002. In the Case 002/01 Judgement, the Trial Chamber found that, at least for the period of June 1974 to December 1977, NUON Chea and KHIEU Samphan were members of a joint criminal enterprise "who shared a common purpose to 'implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary'".[62] While the Trial Chamber limited its analysis of the execution of the common purpose to the design and implementation of the two policies relevant to Case 002/01, namely the forced movements of population and the targeting of former Khmer Republic officials as part of the broader CPK policy to eliminate enemies,[63] it made foundational findings on significant, extant issues pertaining to the alleged joint criminal enterprise in Case 002/02. For example, the Trial Chamber found that the plurality of persons, common purpose, membership of the Accused in the joint criminal enterprise and the existence of the joint criminal enterprise itself – all of which are extant issues in Case 002/02 – had been established beyond reasonable doubt. Further, although it did not analyse the implementation of all policies in great depth, the Trial Chamber found that all five CPK policies which the Accused are alleged to have designed and implemented – including the policies to eliminate enemies, to establish cooperatives and worksites, to force people to marry and to target specific groups, which are to be adjudicated upon in Case 002/02 – had been established.[64] While it purported to limit some of these findings to the period before April 1975,[65] the Judgement is replete with findings which assume the existence of these policies during the entire DK period, as well as

[62] Case 002/01 Judgement, para. 777.
[63] *See, e.g.*, Case 002/01 Judgement, para. 723.
[64] *See, e.g.*, Case 002/01 Judgement, paras 112, 116, 118, 127 and 130 .
[65] *See, e.g.*, Case 002/01 Judgement, paras 112 ("the Chamber is satisfied that a policy of repeated movements from towns and cities to rural areas existed before the DK period"), 116 ("The Chamber is satisfied that prior to 1975 there existed a CPK policy to create cooperatives"), 127 ("a CPK policy targeting soldiers and officials of the Khmer Republic existed prior to 1975").

findings that such policies did exist subsequent to April 1975.[66] In numerous places the Trial Chamber also made factual findings which do appear to underlie the Accused's participation in the joint criminal enterprise in respect of policies pertaining to Case 002/02: for example, the Trial Chamber found that NUON Chea, KHIEU Samphan and others met "on a regular basis" to "discuss policies and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives",[67] and that there was a "calculated plan" by the CPK leadership to "augment and improve national defence (by creating cooperatives)".[68] The Trial Chamber also made findings on the governing of cooperatives and placed them in the chain of command.[69]

27. I acknowledge that, due to the way the Indictment is structured and the joint criminal enterprise allegations framed, it would likely be impossible to address certain inextricably linked policies individually (for example, the movement of population policy, one purpose of which was to build and expand cooperatives, and the policy on the establishment and operation of

[66] *See, e.g.*, on the policy concerning the establishment and operation of cooperatives and worksites: Case 002/01 Judgement, para. 740 (from 25 April 1975 "at the latest", the Joint Leadership Committee met with "various Zone and Autonomous Sector secretaries and others" to "discuss policies and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives"), para. 751 (KHIEU Samphan attended meetings in "late April and May 1975 where other economic policies, including the establishment of cooperatives, were addressed"), para. 765 (KHIEU Samphan endorsed policies regarding cooperatives), para. 900 ("From 25 April 1975, at the latest, NUON Chea met with other senior leaders concerning policies to build and defend a self-reliant, independent and socialist country. The plan was to create a classless society in which all would be organised into cooperatives"), para. 967 ("By 25 April 1975, at latest, KHIEU Samphan formed part of the group of CPK leaders residing at the Phnom Penh railway station, and thereafter at the former Ministry of Finance building and the Silver Pagoda, where meetings were held to discuss policies and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives"), para. 604 ("The Party leadership determined that it would expand cooperatives"), para. 616 ("In mid-1976, the Party declared that it had organized, built, strengthened and expanded the cooperatives").

[67] Case 002/01 Judgement, para. 740. *See also* para. 743 ("NUON Chea, KHIEU Samphan and others, including representatives from all Zones, met at the Silver Pagoda, where reasons justifying the evacuations of the cities were provided and priority was given to the need to rapidly build and defend the country through the creation of cooperatives").

[68] Case 002/01 Judgement, para. 867 ("The Standing Committee's report illustrates the hostile attitudes of Committee members towards New People. It outlined the Committee's plan to force all New People into cooperatives. The Chamber finds that the report outlines a calculated plan by the leadership to augment and improve national defence (by creating cooperatives) and the economy (by population movements)").

[69] For example, the Chamber found that "[a]ll levels of the hierarchy – Zones, Sectors, Districts, Communes and co-operatives – were governed by committees" (Case 002/01 Judgement, para. 218) and that "In addition to the Zone, Sector and District armies, there also existed local militias, which were under the control of the sub-district leaders and which were responsible for security and discipline in the villages, communes and co-operatives" (Case 002/01 Judgement, para. 246).

cooperatives and worksites).[70] Also, there is no doubt that findings on the Accused's participation in the joint criminal enterprise were necessary for the determination of Case 002/01. However, I consider that this cannot justify the impression of prejudgment which such findings create. Having already been persuaded, in accordance with their judicial obligations, of these matters beyond reasonable doubt, it is difficult to imagine how the same judges could bring a mind free of the effect of these conclusions to bear in dealing with the same Accused's alleged responsibility for involvement in the same joint criminal enterprise in a subsequent trial.

(ii) Findings Specific to NUON Chea

28. NUON Chea submits that the judges' findings on his role and responsibility, "both general and in particular", amount to a predetermination of issues and preformed views unfavourable to the potential defence case in Case 002/02.[71] In the Case 002/01 Judgement, the Trial Chamber found that NUON Chea had oversight of all Party activities, exercised the ultimate decision-making power of the Party and held and exercised the power to make and implement CPK policies and decisions.[72] I consider that these overarching findings, which go to the heart of NUON Chea's individual criminal responsibility, in conjunction with other findings of a general nature on responsibility, such as that NUON Chea exercised effective control over members of the CPK and Khmer Rouge forces,[73] may reasonably lead a reasonable observer to conclude that the judges who sat on Case 002/01 have predetermined NUON Chea's responsibility for crimes committed by the Khmer Rouge forces during the DK era.

29. I am of the view that these general findings on responsibility are all the more concerning when considered in conjunction with particular findings on the responsibility of NUON Chea for specific themes which are included in the scope of Case 002/02, such as internal purges.[74] The

[70] Case 002/01 Judgement, para. 576 ("In order to build and expand the cooperatives, people had to be moved. The Party leadership believed that population movements allowed it to overcome challenges in building and defending the country and re-organising the people, economy, politics and military").
[71] NUON Chea Disqualification Application, paras 106-111.
[72] Case 002/01 Judgement, para. 348 ("Due to his seniority within the leadership of the CPK, NUON Chea enjoyed oversight of all Party activities extending beyond the roles and responsibilities formally entrusted to him during the DK period"). *See also*, para. 875 ("NUON Chea was a key actor responsible for the formulation of Party policies").
[73] *See, e.g.*, Case 002/01 Judgement, paras 887, 896, 913, 933. *See also* general findings that "NUON Chea's formal responsibility for propaganda and education-related matters also extended to the discipline of cadres and other internal security matters" (para. 329).
[74] Trial Chamber Decision on Additional Severance of Case 002, p. 21.

Trial Chamber in the Case 002/01 Judgement found that, "NUON Chea was also involved in the purges of cadres and military, particularly from the East Zone".[75] Having found that: (1) internal purges occurred during the DK; and (2) NUON Chea was involved in them, I consider that there are grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias on the part of the Trial Chamber judges in respect of NUON Chea's alleged responsibility for internal purges committed during the DK. As the Trial Chamber has previously made a direct finding on an extant issue in Case 002/02 which is directly related to the Accused's alleged responsibility, I find there is merit to the submission of NUON Chea that the judges' predetermination of these issues will give rise to their appearance of bias if they continue to sit in the Case 002/02 trial.[76]

30. Similarly, cooperatives and worksites are included within the scope of Case 002/02: the additional severance decision incorporated the Tram Kok Cooperative and 1st January Dam Worksite "crime base" and the alleged joint criminal enterprise policy of implementing and defending "the socialist revolution through the establishment and operation of cooperatives and worksites by whatever means necessary".[77] In the Case 002/01 Judgement, the Trial Chamber made a number of findings on NUON Chea's role in developing and implementing the policy on cooperatives (notably, in the context of the joint criminal enterprise, but also in relation to other modes of liability).[78] The Trial Chamber found that, "NUON Chea participated alongside other key leaders in the May 1975 meeting that discussed the leadership's plan to bring about socialist revolution by implementing collectivisation".[79] "NUON Chea met with other senior leaders

[75] Case 002/01, para. 340.
[76] NUON Chea's Disqualifiation Application, para. 111.
[77] List of Paragraphs Relevant to Case 002/02, p. 1 (incorporating paragraphs 168-177 of the Closing Order, including the above quotation from paragraph 168 of the Closing Order) and p. 2 (incorporating paragraphs 302-321 and 351-367of the Closing Order on the Tram Kok Cooperatives and 1st January Dam Worksite).
[78] *See, e.g.,* Case 002/01 Judgement, para. 901 on planning.
[79] Case 002/01 Judgement, para. 901. *See also*, para. 902 ("In late 1975, NUON Chea, collectively with others, developed a specific economic plan. This plan acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan involved allocating labour strategically according to the Party's rice production target and infrastructure priorities, expanding the cooperatives, and rewarding the 'Old People' to the detriment of the suspect 'New People'. After the Standing Committee visited the Northwest Zone in August 1975 (a visit either attended by NUON Chea or of which he was at least aware by means of written reports), the Standing Committee decided to reallocate an additional 400,000 to 500,000 people to the region. The Party leadership also planned and ordered the movement of 20,000 to Preah Vihear (Sector 103) and others to Kampong Thom (Central (old North) Zone). In September 1975, the Central Committee, including NUON Chea as a full-rights member, endorsed the August 1975 decision. The Party leadership disseminated a document analysing progress in implementing the Party's agricultural policy in the previous four to five months and outlining a plan to move more

concerning policies to build and defend a self-reliant, independent and socialist country. The plan was to create a classless society in which all would be organised into cooperatives to rapidly build and defend the country, focusing in particular on rice production and irrigation projects. These plans originated in, and were based on, the Party's experience in the liberated Zones where, in order to supply the manpower needed to accomplish these projects, a consistent pattern of urban evacuations and movements between rural areas had emerged prior to 17 April 1975 and continued thereafter. Despite this experience, there is no evidence that the plan included any measures providing for the health, well-being or consent of the people to be gathered into cooperatives".[80] The Trial Chamber further found that, "Shortly after the May 1975 meeting at the Silver Pagoda, NUON Chea, along with POL Pot and other key leaders, led a series of meetings. Between 20 and 25 May 1975 NUON Chea and other leaders instructed representatives from military units and all District, Sector and Zone secretaries on the Party's policies concerning the organisation of cooperatives [...] In the following months, the lower levels implemented the instructions they had received".[81] NUON Chea was also found to have "led education sessions in Phnom Penh, beginning soon after 17 April 1975 and continuing throughout the DK era" and lectured "Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives".[82] Further, NUON Chea was found to have "focused actively on propaganda and training Khmer Rouge cadres in the countryside, advocating" *inter alia* "the formation of cooperatives".[83] Through "propaganda materials and indoctrination sessions, NUON Chea disseminated, endorsed, praised and encouraged the Party's economic policies

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than half a million people to other Zones in order to meet rice production requirements and acknowledged that shortages of medicine and food affected the 'New People' who were forcibly evacuated from Phnom Penh in particular. Despite the Party's extensive experience of the serious problems associated with forced urban evacuations and movements between rural areas, there is no evidence that the plan which emerged in late 1975 included any measures providing for the consent, health or well-being of those to be moved.")

[80] Case 002/01 Judgement, para. 900.

[81] Case 002/01 Judgement, para. 871. *See also* para. 743 ("Thereafter, between approximately 20 and 25 May 1975, NUON Chea, POL Pot, KHIEU Samphan, IENG Thirith, SON Sen and others attended at least one meeting either at the Olympic Stadium or the Khmer-Soviet Technical Institute. NUON Chea, POL Pot and others instructed representatives from all military units and all District, Sector and Zone secretaries on the organisation of cooperatives, elimination of private property, prohibition of currency and markets, and building of dams and canals").

[82] Case 002/01 Judgement, para. 772.

[83] Case 002/01 Judgement, para. 870. *See also* para. 325 (which finds that NUON Chea "appeared as the chairman, trainer or speaker" at "meetings, training or study sessions" where "revolutionary policies were discussed, including economic policies and cooperatives").

providing for the strategic allocation of labour and class struggle".[84] It is notable that NUON Chea's "role in the propaganda campaign" and "training of cadres" was a basis for the Trial Chamber finding that he "contributed substantially to the dissemination and implementation of the common purpose".[85]

31. As the above recitation of Case 002/01 Judgement findings demonstrates, the challenged judges have previously found that there was a plan to establish cooperatives, which NUON Chea participated in developing. They have further found that NUON Chea was involved in the dissemination and implementation of the plan: for example, he instructed "representatives from military units and all District, Sector and Zone secretaries" – actors NUON Chea was found to have effective control over[86] – on the plan, which was subsequently "implemented" by "the lower levels".[87] I consider that these findings go beyond establishing background facts for contextual purposes and firmly into the realm of establishing individual criminal responsibility.

(iii) Findings Specific to KHIEU Samphan

32. The Trial Chamber also made general findings in the Case 002/01 Judgement which evince KHIEU Samphan's individual criminal responsibility for crimes charged in Case 002/02. The Trial Chamber found that KHIEU Samphan "played a key role in disseminating the content of the common purpose and policies".[88] The Trial Chamber did not limit this role to the dissemination of policies particular to Case 002/01, but made this finding in respect of the common purpose relevant to the entire Case 002 joint criminal enterprise.

33. As noted above, the "establishment and operation of cooperatives" as an alleged joint criminal enterprise policy and both the Tram Kok Cooperative and 1st January Dam Worksite are included within the scope of Case 002/02.[89] In the Case 002/01 Judgement, the Trial Chamber found that by 25 April 1975, "KHIEU Samphan formed part of the group of CPK leaders" who

[84] Case 002/01 Judgement, para. 910.
[85] Case 002/01 Judgement, para. 874.
[86] Case 002/01 Judgement, paras 893-896, 913.
[87] Case 002/01Judgement, para. 871.
[88] Case 002/01Judgement, para. 976.
[89] List of Paragraphs Relevant to Case 002/02, p. 1 (incorporating paragraphs 168-177 of the Closing Order, including the above quotation from paragraph 168 of the Closing Order) and p. 2 (incorporating paragraphs 302-321 and 351-367 of the Closing Order on the Tram Kok Cooperatives and 1st January Dam Worksite).

met "to discuss policies and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives".[90] The Trial Chamber found that in June 1974, KHIEU Samphan, among others, attended meetings where economic policies "including the establishment of cooperatives, were addressed".[91] The Trial Chamber found that in May 1975, KHIEU Samphan met with other leaders and decided to give "priority" to "the need to rapidly build and defend the country through the creation of cooperatives".[92] Subsequent to this meeting, senior leaders – who were also found to be members of the joint criminal enterprise – "instructed representatives from all military units and all District, Sector and Zone secretaries on the organisation of cooperatives", *inter alia*.[93]

34. The Trial Chamber further found that KHIEU Samphan "participated in the development of the plan, reflected in September and November 1975 policy documents, to forcibly allocate labour resources strategically according to production targets and infrastructure priorities, reach three tonnes of rice per hectare, focus on the construction of irrigation projects, and reward the 'Old People' to the detriment of the 'New People'".[94] The Trial Chamber further found that the policy "adopted by the Party leadership and KHIEU Samphan" mandated that "all would labour to rapidly build and defend the country, achieving a modern agricultural economy within 10-15 years; confirmed the 1976 production target of three tonnes per hectare; determined that struggle against the imperialists and "their lackeys" remained necessary; encouraged the advancement of the class struggle and the expansion of cooperatives; and instructed that all manpower should be organised for consecutive projects on a seasonal basis".[95] The Trial Chamber found that the specific economic plan developed by KHIEU Samphan and others "acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan was to allocate labour strategically according to the Party's rice production target and infrastructure

[90] Case 002/01 Judgement, para. 967.

[91] Case 002/01 Judgement, para. 751 ("The Chamber has already found that he attended meetings in June 1974 where urban evacuations were discussed, as well as in late April and May 1975 where other economic policies, including the establishment of cooperatives, were addressed. The Chamber therefore finds that KHIEU Samphan, a candidate member of the Central Committee in September 1975, did take part in the development of the plans reflected in the September 1975 policy document.")

[92] Case 002/01 Judgement, para. 743.

[93] Case 002/01 Judgement, para. 743.

[94] Case 002/01 Judgement, para. 968. *See also* paras 748-749 (KHIEU Samphan took "part in the development of the plans reflected in the 1975 policy document", which addressed the importance of "mass movement in implementing the agricultural line of the party", examined "implementation of the party line to build the country" and "provided further particulars and instructions as to population movements and conditions in the countryside").

[95] Case 002/01 Judgement, para. 753.

priorities, expand the cooperatives, and reward the 'Old People' to the detriment of the suspect 'New People'".[96]

35. KHIEU Samphan was also found to have "led education sessions in Phnom Penh, beginning soon after 17 April 1975 and continuing throughout the DK era" to lecture "Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives".[97] The Trial Chamber further found that in April 1976, KHIEU Samphan gave the inaugural speech of the People's Representative Assembly, where he endorsed policies regarding cooperatives,[98] and that "throughout the DK era" he "lectured Zone, Sector and District officials, as well as ordinary cadres" about, *inter alia*, the "establishment of cooperatives".[99]

36. I consider that the above recitation of Case 002/01 Judgement findings demonstrates an implication of KHIEU Samphan's individual criminal responsibility for Case 002/02. The Judgement establishes KHIEU Samphan's general participation in the common purpose of the joint criminal enterprise relevant to the whole of Case 002. The above findings demonstrate that the challenged judges have previously found that there was a plan to establish cooperatives, which KHIEU Samphan participated in developing, disseminating and endorsing.

(iv) "Crime base" findings

37. The Trial Chamber made a number of findings on the "crime base" at issue in Case 002/02 which I do not consider would, by themselves, necessarily give rise to an apprehension of bias, but which I find concerning when considered concomitantly with the matters examined above.

[96] Case 002/01 Judgement, para. 1025.

[97] Case 002/ 01Judgement, para. 772. *See also* para. 975 ("KHIEU Samphan also led education sessions in Phnom Penh throughout the DK era. He lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives, building of dikes and canals, and completion of work quotas").

[98] Case 002/01 Judgement, para. 765.

[99] Case 002/01 Judgement, para. 975.

38. First, in the Case 002/01 Judgement, the Trial Chamber found that people were "imprisoned at S-21".[100] Imprisonment as a crime against humanity at S-21 is charged in Case 002/02 as part of the internal purges phenomenon.[101] The Trial Chamber qualified its statements on S-21 by declaring that it was not making findings on "the allegations concerning NUON Chea's responsibility in connection with the operation of S-21 Security Office".[102] However, the Trial Chamber only qualified its findings in this regard in relation to NUON Chea's individual criminal responsibility and not the "crime base". The "crime base" findings on the imprisonment of individuals at S-21 are stated generally (and not as the mere recitation of the testimony of a particular individual) and are supported with references to witness and expert testimony, as well as documentary evidence, without reference to contradictory evidence. Accordingly, I am of the view that these are factual findings on part of the "crime base" at issue in Case 002/02; they are not a simple recitation of evidence. Furthermore, I consider that this crime base finding is all the more concerning when seen in the light of the Trial Chamber's finding that NUON Chea was involved in internal purges, given that imprisonment of CPK cadres and military at S-21 is central to this phenomenon.

39. Secondly, the Trial Chamber made limited factual findings on the 1st January Dam Worksite, which is another of the crime sites included in Case 002/02 as part of the policy to establish cooperatives and worksites.[103] The Trial Chamber found that construction on the 1st January Dam began in December 1976[104] and that "throughout 1977, between 8,000 and 20,000 people were transferred to work at the 1 January Dam Work-site".[105] In my view, a reasonable observer, properly informed, may be left with the impression that the challenged judges have prejudged the underlying factual substratum for some of the crimes against humanity charged at

[100] Case 002/01 Judgement, para. 345 ("Several foreigners were also imprisoned in S-21. Among these were Vietnamese soldiers, whose arrest and imprisonment at S-21 was communicated to the Party Centre, including NUON Chea"). *See also*, eg, para. 211 (" [...] prisoners brought to the S-21 Security Office [...]"), para. 214 ("S-71 was also empowered to make arrests and to transfer detainees to the S-21 Security Office"), para. 345 ("At that time, there were about 500 detainees still being held at S-21"); para. 392 ("Doeun was arrested and taken to S-21 in February 1977"); para. 402 ("After the Khmer Rouge seized power, the first person to take charge of the economy was KOY Thuon. He was arrested in April 1976 and taken to S-21 in 1977").
[101] List of Paragraphs Relevant to Case 002/02, p. 3.
[102] Case 002/01 Judgement, para. 346 ("allegations concerning NUON Chea's responsibility in connection with the operation of S-21 Security Office were severed from Case 002/01 and will be considered in future proceedings. Accordingly, the Trial Chamber will make no findings in this regard in this Judgement").
[103] *See* List of Paragraphs Relevant to Case 002/02, pp. 2-3.
[104] Case 002/01 Judgement, para. 612.
[105] Case 002/01 Judgement, 581.

the 1st January Dam Worksite in Case 002/02. As noted above, I do not consider this of itself would give rise to an apprehension of bias; however, considered alongside the above analysis of NUON Chea's and KHIEU Samphan's involvement in the establishment of a policy to create cooperatives and worksites, I find it concerning.

V - Conclusion

40. I find that although some of the Case 002/01 Judgement findings on issues for determination in Case 002/02 by themselves do not establish an appearance of bias, considered together, they do. In respect of NUON Chea, the Trial Chamber judges have previously ruled upon issues as diverse and all-encompassing as: the existence of a joint criminal enterprise involving the Accused;[106] charged CPK policy;[107] NUON Chea's general responsibility, including NUON Chea's effective control over the CPK and Khmer Rouge forces, during the DK;[108] NUON Chea's involvement in particular themes within the scope of Case 002/02, such as internal purges and cooperatives;[109] crime base evidence relevant to these two themes;[110] and *chapeau* elements of crimes against humanity.[111] Similarly, in respect of KHIEU Samphan, the Trial Chamber previously ruled upon the existence of a joint criminal enterprise involving the Accused;[112] charged CPK policy;[113] KHIEU Samphan's general involvement in the common purpose and in particular themes within the scope of Case 002/02, such as the establishment of cooperatives and worksites;[114] crime base evidence relevant to this policy;[115] and *chapeau*

[106] Case 002/01 Judgement, para. 777.
[107] *See* discussion above on the existence of policy.
[108] *See* those paragraphs discussed above, including Case 002/01 Judgement, paras 896, 913, 933.
[109] *See* those paragraphs discussed above, including Case 002/01 Judgement, paras 340, 871, 900-902.
[110] Case 002/01Judgement, para. 345 ("Several foreigners were also imprisoned in S-21. Among these were Vietnamese soldiers, whose arrest and imprisonment at S-21 was communicated to the Party Centre, including NUON Chea"). *See also, e.g.,* para. 211 ("[...] prisoners brought to the S-21 Security Office [...]"), para. 214 ("S-71 was also empowered to make arrests and to transfer detainees to the S-21 Security Office"), para. 345 ("At that time, there were about 500 detainees still being held at S-21"); para. 392 ("Doeun was arrested and taken to S-21 in February 1977"); para. 402 ("After the Khmer Rouge seized power, the first person to take charge of the economy was KOY Thuon. He was arrested in April 1976 and taken to S-21 in 1977").
[111] The Chamber found that, at least for the period 17 April 1975 to December 1977 – that is, more than half of the period with which Case 002/02 is concerned – there was a widespread and systematic attack against the civilian population of Cambodia carried out on a discriminatory basis, such that the Chamber could be "satisfied that all the chapeau requirements for the application of Article 5 of the ECCC Law are met": Case 002/01 Judgement, paras 193-198.
[112] Case 002/01Judgement, para. 777.
[113] *See* discussion above on the existence of policy.
[114] Case 002/01 Judgement, paras 974-975.
[115] *See* discussion above on the findings in respect of the 1st January Dam Worksite.

elements of crimes against humanity.[116] As these findings were made beyond reasonable doubt, in respect of the same Accused, I consider that these constitute grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias on the part of President NIL Nonn and Judges YA Sokhan, Jean-Marc Lavergne and YOU Ottara.

Accordingly, I would have granted NUON Chea's and KHIEU Samphan's applications for disqualification, except insofar as KHIEU Samphan's application relates to Judge FENZ

Phnom Penh, 23 January 2015

Rowan Downing

[116] Case 002/01 Judgement, paras 193-198.

ANNEX

Predetermination of factual issues relevant to NUON Chea's criminal responsibility for crimes prosecuted in Case 002/02	
CASE 002/02 CHARGES (references are to the Closing Order)	**CASE 002/01 FINDINGS (references are to the Case 002/01 Judgement)**
Crimes Against Humanity: Chapeau Elements 1350. In light of the facts set out in the sections of this Closing Order on, *inter alia,* the "Factual Findings – Joint Criminal Enterprise" and the "Factual Findings – Crimes", the policy implemented by the Democratic Kampuchea authorities between 17 April 1975 and 7 January 1979 consisted of a widespread and systematic attack against the entire civilian population of Cambodia, principally on political grounds but also, in some contexts, on national, ethnic, racial or religious grounds. The underlying crimes set out below were committed as part of this attack; accordingly, the "chapeau" elements of crimes against humanity, as defined at the time of the events, have been established. (*See* paras 1350-1372 for further analysis)	Crimes Against Humanity: Chapeau Elements 193. The Chamber is satisfied that beginning by 17 April 1975 and continuing at least until December 1977, the temporal period at issue in Case 002/01, there was a widespread and systematic attack against the civilian population of Cambodia. [...] 195. The Chamber further finds that the attack against the civilian population was carried out on political grounds, pursuant to the plans and policies of the Party to build socialism and defend the country. [...] 198. The Chamber is thus satisfied that all the chapeau requirements for the application of Article 5 of the ECCC Law are met.
The JCE 156. The common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a "great leap forward" and defend the Party against internal and external enemies, by whatever means necessary. 157. To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies: • The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another; • The establishment and operation of cooperatives and worksites; • The reeducation of "bad-elements" and killing of "enemies", both inside and outside the Party ranks; • The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil	The JCE 777. The Chamber is therefore satisfied that, at the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary". Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries, including NUON Chea, KHIEU Samphan, POL Pot, IENG Sary, SON Sen, VORN Vet, Ta Mok, SAO Phim, ROS Nhim, KOY Thuon, KE Pauk, CHANN Sam, CHOU Chet, BOU Phat, YONG Yem, BORN Nan, IENG Thirith and MEY Prang, were part of this group with the specified common purpose. The evidence establishes that this common purpose to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at

servants and former military personnel and their families; and • The regulation of marriage. 159. The persons who shared this common purpose included, but were not limited to: members of the Standing Committee, including Nuon Chea and Ieng Sary; members of the Central Committee, including Khieu Samphan; heads of CPK ministries, including Ieng Thirith; zone and autonomous sector secretaries; and heads of the Party Centre military divisions. 1524. The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC.	least until December 1977. 804. The Trial Chamber is satisfied, based on the evidence put before it in Case 002/01, that the existence of a joint criminal enterprise has been established. First, the evidence establishes that a plurality of persons, including the leaders of the CPK, shared a common purpose to implement a socialist revolution in Cambodia. Second, it has also been established that while this common purpose was not criminal in itself, the policies formulated by the Khmer Rouge involved the commission of a crime as a means of bringing the common plan to fruition. These policies resulted in and/or involved the commission of crimes, including forced transfers, murders, attacks against human dignity and political persecution. Both population movements (phases one and two), followed a consistent pattern of conduct in each case including and involving the commission of crimes. This confirms that these policies were criminal and had been adopted beforehand in order to ensure that the common purpose would be achieved. 807. The Chamber is therefore satisfied that the crimes committed during movement of population (phase one) can be imputed to various participants in the JCE including, at least, some Central and Standing Committee members such as POL Pot, Ta Mok, SON Sen, SAO Phim, VORN Vet and KOY Thuon. *See also* the section "Modes of Responsibility for NUON Chea: JCE", which contains findings about the existence of all the five policies.
<u>Cooperatives and Worksites</u> 168. One of the five policies was to implement and defend the socialist revolution through the establishment and operation of cooperatives and worksites by whatever means necessary. Cooperatives and worksites were set up throughout Cambodia before 1975, from the early stages of the CPK control over certain parts of the territory. These cooperatives and worksites continued until at least 6 January 1979. The Co-Investigating Judges were specifically seized of six worksites and cooperatives: Trapeang Thma Dam worksite, Kampong Chhang Airport construction site, 1st	<u>Cooperatives and Worksites</u> 604. Between September and October 1975, the Standing Committee met to discuss policies to defend and build the country. In November 1975, the First Nationwide Party Economic Congress set out a plan that would transform the country's degraded agricultural system into a modern agricultural system in 10-15 years. The Party leadership determined that it would expand cooperatives; build dikes, canals and dams; and focus on the most fertile land to achieve yields of

January Dam worksite, Srae Ambel government worksite, the Tram Kok Cooperatives and Prey Sar worksite(S-24). 170. The establishment of collective agricultural production by the CPK began around 1970, expanding as the CPK strengthened its control over Cambodian territory. By 1973 a number of cooperatives had been established. In May 1975, a conference was held with CPK representatives from throughout the country, at which Pol Pot and other senior leaders decided that the establishment of socialist revolution in Cambodia required a focus on agriculture and industry, which was to be achieved through continued establishment of cooperatives and the construction of canals and dams. The latter project was to be launched in 1976.	three tonnes per hectare by 1976. The minutes of a meeting held on 8 March 1976, at which KHIEU Samphan and NUON Chea were present, indicate that 30 percent of the 1976 goal had already been reached and attributed this success to careful and detailed planning. By May 1976, the rice fields had been ploughed at least once, and sowing and transplanting had begun. 612. Between December 1976 and December 1977, mobile units were also sent to build dams in Kampong Thom and Kampong Cham (Central (old North) Zone) and Kampot (Southwest Zone). There were no machines to build dams, so manual labour was used. In particular, workers numbering in the thousands were gathered from Kampong Cham and Kampong Thom (Central (old North) Zone) to work on the 1st January Dam, located in Baray District, Kampong Thom, over the course of its construction which began in December 1976. Mobile units walked between dam work-sites regardless of the distance and were not provided with food, water or mosquito nets. Sometimes, they were not escorted. However, nobody refused transfer unless they were sick or unable to walk. 616. In mid-1976, the Party declared that it had organized, built, strengthened and expanded the cooperatives, attacked the capitalist regime and ended the feudalist landowner regime. Thus in mid-1976, the primary focus began to shift to enemies within the Party. Nevertheless, it was still considered essential to attack the 'New People', the remnants of the feudalists and capitalists. Throughout 1976, the cooperatives continued to expand, on average to between 100 and 300 families, with some reaching as many as 500 families and some commune cooperatives reaching as many as 1,000 families. 740. Having all arrived in Phnom Penh by 25 April 1975, at the latest, NUON Chea, POL Pot, KHIEU Samphan, IENG Sary and SON Sen formed a Joint Leadership Committee. On a regular basis, along with various Zone and Autonomous Sector secretaries and others, they met to discuss policies

	and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives. 749. [...] IENG Sary confirmed that he was present at a September 1975 meeting of Party leaders, including KHIEU Samphan, POL Pot, NUON Chea, SAO Phim, SON Sen, Ta Mok, VORN Vet, ROS Nhim, KOY Thuon and a number of military commanders, at which defence, agriculture, "the water problem" and industry were discussed. Expert Philip SHORT also wrote of a mid-September Central Committee meeting addressing agriculture, social affairs and defence matters, although his source for this statement is unclear.2355 Further, the October-November 1975 issue of *Revolutionary Flag* indicates that the "Centre Party Congress" had already unanimously decided upon the three tonnes per hectare before November 1975, a production target specifically mentioned in the September 1975 policy document. Finally, Expert David CHANDLER explained that the overall economic plan which emerged in late 1975 and led to movements between rural areas, particularly in early 1976, was a product of the collective leadership of the Centre, "centred at some point in the Central Committee". The Chamber is therefore satisfied that there was a meeting of the Party leadership in early September 1975 concerning the economic policies later reflected in the September 1975 policy document. Noting his central decision-making role throughout the DK era and longstanding membership of the Standing and Central Committees, the Chamber finds that NUON Chea was present at this meeting. 867. After the Standing Committee visited the Northwest Zone in August 1975, it decided to reallocate an additional 400,000 to 500,000 people to the region. The Standing Committee's report of this visit offered "Angkar's guiding opinions" on key questions of 'workforce arrangements,' cooperatives and the handling of cities. The Standing Committee's report illustrates the hostile attitudes of Committee members towards New People. It outlined the Committee's plan to force all New People into cooperatives. The Chamber finds that the report outlines a calculated plan by the leadership to augment and improve national

	defence (by creating cooperatives) and the economy (by population movements). Given that the Standing Committee met on a weekly basis and more frequently during times of emergency, the Chamber is satisfied that even if NUON Chea did not personally participate in the visit to the Northwest Zone he was made aware of the visit's outcomes, the decisions subsequently taken and the issues faced by the New People in that Zone by means of the written report of the Standing Committee. In view of NUON Chea's prior statements, the Chamber is also satisfied that he shared the leadership's views expressed in the report concerning New People. 871. Shortly after the May 1975 meeting at the Silver Pagoda, NUON Chea, along with POL Pot and other key leaders, led a series of meetings. Between 20 and 25 May 1975 NUON Chea and other leaders instructed representatives from military units and all District, Sector and Zone secretaries on the Party's policies concerning the organisation of cooperatives, elimination of private property, prohibition of currency and markets, and the building of dams and canals. In the following months, the lower levels implemented the instructions they had received. 900. From 25 April 1975, at the latest, NUON Chea met with other senior leaders concerning policies to build and defend a self-reliant, independent and socialist country. The plan was to create a classlesssociety in which all would be organised into cooperatives to rapidly build and defend the country, focusing in particular on rice production and irrigation projects. These plans originated in, and were based on, the Party's experience in the liberated Zones where, in order to supply the manpower needed to accomplish these projects, a consistent pattern of urban evacuations and movements between rural areas had emerged prior to 17 April 1975 and continued thereafter. Despite this experience, there is no evidence that the plan included any measures providing for the health, well-being or consent of the people to be gathered into cooperatives. 901. NUON Chea participated alongside other key leaders in the May 1975 meeting that discussed the

	leadership's plan to bring about socialist revolution by implementing collectivization [...]. 902. In late 1975, NUON Chea, collectively with others, developed a specific economic plan. This plan acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan involved allocating labour strategically according to the Party's rice production target and infrastructure priorities, expanding the cooperatives, and rewarding the 'Old People' to the detriment of the suspect 'New People'. After the Standing Committee visited the Northwest Zone in August 1975 (a visit either attended by NUON Chea or of which he was at least aware by means of written reports), the Standing Committee decided to reallocate an additional 400,000 to 500,000 people to the region. 904. The Party Centre, in conjunction with Zone, Sector and District officials, controlled the means and modes of transportation. As provided for in the plans and consistent with a pattern of conduct, people were then transferred to work sites and areas reputedly with the most fertile land.
Internal Purges 192. Internal *"purges"* occurred increasingly in parallel with the evolution of this policy. To "purge" meant to politically purify by means of a range of sanctions, from being demoted or reeducated, to being smashed. This applied to both members of the Party and nonmembers. A number of situations under investigation may be described factually as purges. In particular, the Co-Investigating Judges were seized of two specific purge phenomena which occurred during the CPK regime: the purge of the Old and New North Zones; and the purge of the East Zone. 193. Following the decision of 30 March 1976 to conduct "smashings" inside the revolutionary ranks, purges were implemented *inter alia* by mass killings of Party members in the North Zone and in Sector 106, from the end of 1976. This escalated dramatically in early 1977 and continued until the end of that year. 194. Until April 1975, the North Zone (then coded Zone 304) comprised the post-April 1975 Sectors	Internal Purges 340. NUON Chea was also involved in the purges of cadres and military, particularly from the East Zone. In 1978, he participated in a meeting with other Party leaders, including POL Pot, SON Sen and Ta Mok, as well as several military commanders, during which members of the East Zone, particularly SAO Phim, were declared internal enemies of the Party to be purged. During the meeting, NUON Chea spoke of the arrest of several members of the East Zone. 345. Several foreigners were also imprisoned in S-21. Among these were Vietnamese soldiers, whose arrest and imprisonment at S-21 was communicated to the Party Centre, including NUON Chea. KAING Guek Eav testified that prior to the fall of DK, NUON Chea ordered him to 'smash' (that is, to execute) all remaining S-21 inmates. At that time, there were about 500 detainees still being held at S-21.

41, 42, 43 and 106. It was then under the control of Secretary Koy Thuon, and Ke Pork 641 as Deputy Secretary (both were members of the Central Committee). After April 1975, the North Zone (re-designated Zone 303) included only Sectors 41, 42 and 43, as Sector 106 became autonomous. Koy Thuon was transferred to the Centre and became Minister of Commerce at which time Ke Pork replaced him as North Zone Secretary. This remained the situation until the intensification of purges in 1977. In the context of these purges, Ke Pork initially became Secretary of a re-enlarged North Zone, reincorporating Sector 106, and Chan Sam alias Kang Chap alias Se was transferred from his previous posts in the Southwest Zone to become Zone Deputy Secretary and concurrently Secretary of Sector 106. Later in the year, a new North Zone (coded 801) was created. It was comprised of Sector 106 and the hitherto autonomous Sector 103, with Se as Secretary. Sectors 41, 42 and 43 were renamed the Central Zone, with Ke Pork as Secretary.

195. Within days of the 30 March 1976 Central Committee decision, Ke Pork, North Zone Secretary, notified Pol Pot and Nuon Chea of his willingness to take measures against alleged traitors within the revolutionary ranks. Shortly thereafter, Koy Thuon, former North Zone Secretary and then Minister of Commerce, was placed under house arrest for alleged offences (falling short of accusing him of being an enemy agent) and he appears to have been treated as an element in need of political reeducation, pursuant to provisions of the Democratic Kampuchea Constitution. He was also expelled from the Party pursuant to its Statute.

196. Inside the North Zone, the implementation of this 30 March 1976 decision led to the first arrest of a high-level cadre in late 1976, whereby Chheum Meas alias Hah (Secretary of a regiment of North Zone Division 117) was sent to S-21 where he was made to produce a confession implicating Koy Thuon. Around the same time, S-21 cadre arrested the first major Commerce Ministry cadre closely associated with Koy Thuon: Tit Son alias Nhem, who was the number two-ranked member of the Centre Commerce Committee and who began confessing under torture around November 1976.

197. As a result of being implicated in these initial

confessions, Koy Thuon was deemed to be a traitor, at which time he was arrested on a decision of the Standing Committee and sent to S-21, where part of his questioning was conducted by Duch personally. Koy Thuon confessed to having been a member of a massive network of traitors, encompassing a large number of administrative and military cadres in the North Zone. This lead to a sharp increase in the scope of the purges, with truckloads of arrestees being sent to S-21. Duch states that the initial confession of Koy Thuon triggered a massive purge, leading to the arrest of many North Zone cadres. Ke Pork supervised the purges of Sector 106 and reported on the situation to Committee 870. A large number of alleged traitors from Sector 106 arrived at S-21 beginning early 1977. Lower-ranking victims of the purge where executed locally and replaced by Southwest Zone cadre that had been sent to assist in the purge by relatives of Ke Pork.

198. The purges of the North Zone continued until 1978. Besides Sector 106, the purges severely affected Zone Division 174; Sector 103; Centre Division 920 and Sector 105; Centre Divisions 310 and 450; the Centre's 870 offices; former North Zone cadre; and Ministry of Commerce personnel. More details on purges in the new North Zone are set out in the section of the Closing Order regarding the North Zone security centre.

199. The purges of the East zone started from mid-1976 with the arrests of Suos Nov alias Chhouk, former secretary of Sector 24, and Chan Chakrei alias Nov Mean, former cadre of East Zone Division 170. Both were arrested pursuant to a decision of the Standing Committee. Interrogated and tortured, they produced confessions in which they implicated a number of cadre from Sector 24. These confessions were analysed and by mid-September 1976, Son Sen and S-21 staff intensified their pursuit of alleged traitors with regard to cadres and former cadres of the East Zone supposedly implicated as CIA, KGB or Vietnamese agents. This launched a series of arrests of East Zone cadre, many of whom were sent to S-21 through 1977. For example, on 30 April 1977, Seat Chhae alias Tum, former Secretary of Sector 22, was arrested, whose S-21 confession dated 5 June 1977 was followed by a major purge of sector 22.

200. From mid-August 1977, arrests and transfers in the East Zone were orchestrated by Son Sen and Ke Pork, using regular forces from the Centre, Central Zone units and former Southwest Zone troops placed under Centre command. In March 1978, a massive escalation of purges of East Zone cadre and combatants occurred in Svay Rieng in Sector 23. This was followed by even more arrests and executions in May-June 1978 in other parts of the East Zone. During this time Sao Phim, East Zone Secretary, committed suicide to avoid arrest. 201. Purges of remaining East Zone cadres, and of cadre who, although operating outside the East Zone were originally from the East Zone, including in various Ministries such as the Ministry of Social Affairs, continued through to the end of the CPK regime. Some of these cadres were sent from the East Zone to S-21 while others were killed on the spot or moved to other parts of the country. Many other East Zone or ex-East Zone cadre and combatants were sent for "reeducation" at worksites such as the Kampong Chhnang Airport construction site. 202. As was the case with the North Zone and related purges, CPK senior leaders used the Party publication *Revolutionary Flag* in order to justify the ongoing East zone purges, to convince cadres that the Party had been infiltrated by internal enemies, and to encourage them to search out and "smash" such enemies.	
Modes of Responsibility for NUON Chea: JCE 1532. Nuon Chea's membership in the Joint Criminal Enterprise has been established. As set out in the sections of this Closing Order concerning Nuon Chea and the "Factual Findings – Joint Criminal Enterprise", Nuon Chea participated or contributed to the design, implementation and control of the execution of the Common Purpose both before and during the CPK regime, which resulted in and/or involved the commission of crimes. He exercised this authority by virtue of being Deputy Secretary and member of the Military Committee of the Central Committee and full-rights member of the Central and Standing Committees, the highest decision-making bodies in the country, and through the CPK's imposition of a strict chain of command from the Centre to the	Modes of Responsibility for NUON Chea: JCE 348. Due to his seniority within the leadership of the CPK, NUON Chea enjoyed oversight of all Party activities extending beyond the roles and responsibilities formally entrusted to him during the DK period. The Trial Chamber agrees with the views of Experts David CHANDLER and Philip SHORT that, within the Standing Committee NUON Chea with POL Pot, exercised the ultimate decision-making power of the Party. As Deputy Secretary of the Party, his control extended not only to political decisions, but also to the government and the administration of DK and to military matters. For these reasons, the Chamber finds that NUON Chea held and exercised the power to make and implement CPK policies and decisions.

base. In these roles, Nuon Chea attended high level meetings where policy was decided and participated in the elaboration of CPK official policy documents. By supervising S-21 and internal security throughout Cambodia, Nuon Chea assumed significant responsibility for the implementation of the policy issuing directives to and receiving reports from his subordinates. Nuon Chea publically explained, endorsed and encouraged the CPK's policies through his involvement in CPK propaganda and in speeches, by chairing mass political trainings, and by personally visiting the provinces. 1533. As set out above the implementation of the JCE common purpose resulted in and/or involved the commission of crimes. By his words, his actions and his omissions Nuon Chea intended this result.	861. The Chamber is satisfied that NUON Chea, as Deputy Secretary of the Party who had ultimate decision-making power with POL Pot, was not only involved in the initial development of DK policies but also actively involved throughout the period relevant to Case 002/01 in their continuing implementation. Notably, NUON Chea attended meetings at which plans for the evacuation of Phnom Penh, with which he agreed, were discussed. NUON Chea also knew and approved of subsequent forced population movements and contributed to developing and promoting the DK policy of targeting former Khmer Republic officials. 862. As set out in further detail below, the Trial Chamber is satisfied that NUON Chea participated in the common purpose of the joint criminal enterprise, making a significant contribution. In order to hold NUON Chea responsible for crimes committed by Khmer Rouge soldiers who are not members of the JCE, it must be shown that the crime can be imputed to a member of the JCE and that this member, using a direct perpetrator, acted in accordance with the common plan. The Chamber recalls its finding that the crimes can be imputed to various members of the JCE. The Chamber's findings below that NUON Chea planned, ordered, instigated, aided and abetted the crimes at issue (Section 15.4) also demonstrate a sufficient link between the direct perpetrators and NUON Chea. The Chamber is therefore satisfied that the crimes can be directly imputed to NUON Chea. 863. NUON Chea was appointed Deputy Secretary of the Party at the First Party Congress in September 1960, where he played an instrumental part in the formulation of the Party's stance on revolutionary violence and use of armed struggle to achieve its goals. He also participated in the Second and Third Party Congresses (in February 1963 and 1971) where the same political line was affirmed. At the First Party Congress, the Party also outlined its goal of socialist revolution and decreed that foreign imperialists, their "lackeys" or henchmen and the "feudalists, capitalists and reactionaries" were all class enemies. In his capacity as the Party's Deputy Secretary and with his contribution to the Party stance, NUON Chea helped initiate and officially approved this Party

	line. 869. Through his contributions at Party Congresses and other meetings with other senior CPK leaders, the Chamber is satisfied that NUON Chea not only shared support for the common plan, but played a key role in formulating its content. 870. The Chamber has found that, both in the years preceding the evacuation of Phnom Penh and during the subsequent DK regime, NUON Chea focused actively on propaganda and training Khmer Rouge cadres in the countryside, advocating the Party's revolutionary and economic policies, the formation of cooperatives and vigilance against enemies. NUON Chea also appeared as the chairman, trainer or speaker at a range of meetings, trainings or study sessions where he promoted the Party line of vigilance against internal and external enemies to lower-level followers. 870. Shortly after the May 1975 meeting at the Silver Pagoda, NUON Chea, along with POL Pot and other key leaders, led a series of meetings. Between 20 and 25 May 1975 NUON Chea and other leaders instructed representatives from military units and all District, Sector and Zone secretaries on the Party's policies concerning the organisation of cooperatives, elimination of private property, prohibition of currency and markets, and the building of dams and canals. In the following months, the lower levels implemented the instructions they had received. 874. The Chamber finds that through his role in the propaganda campaign (including his instrumental role in issuing the *Revolutionary Flag*) and training of cadres both before and after April 1975, NUON Chea contributed substantially to the dissemination and implementation of the common purpose. 875. As Deputy Secretary of the CPK, full-rights member of the Central and Standing Committees, and by virtue of his close relationship with POL Pot and other top CPK leaders, NUON Chea was a key actor responsible for the formulation of Party policies. He also participated in the meetings prior to April 1975 approving the plan to forcibly transfer the population of Phnom Penh and at all times thereafter was a key member of the Committees that approved continuous population

	movements within Cambodia within the time period relevant to Case 002/01. He was also a strong proponent of waging 'class struggle' against, *inter alia*, Khmer Republic officials and played a leading role in propaganda and training of cadre to achieve this. In the Chamber's view, the significance of his role is further heightened given the limited number of people who constituted the 'upper echelon'. Accordingly, the Chamber is satisfied that, as a member of the JCE, NUON Chea contributed significantly to the realisation of the common purpose and that he intended to further the implementation of the common purpose through his actions. 876. In light of the foregoing, the Chamber finds that NUON Chea shared the intent of the other members of the JCE to bring about the common purpose through implementation of the Party's policies on population movements and targeting Khmer Republic officials. He shared with the other participants of the JCE the intent to commit the other inhumane acts of forcible transfer and attacks against human dignity, murder committed during population movements (phases one and two), as well as murder and extermination as crimes against humanity at Tuol Po Chrey. Further, in light of his contribution to developing the Partly line on class-struggle and the policy to target Khmer Republic officials, the Chamber is also satisfied NUON Chea shared with the other members of the JCE the requisite discriminatory intent for the crime of political persecution (committed during population movements (phases one and two)).
Other Modes of Responsibility In Case 002/02, NUON Chea has been charged with crimes committed through the following modes: • Planning • Instigating • Aiding and abetting • Ordering • Superior responsibility	Other Modes of Responsibility (general judgement findings which go to establishing other modes of responsibility) *Planning* 878. NUON Chea was a full rights member of the Central and Standing Committees, who had the right to participate in meetings and did in fact participate in meetings. 900. From 25 April 1975, at the latest, NUON Chea met with other senior leaders concerning policies to build and defend a self-reliant, independent and socialist country. The plan was to create a classless society in which all would be organised into

	cooperatives to rapidly build and defend the country, focusing in particular on rice production and irrigation projects. These plans originated in, and were based on, the Party's experience in the liberated Zones where, in order to supply the manpower needed to accomplish these projects, a consistent pattern of urban evacuations and movements between rural areas had emerged prior to 17 April 1975 and continued thereafter. Despite this experience, there is no evidence that the plan included any measures providing for the health, well-being or consent of the people to be gathered into cooperatives. 901. NUON Chea participated alongside other key leaders in the May 1975 meeting that discussed the leadership's plan to bring about socialist revolution by implementing collectivization [...] 902. In late 1975, NUON Chea, collectively with others, developed a specific economic plan. This plan acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan involved allocating labour strategically according to the Party's rice production target and infrastructure priorities, expanding the cooperatives, and rewarding the 'Old People' to the detriment of the suspect 'New People'. After the Standing Committee visited the Northwest Zone in August 1975 (a visit either attended by NUON Chea or of which he was at least aware by means of written reports), the Standing Committee decided to reallocate an additional 400,000 to 500,000 people to the region. *Ordering* 772. [...] Party leaders, including POL Pot, KHIEU Samphan and NUON Chea, led education sessions in Phnom Penh, beginning soon after 17 April 1975 and continuing throughout the DK era. They lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives, building of dikes and canals, and completion of work and production quotas. 884. NUON Chea, together with POL Pot,

	exercised the ultimate decision-making power of the Party, and used *de jure* and *de facto* authority to instruct lower-level Khmer Rouge cadres and soldiers to commit crimes of murder, extermination, political persecution and the other inhumane acts of forced transfer and attacks against human dignity. [...] After a further meeting in early-April 1975 at which the evacuation was discussed, orders were again conveyed to military commanders for implementation. 885. The Chamber is satisfied that the decisions and instructions of the Party Centre, which included NUON Chea, amounted to orders which were implemented, and that the lower-level cadres accepted the authority and decisions of the CPK Party. These orders preceded and substantially contributed to the commission of the crimes. 905. [...] The Chamber has found above that NUON Chea played a key role in the formulation of decisions of the Party leadership and that these decisions were conveyed through the administrative and military hierarchy and then implemented by Khmer Rouge forces. That the lower-level cadres accepted the *de facto* authority and decisions of NUON Chea through the Party Centre and implemented Party policy both to move populations and identify enemies demonstrates that the decisions amounted to orders. 923. [...] NUON Chea had *de facto* and *de jure* authority over lower-level Khmer Rouge. [...]After the further meeting of senior leaders in early April 1975, which NUON Chea attended and participated in, and at which the plan for the final offensive was affirmed, orders were again conveyed to military commanders for implementation *Instigating* 887. [...]The Chamber has also found that NUON Chea, together with POL Pot, exercised the ultimate decision-making power of the Party, and used this *de jure* and *de facto* authority to instruct lower-level Khmer Rouge cadres and soldiers to commit crimes that occurred during movement of population (phase one). NUON Chea played a leading role in the indoctrination of Khmer Rouge cadres and soldiers particularly regarding training cadre on maintaining vigilance against enemies,

	and in the strict indoctrination of peasants on class struggle which included the identification of all 'New People' and former Khmer Republic officials as enemies. The Chamber is satisfied that NUON Chea's involvement, alongside other leaders, in formulating the policies to forcibly transfer the population and to target certain groups, preceded and substantially contributed to the crimes which were committed in the course of movement of population (phase one). Further, in view of NUON Chea's positions of authority at the time of the evacuation of Phnom Penh, the Chamber is satisfied his trainings, statements and involvement in issuing *Revolutionary Flag* were understood by lower-level Khmer Rouge cadres and soldiers prompting them to commit crimes against those considered enemies. [...] 908. [...] The Chamber has also found that NUON Chea, together with POL Pot, exercised the ultimate decision-making power of the Party, and used this *de jure* and *de facto* authority to instruct lower-level Khmer Rouge cadres and soldiers to commit crimes that occurred during movement of population (phase two). NUON Chea played a leading role in the indoctrination of Khmer Rouge cadres and soldiers particularly regarding training cadre on maintaining vigilance against enemies, and in the strict indoctrination of peasants on class struggle which included the identification of all 'New People' and former Khmer Republic officials as enemies. As discussed above, the leadership, including NUON Chea designed policies which enabled 'enemies' to be identified and re-educated, or to disappear and continuously stressed the importance of the principle of secrecy. 926. NUON Chea played a leading role in the indoctrination of Khmer Rouge cadres and soldiers particularly regarding training cadre on maintaining vigilance against enemies, and in the strict indoctrination of peasants on class struggle which included the identification of all 'New People' and former Khmer Republic officials as enemies. As discussed above, the leadership, including NUON Chea designed policies which enabled 'enemies' to be identified and re-educated, or to disappear and continuously stressed the importance of the principle of secrecy. [...] Further, in view of NUON Chea's positions of authority at the time of the evacuation of Phnom Penh, the Chamber is

	satisfied his trainings, statements and involvement in issuing *Revolutionary Flag* were understood by lower-level Khmer Rouge cadres and soldiers as a direct incitement to commit crimes against those considered enemies. [...] *Aiding and Abetting* 890. [...] NUON Chea's words and actions in disseminating the forced movement and targeting policies to cadres and in advocating implementation of the policies encouraged the perpetrators to commit the crimes. Further, the CPK's approval of the policies had a legitimising effect which facilitated the realisation of the crimes. 910. In propaganda materials and indoctrination sessions, NUON Chea disseminated, endorsed, praised and encouraged the Party's economic policies providing for the strategic allocation of labour and class struggle. *Superior Responsibility* 896. Accordingly, the Chamber is satisfied that by virtue of the CPK Statute and his assigned responsibilities, NUON Chea possessed both *de jure* and *de facto* authority to discipline insubordinate members of the Party and military. 913. In view of his senior position as the Party Deputy Secretary and in light of the strict, hierarchical administrative structure put in place by the CPK Statute, NUON Chea had *de jure* authority over those in the established line of command. Additionally, having regard to the strict reporting line through which the lower echelons briefed senior leaders on key matters and requested guidance, the Chamber is satisfied NUON Chea also exercised *de facto* authority over all Khmer Rouge cadres. 914. [...] The Chamber is thus also satisfied that the CPK, including NUON Chea, maintained a superior-subordinate relationship and continued to exercise effective control over the newly restructured Khmer Rouge forces known as the RAK after July 1975. 933. It has been established that NUON Chea held

	a superior-subordinate relationship and exercised effective control over Khmer Rouge forces and Zone secretaries at the time of the capture of Phnom Penh. The Chamber is satisfied the analysis applies equally to the events at Tuol Po Chrey which unfolded in the Northwest Zone under the authority of its Secretary, MUOL Sambath *alias* ROS Nhim, in the days following the capture of Phnom Penh. The Chamber notes that NUON Chea and ROS Nhim had an ongoing working relationship from long before 17 April 1975. ROS Nhim was a member of the Central Committee, and he attended the Second and Third Party Congress with NUON Chea and other CPK leaders in 1963 and 1971 respectively. NUON Chea visited ROS Nhim in Samlaut on many occasions and ROS Nhim was present at the June 1974 meeting at which the CPK leaders, including NUON Chea, decided to empty all the cities, including Phnom Penh, once the country was liberated. 934. After 17 April 1975, ROS Nhim and other Zone secretaries attended regular meetings, *inter alia* with, NUON Chea, to discuss the implementation of CPK policies, including the May 1975 meeting at the Silver Pagoda. [...]

Predetermination of factual issues relevant to KHIEU Samphans' criminal responsibility for crimes prosecuted in Case 002/02	
CASE 002/02 CHARGES (references are to the Closing Order)	**CASE 002/01 FINDINGS (references are to 002/01 judgement paras)**
Crimes Against Humanity: Chapeau Elements 1350. In light of the facts set out in the sections of this Closing Order on, *inter alia,* the "Factual Findings – Joint Criminal Enterprise" and the "Factual Findings – Crimes", the policy implemented by the Democratic Kampuchea authorities between 17 April 1975 and 7 January 1979 consisted of a widespread and systematic attack against the entire civilian population of Cambodia, principally on political grounds but also, in some contexts, on national, ethnic, racial or religious grounds. The underlying crimes set out below were committed as part of this attack; accordingly, the "chapeau" elements of crimes against humanity, as defined at the time of the events, have been established. (*See* paras 1350-1372 for further analysis).	Crimes Against Humanity: Chapeau Elements 193. The Chamber is satisfied that beginning by 17 April 1975 and continuing at least until December 1977, the temporal period at issue in Case 002/01, there was a widespread and systematic attack against the civilian population of Cambodia. [...] 195. The Chamber further finds that the attack against the civilian population was carried out on political grounds, pursuant to the plans and policies of the Party to build socialism and defend the country. [...] 198. The Chamber is thus satisfied that all the chapeau requirements for the application of Article 5 of the ECCC Law are met.
The JCE 156. The common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a "great leap forward" and defend the Party against internal and external enemies, by whatever means necessary. 157. To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies: • The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another; • The establishment and operation of cooperatives and worksites; • The reeducation of "bad-elements" and killing of "enemies", both inside and outside the Party ranks; • 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	The JCE 777. The Chamber is therefore satisfied that, at the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary". Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries, including NUON Chea, KHIEU Samphan, POL Pot, IENG Sary, SON Sen, VORN Vet, Ta Mok, SAO Phim, ROS Nhim, KOY Thuon, KE Pauk, CHANN Sam, CHOU Chet, BOU Phat, YONG Yem, BORN Nan, IENG Thirith and MEY Prang, were part of this group with the specified common purpose. The evidence establishes that this common purpose to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was

• The regulation of marriage. 159. The persons who shared this common purpose included, but were not limited to: members of the Standing Committee, including Nuon Chea and Ieng Sary; members of the Central Committee, including Khieu Samphan; heads of CPK ministries, including Ieng Thirith; zone and autonomous sector secretaries; and heads of the Party Centre military divisions. 1524. The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC.	firmly established by June 1974 and continued at least until December 1977. 804. The Trial Chamber is satisfied, based on the evidence put before it in Case 002/01, that the existence of a joint criminal enterprise has been established. First, the evidence establishes that a plurality of persons, including the leaders of the CPK, shared a common purpose to implement a socialist revolution in Cambodia. Second, it has also been established that while this common purpose was not criminal in itself, the policies formulated by the Khmer Rouge involved the commission of a crime as a means of bringing the common plan to fruition. These policies resulted in and/or involved the commission of crimes, including forced transfers, murders, attacks against human dignity and political persecution. Both population movements (phases one and two), followed a consistent pattern of conduct in each case including and involving the commission of crimes. This confirms that these policies were criminal and had been adopted beforehand in order to ensure that the common purpose would be achieved. 807. The Chamber is therefore satisfied that the crimes committed during movement of population (phase one) can be imputed to various participants in the JCE including, at least, some Central and Standing Committee members such as POL Pot, Ta Mok, SON Sen, SAO Phim, VORN Vet and KOY Thuon. *See also* the section "Modes of Responsibility for Khieu Samphan: JCE", which contains findings about the existence of all the five policy.
<u>Cooperatives and Worksites</u> 168. One of the five policies was to implement and defend the socialist revolution through the establishment and operation of cooperatives and worksites by whatever means necessary. Cooperatives and worksites were set up throughout Cambodia before 1975, from the early stages of the CPK control over certain parts of the territory. These cooperatives and worksites continued until at least 6 January 1979. The Co-Investigating Judges were specifically seized of six worksites and cooperatives: Trapeang Thma Dam worksite,	<u>Cooperatives and Worksites</u> 406. Although he never served as Minister of Commerce, surviving documents demonstrate that KHIEU Samphan had an important role in relation to the DK economy, presumably in his admitted capacity as the member of Office 870 responsible for commerce. In October 1976, the Commerce Committee began to report to KHIEU Samphan instead of Doeun. Documents addressed or copied to KHIEU Samphan included reports of discussions with foreign trade delegations and other communications relating to international trade;

Kampong Chhang Airport construction site, 1st January Dam worksite, Srae Ambel government worksite, the Tram Kok Cooperatives and Prey Sar worksite (S-24). 170. The establishment of collective agricultural production by the CPK began around 1970, expanding as the CPK strengthened its control over Cambodian territory. By 1973 a number of cooperatives had been established. In May 1975, a conference was held with CPK representatives from throughout the country, at which Pol Pot and other senior leaders decided that the establishment of socialist revolution in Cambodia required a focus on agriculture and industry, which was to be achieved through continued establishment of cooperatives and the construction of canals and dams. The latter project was to be launched in 1976. 171. [...] At the same meeting, the Standing Committee established a number of committees surrounding Office 870, with responsibilities in relation to agriculture, commerce and economics, and gave instructions on matters such as foreign trade negotiations with North Korea and China, the expansion of rubber production and early season rice yields, and building and distributing water pumps. On 30 May 1976, the Standing Committee established guidelines for the agricultural production action of the army, which was considered as having the "joint duty to build the country". Finally, in August 1976, the Standing Committee developed a four-year plan to build socialism in all fields including rapid agricultural development. 177. Although serious health and food problems arose following the establishment of the CPK regime, the CPK leaders had not provided for adequate systems to respond to these problems and did not accept international aid, except for the limited support primarily available from China. On the contrary, the CPK policies were focused on isolation and the self-sufficiency of the national economy. 1165. During the CPK regime, Khieu Samphan was involved in the continued planning of this policy by his attendance at Standing Committee meetings or through access to their minutes4765 and in the	reports on the quantities of rice sent to the state warehouses by the various Zones, and on the export of rice [...]. 581. [...] Civil Parties indicated that, during their transfers to and from cooperatives and worksites, they saw hundreds, thousands and tens of thousands of people displaced. In 1977, KHIEU Samphan reported that irrigation projects were being implemented nationwide with between 10,000 and 30,000 workers at each site. For example, throughout 1977, between 8,000 and 20,000 people were transferred to work at the 1 January Dam Work-site; 20,000 people, some in mobile units, built the 17 January Dam; and 23,000 people constructed the 5 January and 6 January Dams. The Chamber is therefore satisfied that the intra-regional movements between around September 1975 and December 1977 were also on a massive scale. However, without further evidence as to the percentage of those moved to various cooperatives and work-sites, the Chamber can only make a very conservative estimate that a minimum of 30,000 were moved within regions during movement of the population (phase two). The Chamber again emphasises that the likely number moved far exceeds this estimate considering the geographical and temporal scope of these movements, the number of cooperatives and work-sites that existed during the DK era, and the number of workers at each cooperative and work-site. 604. Between September and October 1975, the Standing Committee met to discuss policies to defend and build the country. In November 1975, the First Nationwide Party Economic Congress set out a plan that would transform the country's degraded agricultural system into a modern agricultural system in 10-15 years. The Party leadership determined that it would expand cooperatives; build dikes, canals and dams; and focus on the most fertile land to achieve yields of three tonnes per hectare by 1976. The minutes of a meeting held on 8 March 1976, at which KHIEU

development of the Four Year Plan to build socialism in all fields. It was also addressed at an enlarged meeting of the Standing Committee in September 1975 at which the rapid strengthening of agriculture was discussed. He may have further assisted with the planning of this policy through involvement with the Council of Ministers. Khieu Samphan also stated that this policy was decided during meetings of the Central Committee. Khieu Samphan attended the Standing Committee meetings at which the decision was made to establish Kampong Chhnang Airport.

1168. Khieu Samphan was aware of the various ways in which this policy was implemented throughout Cambodia. He travelled extensively throughout Cambodia to inspect worksites and cooperatives. He has stated that he accompanied Prince Norodom Sihanouk to the Centre and Northwest Zones and had "witnessed the organization efforts in the countryside" and did a further "study-tour" in the West and Southwest Zones. During a tour with Prince Norodom Sihanouk between 15-17 January 1976, Khieu Samphan witnessed tens of thousands of workers doing manual labour in cooperatives. [...]

1170. Khieu Samphan was also aware that rice was being exported by the CPK during a period when the population was facing starvation. A report sent by Van Rit to Khieu Samphan on 4 November 1978 reported that during January-September 1978, 29,758 tons of paddy and rice were exported. [...]

Samphan and NUON Chea were present, indicate that 30 percent of the 1976 goal had already been reached and attributed this success to careful and detailed planning. By May 1976, the rice fields had been ploughed at least once, and sowing and transplanting had begun.

612. Between December 1976 and December 1977, mobile units were also sent to build dams in Kampong Thom and Kampong Cham (Central (old North) Zone) and Kampot (Southwest Zone). There were no machines to build dams, so manual labour was used. In particular, workers numbering in the thousands were gathered from Kampong Cham and Kampong Thom (Central (old North) Zone) to work on the 1st January Dam, located in Baray District, Kampong Thom, over the course of its construction which began in December 1976. Mobile units walked between dam work-sites regardless of the distance and were not provided with food, water or mosquito nets. Sometimes, they were not escorted. However, nobody refused transfer unless they were sick or unable to walk.

616. In mid-1976, the Party declared that it had organized, built, strengthened and expanded the cooperatives, attacked the capitalist regime and ended the feudalist landowner regime. Thus in mid-1976, the primary focus began to shift to enemies within the Party. Nevertheless, it was still considered essential to attack the 'New People', the remnants of the feudalists and capitalists. Throughout 1976, the cooperatives continued to expand, on average to between 100 and 300 families, with some reaching as many as 500 families and some commune cooperatives reaching as many as 1,000 families.

740. Having all arrived in Phnom Penh by 25 April 1975, at the latest, NUON Chea, POL Pot, KHIEU Samphan, IENG Sary and SON Sen formed a Joint Leadership Committee. On a regular basis, along with various Zone and Autonomous Sector secretaries and others, they met to discuss policies and plans to build and defend a self-reliant,

	independent and socialist country, such as the establishment of cooperatives. 743. Over the course of about 10 days in May 1975, POL Pot, NUON Chea, KHIEU Samphan and others, including representatives from all Zones, met at the Silver Pagoda, where reasons justifying the evacuations of the cities were provided and priority was given to the need to rapidly build and defend the country through the creation of cooperatives and the construction of dams and canals. Thereafter, between approximately 20 and 25 May 1975, NUON Chea, POL Pot, KHIEU Samphan, IENG Thirith, SON Sen and others attended at least one meeting either at the Olympic Stadium or the Khmer-Soviet Technical Institute. NUON Chea, POL Pot and others instructed representatives from all military units and all District, Sector and Zone secretaries on the organisation of cooperatives, elimination of private property, prohibition of currency and markets, and building of dams and canals. 749. [...] IENG Sary confirmed that he was present at a September 1975 meeting of Party leaders, including KHIEU Samphan, POL Pot, NUON Chea, SAO Phim, SON Sen, Ta Mok, VORN Vet, ROS Nhim, KOY Thuon and a number of military commanders, at which defence, agriculture, "the water problem" and industry were discussed. Expert Philip SHORT also wrote of a mid-September Central Committee meeting addressing agriculture, social affairs and defence matters, although his source for this statement is unclear.2355 Further, the October-November 1975 issue of *Revolutionary Flag* indicates that the "Centre Party Congress" had already unanimously decided upon the three tonnes per hectare before November 1975, a production target specifically mentioned in the September 1975 policy document. Finally, Expert David CHANDLER explained that the overall economic plan which emerged in late 1975 and led to movements between rural areas, particularly in early 1976, was a product of the collective leadership of the Centre, "centred at some point in the Central Committee". The Chamber is therefore satisfied that there was a meeting of the Party leadership in early September 1975 concerning the economic policies later reflected in the September 1975 policy document. Noting his central decision-making role throughout

	the DK era and longstanding membership of the Standing and Central Committees, the Chamber finds that NUON Chea was present at this meeting 751. [...] The Chamber has already found that he attended meetings in June 1974 where urban evacuations were discussed, as well as in late April and May 1975 where other economic policies, including the establishment of cooperatives, were addressed. The Chamber therefore finds that KHIEU Samphan, a candidate member of the Central Committee in September 1975, did take part in the development of the plans reflected in the September 1975 policy document. 753. The October-November 1975 issue of *Revolutionary Flag* magazine reported that the First Nationwide Economics Congress, attended by "economic cadres", mandated that all would labour to rapidly build and defend the country, achieving a modern agricultural economy within 10-15 years; confirmed the 1976 production target of three tonnes per hectare; determined that struggle against the imperialists and "their lackeys" remained necessary; encouraged the advancement of the class struggle and the expansion of cooperatives; and instructed that all manpower should beorganised for consecutive projects on a seasonal basis. While there is no evidence other than an issue of *Revolutionary Flag* indicating that this Congress actually took place, the Chamber notes that the magazine explained that the plans and policies concerning the production target of three tonnes per hectare adopted during the alleged Congress had been decided upon and endorsed by the "Centre Party Congress". The Chamber also considers that the resolution of the First Nationwide Economics Congress on this matter closely reflects the contents of the September 1975 policy document. Considering its findings above concerning the series of meetings beginning, at the latest, in May 1975 and continuing until late 1975, the Chamber is satisfied that resolution later published as a result of this alleged First Nationwide Economics Congress represented the policy adopted by the Party leadership and KHIEU Samphan. 765. KHIEU Samphan, NUON Chea, POL Pot, IENG Thirith and other leaders attended the first session of the PRA held from 11 to 13 April 1976. KHIEU Samphan gave the inaugural speech on 11

	April 1976 claiming that fair and honest elections had been held and endorsing policies regarding work-sites, cooperatives and the ongoing class struggle. [...] 770. In November 1976, the Party held its Second Nationwide Economics Conference. After analysing the successes and failures in 1976, a representative of the "Party Organisation" set out the 1977 plan, including the production target of three tonnes per hectare and six tonnes in those regions that could produce both a rainy and dry season rice crop. The Party leadership intended that manpower be sent first to areas where there was sufficient water and fertile land and whenever there was manpower free, it was to be assigned to build dikes and canals. The people were to be divided according to their class, to ensure that 'New People', who could not be trusted, were assigned secondary tasks. 967. By 25 April 1975, at latest, KHIEU Samphan formed part of the group of CPK leaders residing at the Phnom Penh railway station, and thereafter at the former Ministry of Finance building and the Silver Pagoda, where meetings were held to discuss policies and plans to build and defend a self-reliant, independent and socialist country, such as the establishment of cooperatives. [...] 968. KHIEU Samphan participated in the development of the plan, reflected in September and November 1975 policy documents, to forcibly allocate labour resources strategically according to production targets and infrastructure priorities, reach three tonnes of rice per hectare, focus on the construction of irrigation projects, and reward the 'Old People' to the detriment of the 'New People'. During the Fourth Party Congress in January 1976, collectively with other Party members, he adopted an amended Statute which affirmed the need for class struggle, democratic centralism, vigilance against enemies and commitment to the principles of independence-sovereignty and self-reliance. 975. KHIEU Samphan also led education sessions in Phnom Penh throughout the DK era. He lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives, building of

	dikes and canals, and completion of work quotas. He also conducted at least one political study session with returnees in late 1975. During this session, he justified urban evacuations and lectured that knowledge originating from education by the "colonialists and imperialists" had to be forgotten. 977. KHIEU Samphan played an important role in the DK economy and in particular in his capacity as a member of Office 870. He had responsibility for distribution of goods to the Zones; transportation of rice from the Zones to State warehouses and its management; international trade and imports/exports; and use of credit. From around October 1976, he exercised some level of oversight of the Commerce Committee, which reported to him, often seeking his instructions. 990. After NORODOM Sihanouk's return to Cambodia following the liberation of the country, KHIEU Samphan accompanied him on visits to the countryside in early 1976, including to worksites where tens of thousands laboured on irrigation projects. On these visits, he praised the construction of dams and canals, and agricultural production. He sought to demonstrate the success and benefits of the socialist revolution, in which he himself believed, where all worked with their bare hands to build and defend their country. 1025. In late 1975, KHIEU Samphan, collectively with others, developed a specific economic plan. This plan acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan was to allocate labour strategically according to the Party's rice production target and infrastructure priorities, expand the cooperatives, and reward the 'Old People' to the detriment of the suspect 'New People'. [...] *See also* paras 604, 612 and 616.
<u>Internal Purges</u> 1184. Khieu Samphan stated that he never participated in any meetings where purges or arrests were decided and did not know the extent of arrests before 1979. He stated that Pol Pot did not involve the Standing Committee in decisions about the arrests of important cadres within the Party.	<u>Internal Purges</u> 409. Despite holding an array of titles, the evidence suggests that KHIEU Samphan's decision-making power was primarily limited to matters of economics and foreign trade. However, he had a certain amount of broader authority by virtue of his senior position, as shown by his ability to ensure

However, it appears that Khieu Samphan knew of and was involved in the purges of senior leaders of the CPK, as well as people in the 870 offices and in the Ministry of Commerce and related offices. 1185. [...] As a regular attendee and participant in the Standing Committee, Khieu Samphan would have known of and participated in the arrest and subsequent execution or suicide of standing committee members, zone and autonomous sector secretaries, and ministers. Indeed, Khieu Samphan has acknowledged that he knew of the arrest and elimination of senior leaders and has given justifications for the purges inside the ranks of the CPK. He stated in a 1980 interview that there were many undercover Vietnamese agents in the CPK "who obtained important positions. They exercised their power. Some of them were in charge of major zones". He further stated that in 1975, around half of the Central Committee and the Standing Committee were Vietnamese agents. In an interview in 2006, he stated that Vorn Vet and Sao Phim were arrested because they were Vietnamese agents. [...]	the safety of some of his family members in the countryside. Through his attendance of Central and Standing Committee meetings, his work in Office 870, his supervision of the Commerce Committee and the content of the speeches he made, he had knowledge of the CPK's policies and access to information about the situation in Cambodia generally, including knowledge of arrests of senior cadres such as KOY Thuon, Doeun and VORN Vet. 389. Further demonstrating his level of awareness, KHIEU Samphan has admitted that he attributed the disappearance of friends and colleagues during the DK era to POL Pot but "kept on hoping that POL Pot would backtrack one day." He has also admitted that in mid-1978 he learned of "arrests and barbarous acts" in Preah Vihear, and specifically of the arrest and ill-treatment of his wife's siblings. Consistently with this, Witness MEAS Voeun – a military officer who went to the new North Zone in 1978 – testified that KHIEU Samphan sent him a telegram in 1978 asking about the welfare of his relatives, and ordering that they be sent to Phnom Penh if they were facing hardship. As a result, Witness MEAS Voeun made enquiries, and helped to secure the release of KHIEU Samphan's sister-in-law from a security centre in Siem Reap where she had been detained. While Witness KAING Guek Eav suggested that KANG Chap, the Secretary of the new North Zone, was punished by POL Pot for his role in this incident, in a letter written to national newspapers in, KHIEU Samphan appeared to acknowledge that the detention of his relatives had led to the arrest of certain "regional party secretaries".
<u>Modes of Responsibility for KHIEU Samphan: JCE</u> 1536. Khieu Samphan's membership in the Joint Criminal Enterprise has been established. As set out in the sections of this Closing Order concerning Khieu Samphan and the Factual Characterizations of the Joint Criminal Enterprise, Khieu Samphan participated or contributed to the design, implementation and control of the execution of the common purpose both before and during the CPK regime, which resulted in and/or involved the commission of crimes. He exercised this authority by virtue of his membership of the Central Committee and regular participation in the	<u>Modes of Responsibility for KHIEU Samphan: JCE</u> 383. As President, KHIEU Samphan also continued to make speeches, praising the Cambodian people and revolutionary army for their role in the 'liberation' of Phnom Penh; supporting the creation of the new DK state and its institutions; endorsing the CPK's policies, such as the use of co-operatives, food rationing, child labour and worksites; celebrating purported achievements in nation-building and improvements in living conditions; and decrying Vietnamese 'aggression'. KHIEU Samphan told the Co-Investigating Judges that the content of his speeches was "dictated" by

Standing Committee, the highest decision-making bodies in the country, and through the CPK's imposition of a strict chain of command from the Center to the base. In these roles, Khieu Samphan: attended and contributed to high-level meetings and major Party gatherings where policy was decided and disseminated; attended regular meetings with zone, sector and district cadres; worked within Political Office 870 at which the common purpose of the Party was implemented and monitored; and personally travelled throughout the provinces. Khieu Samphan endorsed and disseminated the common purpose internationally and domestically through his speeches and radio broadcasts, his presentations at major Party gatherings, and through political indoctrination and study sessions, and his foreign trips as a member of CPK delegations. 1537. As set out above the implementation of the JCE common purpose resulted in and/or involved the commission of crimes. By his words, his actions and his omissions Khieu Samphan intended this result.	POL Pot and that, although he generally agreed with what he said, privately he disagreed with some of the specifics, such as the material on the abolition of the currency. 388. Moreover, despite repeatedly claiming that he was not kept well-informed during the DK era, and despite specifically denying knowledge of arrests, KHIEU Samphan was present at Standing Committee meetings during which arrests, propaganda, living conditions in the countryside (including illnesses, deaths and food shortages), child labour, foreign affairs, national defence, armed conflict with Vietnam and commerce were discussed. 945. By his speeches and through training sessions, KHIEU Samphan personally participated in the indoctrination of people on class struggle and the need to ensure the independence of the country. By these actions, he also contributed to the identification of feudalists and capitalists as enemies and generally of all the 'New People' as people who needed to be tempered. KHIEU Samphan knew that such indoctrination to hate would inevitably lead to violence. He also agreed with the view that the revolution should rely on the peasants of the lowest classes in order to impose on Cambodia the dictatorship of the proletariat. Those belonging to this new ruling class had very little formal education, but were strictly disciplined, indoctrinated, taught to deceive people and behave in accordance with the principle of secrecy. KHIEU Samphan could not ignore that giving extensive power to such people would lead to unquestioning implementation of the party line without the exercise of proper judgment. For this reason, the only reasonable expectation was that vast numbers of people would die during forced population movements because of the conditions of transport, and that such movements would involve the commission of many crimes against humanity. Furthermore, in order to exclude witnesses and avoid international criticism, KHIEU Samphan constantly supported the principle of secrecy and contributed to the decision to evacuate all foreigners still present in Phnom Penh. Indeed, he played a key role in preserving the secrecy fostered by the regime, continuously denying and hiding the reality of the situation experienced by the Cambodian people. KHIEU Samphan knew that, in

	doing so, he protected perpetrators and allowed the commission of further crimes. 963. For these reasons, set out in more detail below, the Chamber finds that KHIEU Samphan participated in the JCE, thereby making a significant contribution. [...] 964. KHIEU Samphan attended meetings of the Central and Standing Committees, as well as Party congresses, throughout the revolutionary and DK eras, at which the common purpose to implement rapid socialist revolution and defend the country, aswell as the policies deemed necessary to achieve he common purpose, were planned and decided upon. 965. [...] The Chamber is therefore satisfied that, by 1969 when he joined the CPK, KHIEU Samphan was well aware of the common purpose decided upon at the First and Second Party Congresses, as well as its development during meetings of Party leaders in the liberated Zones, and that he assented to it, saying that he joined the CPK, despite disagreeing with some of their actions, for the sake of Cambodian independence. At the Third Party Congress, in 1971, collectively with other Party members, KHIEU Samphan affirmed the Party's strategic lines adopted at previous congresses, including commitment to the class struggle. 972. The Chamber is therefore satisfied that his attendance at meetings and contribution to plans of the Party Centre demonstrate that he not only shared the common purpose which resulted in and/or involved policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials, but that he also played a key role in formulating the content of the common purpose and policies. 974. In May 1975, KHIEU Samphan and other senior leaders, including representatives from all Zones, attended a 10-day meeting at the Silver Pagoda. At the meeting, Party leaders provided reasons justifying the evacuations of the cities and instructions to rapidly build and defend the country through the creation of cooperatives and the construction of dams and canals. Thereafter, between approximately 20 and 25 May 1975,

	KHIEU Samphan, other senior leaders, representatives from all military units and all District, Sector and Zone secretaries attended meeting(s) at either the Olympic Stadium or the Khmer-Soviet Technical Institute. Instructions were given on the organisation of cooperatives, elimination of private property, prohibition of currency and markets, and building of dams and canals. 975. KHIEU Samphan also led education sessions in Phnom Penh throughout the DK era. He lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives, building of dikes and canals, and completion of work quotas. He also conducted at least one political study session with returnees in late 1975. During this session, he justified urban evacuations and lectured that knowledge originating from education by the "colonialists and imperialists" had to be forgotten. 976. The Chamber finds that his attendance at and/or participation in these meetings demonstrate that he not only shared the common purpose which resulted in and/or involved policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials, but also that he played a key role in disseminating the content of the common purpose and policies. Considering his official positions and reputation among the people, his mere presence at meetings facilitated the effectiveness of the instructions delivered, by indicating to those in attendance that he had endorsed the common purpose and policies. This was even further emphasized when he delivered the instructions himself. 979. The objective of the common purpose was establishment of self-reliant, modern agricultural state within 10-15 years, and thereafter an industrial economy. Rice and other agricultural exports would provide the capital necessary to fulfill this objective. The Chamber is therefore satisfied that his economic role demonstrates that he not only shared the common purpose, but also that he played a key role in implementing certain aspects of it. 980. As the highest official in the internal

	resistance and thereafter in his capacity as a DK leader in particular as President of the State Presidium, KHIEU Samphan made statements in which he praised the policies and conduct of the democratic and socialist revolutions. He highlighted past successes and encouraged further action, in particular, in relation to agricultural production, the construction of irrigation projects and the elimination of enemies. He also justified the transfer of the population of Phnom Penh. From a position of high repute and respect, he endorsed and supported the policies of the Khmer Rouge, winning support among the people and internationally for the democratic and socialist revolutions [...]. 985. In his inaugural speech at the first and probably only session of the People's Representative Assembly, on 11 April 1976, KHIEU Samphan lied when he claimed that fair and honest elections had been held and that policies regarding work sites, cooperatives and the ongoing class struggle had been endorsed by voters. [...] 987. These public statements, which whole-heartedly supported the revolution without a hint of criticism, demonstrate that KHIEU Samphan shared the common purpose and policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials for arrest, execution and disappearance. The statements also demonstrate that while his titles and positions were part of a façade, they did serve an important practical purpose as they were used to endorse CPK policies and to deceive people. Using these positions and titles, KHIEU Samphan made public statements in which he presented himself as a key leader and encouraged the Cambodian people and Khmer Rouge cadres to continue implementing the socialist revolution unhindered by the constraints of transparency or publicity, and by any interference and resistance from the people and international community which might otherwise have resulted. 993. [...] Indeed, as set out below, the Chamber considers that his deliberate and continuous participation in the JCE, knowing of the crimes being committed, indicates his criminal intent. 1021. Finally, the Chamber notes KHIEU Samphan's continuing proximity to senior leaders

	throughout the time period relevant to Case 002/01, and his continuing importance in the Khmer Rouge regime and significant participation in the JCE, in particular his regular attendance at and participation in meetings and plans of the Standing Committee and other organs of the Party Centre. [...]
Other Modes of Responsibility In Case 002/02, KHIEU Samphan has been charged with crimes committed through the following modes: • Planning • Instigating • Aiding and Abetting • Ordering • Superior Responsibility	Other Modes of Responsibility (general judgement findings which go to establishing other modes of responsibility) *Planning* 997. [...] The Chamber recalls that KHIEU Samphan was a candidate member of the Central Committee at the time of these meetings and therefore had the right to attend, even if he had no formal "decision rights". The Chamber is also satisfied that, pursuant to the principle of democratic centralism, he had the right to participate in the debates of this Committee. The Chamber has found that he expressed his opinion at the April 1975 meeting, but it has been unable to conclude that he intervened actively in the June 1974 meeting. However, even if he did not actively intervene, he had the right to do so and by his silence indicated assent. He thereby participated in these meetings and endorsed the resulting plans. 1024. From 25 April 1975, at the latest, KHIEU Samphan met with other senior leaders concerning policies to build and defend a self-reliant, independent and socialist country. The plan was to create a classless society in which all would be organised into cooperatives to rapidly build and defend the country, focusing in particular on rice production and irrigation projects. [...] 1025. In late 1975, KHIEU Samphan, collectively with others, developed a specific economic plan. This plan acknowledged the shortages of food and medicine especially affecting the 'New People'. Nevertheless, the plan was to allocate labour strategically according to the Party's rice production target and infrastructure priorities, expand the cooperatives, and reward the 'Old People' to the detriment of the suspect 'New People'. [...] *Ordering*

	772. [...] Party leaders, including POL Pot, KHIEU Samphan and NUON Chea, led education sessions in Phnom Penh, beginning soon after 17 April 1975 and continuing throughout the DK era. They lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle, establishment of cooperatives, building of dikes and canals, and completion of work and production quotas. 1006. [...] KHIEU Samphan was also a Central Committee member and a candidate member of the Standing Committee. These positions gave him the capacity to influence the decision-making process particularly because decisions were made pursuant to the principle of democratic centralism and because the other CPK leaders, including POL Pot, placed great trust in him. The Chamber is therefore satisfied that the evidence demonstrates that KHIEU Samphan held positions of some authority. Indeed, he was within close proximity to other senior leaders throughout the democratic and socialist revolutions, and made significant contributions to the policies decided and implemented by the Khmer Rouge regime, notably through his regular attendance at and participation in key meetings of the Party Centre where the common purpose and policies, including the decision to evacuate Phnom Penh, were planned. *Instigating* 1014. [...] Furthermore, KHIEU Samphan personally participated in the indoctrination of people on class struggle and knew that such indoctrination would inevitably lead to crimes. [...] 1031. Having participated in the planning of movement of population (phase two), KHIEU Samphan made numerous public speeches prior to and during these forced transfers of the population, praising the Khmer Rouge and supporting the policies to build the economy by collective work in fields. These public speeches prompted Khmer Rouge soldiers and cadres to forcibly move the population during phase two. In April 1975, late 1975 and late 1976, knowing that living conditions

	in the country were dire, KHIEU Samphan, along with the other Party leaders, nevertheless planned forced population movements without providing for the consent, the health or the well-being of those to be transferred. He then endorsed these plans publicly. In December 1975, KHIEU Samphan gave a speech emphasising the collective policy and the requirement that all people work in the fields or in factories, increasing rice production and building irrigation projects. He praised the efforts of the people and army. Likewise, in April 1976, he made a speech claiming falsely that the policies regarding work-sites, cooperatives and the on-going class struggle had been endorsed by voters of the PRA. He also praised the Cambodian people and the RAK for their role in the liberation of Phnom Penh, while knowing the crimes that the first population movement had entailed. These public statements whole-heartedly supported the forced movement of the population without a hint of criticism. KHIEU Samphan also maintained his positions in FUNK/GRUNK lending an imprimatur of legitimacy to the Khmer Rouge without addressing the inevitable suffering associated with the forced transfer of the population to worksites and collectives. *Aiding and abetting* 1008. [...] Finally, after the crimes were committed, KHIEU Samphan praised the Cambodian army and people for their victory, lauded the policies of the Khmer Rouge to conduct socialist revolution through collectivisation, denounced the former regime, and justified the evacuation of Phnom Penh in speeches to the people of Cambodia, statements to the international community and indoctrination sessions with returnees. 1009. This practical assistance, encouragement and moral support had a substantial effect on the commission of crimes during phase one. KHIEU Samphan played an important, if not indispensable, role with the Khmer Rouge due to his reputation and popularity among the people and internationally. Based on his reputation, official positions in GRUNK and DK, and unreserved support of the Khmer Rouge, the Chamber is satisfied that the perpetrators were encouraged by KHIEU Samphan's public statements.

	1011. Finally, the Chamber is satisfied that the perpetrators knew, or at least anticipated before and during the transfer of the population of Phnom Penh, that KHIEU Samphan would provide assistance and endorsement after the fact. Indeed, such an expectation was consistent with the support he provided throughout the democratic revolution, in particular during the final offensive on Phnom Penh and in the initial days after liberation. [...] 1033. The Chamber is satisfied that KHIEU Samphan provided practical assistance, encouragement and moral support to the perpetrators of crimes during movement of population (phase two). In public statements in the months leading up to and during phase two, KHIEU Samphan praised the Khmer Rouge; justified and endorsed their policies to build and defend the country by strategic allocation of labour forces according to production targets, infrastructure priorities and the class struggle; and justified or denied their crimes. He repeated these themes during indoctrination sessions, including of intellectuals returning from abroad. KHIEU Samphan also performed diplomatic duties and liaised with NORODOM Sihanouk, securing support and praising the conduct of the socialist revolution, including the manual labour of all to build and defend the country.