

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**URGENT APPLICATION FOR DISQUALIFICATION  
OF THE TRIAL CHAMBER JUDGES**

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## I. INTRODUCTION

1. Pursuant to Rules 34 of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) submit this application to disqualify the Trial Chamber Judges who presided over the trial of Case 001 and delivered its judgment from all further proceedings in the case of Nuon Chea.<sup>1</sup> For the reasons stated below, the Defence submits that: (i) the application is admissible; (ii) all of the judges should step down and a special chamber should be convened to consider and decide the instant application; and (iii) certain factual findings in the Duch Judgment would lead a reasonable observer, properly informed, to apprehend bias on their part against Nuon Chea. In light of the important legal issues raised herein and the general interest in transparent trial proceedings, this application should be classified as a public one.

## II. RELEVANT FACTS

2. In delivering its Judgment in Case 001 (the ‘Duch Judgment’),<sup>2</sup> the Trial Chamber Judges arrived at a number of conclusions which directly impact Nuon Chea’s alleged culpability—as framed by the terms of the Closing Order in the instant case.<sup>3</sup> In particular, adverse factual findings have been made with regard to: (i) contextual elements of certain crimes charged; (ii) criminal events said to have taken place at Office S-21, one of several so-called ‘crime-bases’ identified in the Closing Order; and (iii) most significantly, Nuon Chea’s alleged personal role and responsibility.

### A. Alleged Contextual Elements

#### 1. Crimes Against Humanity

3. According to the Closing Order, the policies implemented by the authorities of Democratic Kampuchea (‘DK’) between 17 April 1975 and 7 January 1979 amounted to a

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<sup>1</sup> These judges are: Nil Nonn, Ya Sokhan, Thou Mony, Silvia Cartwright, and Jean-Marc Lavergne (collectively, the ‘Trial Chamber Judges’). *N.B.* A similar—though factually distinct—application has been filed recently by counsel for Ieng Thirith. See Document No E-28, ‘Ieng Thirith Defence Application for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne, and Thou Mony’, 1 February 2011, ERN 00641075–00641090 (the ‘Ieng Thirith Disqualification Application’).

<sup>2</sup> See Document No E-188, ‘Judgment’, 26 July 2010, ERN 00572517–00572797.

<sup>3</sup> See Document No D-427, ‘Closing Order’, 16 September 2010, ERN 00604508–00605246; Document No D-427/2/12, ‘Decision on Ieng Thirith’s and Nuon Chea’s Appeals Against the Closing Order’, 13 January 2011, ERN 00634916–00634922 (the ‘Closing Order Decision’).

widespread and systematic attack against the entire civilian population of Cambodia, principally on political grounds but also on national, ethnic, racial, and/or religious ones.<sup>4</sup>

4. In a section entitled *Findings on chapeau requirements for Article 5 of the ECCC Law*, the Duch Judgment contains the following determinations:
  - a. Referring to ‘the broader events in Cambodia, and hence the fate that befell the entire Cambodian Population, between April 1975 and January 1979’,<sup>5</sup> the Trial Chamber described the existence of a nationwide CPK ‘attack’, within the context of which ‘S-21 was created and operated’.<sup>6</sup>
  - b. Agreeing with the OCIJ, the Trial Chamber found that ‘the magnitude and number of the crimes committed at S-21, and their organized and prolonged character ensure that, taken as a whole, they were sufficient to meet the requirements of scale or systematicity [*sic*] for the purposes of crimes against humanity’.<sup>7</sup>
  - c. Noting that the CPK’s ‘attack was directed at the entire Cambodian population and did not differentiate between military and civilian personnel’,<sup>8</sup> the Trial Chamber concluded that the particular crimes committed at S-21 ‘can accordingly be said to have been directed against a civilian population’.<sup>9</sup>
  - d. Finding no evidence enabling it ‘to conclude that there was a common linking factor among those detained [at S-21], other than their perceived opposition to the CPK’,<sup>10</sup> the Trial Chamber found ‘that the attack in question was carried out, at a minimum, on political grounds’.<sup>11</sup>

In short, the Trial Chamber has already determined that the chapeau elements for crimes against humanity—at (the very) least with respect to S-21—are proven.

## ***2. Grave Breaches of the Geneva Conventions of 1949***

5. According to the Closing Order: (i) at all times between April 1975 and at least 7 January 1979, a state of international armed conflict existed between DK and the

<sup>4</sup> Closing Order, paras 1350–1372.

<sup>5</sup> Duch Judgment, para 320.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para 321.

<sup>8</sup> *Ibid.*, para 325.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, para 327.

<sup>11</sup> *Ibid.*

Socialist Republic of Vietnam;<sup>12</sup> (ii) members of Vietnam's armed forces and Vietnamese civilians taken captive by DK forces should be categorized as 'protected persons' under the relevant provisions of the Geneva Conventions;<sup>13</sup> (iii) all of the crimes concerned were closely related to the hostilities between DK and Vietnam, and the existence of the armed conflict played a substantial role in the commission of the crimes by the alleged perpetrators;<sup>14</sup> and (iv) the alleged perpetrators of the crimes were aware at all times of both the existence of the international armed conflict as well as the factual circumstances establishing the protected status of the victims.<sup>15</sup>

6. In a section entitled '*Findings on chapeau requirements for Article 6 of the ECCC Law*', the Duch Judgment contains the following determinations:
  - a. An 'international armed conflict' existed between Cambodia and Vietnam at all times from 17 April 1975 until 6 January 1979.<sup>16</sup>
  - b. Activity at S-21 was 'closely related to the armed conflict between DK and Vietnam';<sup>17</sup> and '[n]o fewer than 345 Vietnamese prisoners of war and civilians were detained at S-21 and constituted protected persons under the Geneva Conventions of 1949'.<sup>18</sup>
  - c. Cambodians 'viewed by the CPK as having allegiances to Vietnam and as a threat to DK' were protected persons under the Geneva Conventions of 1949.<sup>19</sup>

In short, the Trial Chamber has already determined that the chapeau elements for grave breaches—at (the very) least with respect to S-21—are proven.

### **B. Crimes Allegedly Committed at S-21**

7. The Closing Order concludes that Nuon Chea bears responsibility for a number of crimes allegedly committed at the S-21 Security Center. These include: (i) the crimes against humanity of murder,<sup>20</sup> extermination,<sup>21</sup> enslavement,<sup>22</sup> deportation,<sup>23</sup>

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<sup>12</sup> Closing Order, para 1480.

<sup>13</sup> *Ibid.*, para 1481.

<sup>14</sup> *Ibid.*, para 1483.

<sup>15</sup> *Ibid.*, para 1487.

<sup>16</sup> Duch Judgment, para 423.

<sup>17</sup> *Ibid.*, para 424.

<sup>18</sup> *Ibid.*, para 425.

<sup>19</sup> *Ibid.*, para 426.

<sup>20</sup> Closing Order, paras 1373–1380.

imprisonment,<sup>24</sup> torture<sup>25</sup> persecution on political, racial, and religious grounds,<sup>26</sup> and other inhumane acts;<sup>27</sup> as well as (ii) the following grave breaches of the Geneva Conventions of 1949: willful killing,<sup>28</sup> torture,<sup>29</sup> inhumane treatment,<sup>30</sup> willfully causing great suffering or serious injury to body or health,<sup>31</sup> willfully depriving prisoners of war or civilians the right to a fair trial and regular trial,<sup>32</sup> unlawful deportation of civilians,<sup>33</sup> and unlawful confinement of civilians.<sup>34</sup>

8. With respect to crimes against humanity, the Trial Chamber Judges have already determined that the various acts and omissions which took place at S-21 amounted to each of the underlying crimes charged in Case 002 with the exception of deportation.<sup>35</sup> Similarly, the Trial Chamber Judges have already concluded that protected persons at S-21 were subjected to each of the underlying grave breaches charged in Case 002, again with the exception of deportation.<sup>36</sup>

### C. Nuon Chea's Alleged Personal Role and Responsibility

9. Among many other detailed allegations, the Closing Order concludes that Nuon Chea: (i) was the Deputy Secretary of the CPK and a full-rights member of its Central and Standing Committees;<sup>37</sup> (ii) participated in military affairs together with Pol Pot and Son Sen as a member of the CPK Military Committee;<sup>38</sup> and (iii) as the individual in charge

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<sup>21</sup> Closing Order, paras 1381–1390.

<sup>22</sup> *Ibid.*, paras 1391–1396.

<sup>23</sup> *Ibid.*, paras 1397–1401.

<sup>24</sup> *Ibid.*, paras 1402–1407.

<sup>25</sup> *Ibid.*, paras 1408–1414.

<sup>26</sup> *Ibid.*, paras 1415–1425.

<sup>27</sup> *Ibid.*, paras 1434–1441.

<sup>28</sup> *Ibid.*, paras 1491–1497.

<sup>29</sup> *Ibid.*, paras 1498–1500.

<sup>30</sup> *Ibid.*, paras 1501–1503.

<sup>31</sup> *Ibid.*, paras 1504–1506.

<sup>32</sup> *Ibid.*, paras 1507–1514.

<sup>33</sup> *Ibid.*, paras 1515–1517.

<sup>34</sup> *Ibid.*, paras 1518–1520.

<sup>35</sup> Duch Judgment, paras 339–341 (murder and extermination); para 346 (enslavement); para 351 (intentional and arbitrary imprisonment); paras 359–360 (torture); paras 372–373 (other inhumane acts); paras 381–390 (persecution on political grounds).

<sup>36</sup> Duch Judgment, para 437 (wilful killing); para 448 (torture); para 449 (inhumane treatment); para 457 (wilful suffering); paras 462–463 (deprivation of fair-trial rights); para 468–469 (arbitrary/illegal imprisonment).

<sup>37</sup> Closing Order, paras 869, 871.

<sup>38</sup> *Ibid.*, paras 873–875.

of the S-21 Security Center from its establishment until its demise,<sup>39</sup> was the indirect and later direct supervisor of Duch<sup>40</sup> who reported to him on a regular basis.<sup>41</sup>

10. Nuon Chea is personally mentioned several times throughout the Duch Judgment:
  - a. In providing an overview of the CPK structure, the Trial Chamber Judges found that the Central Committee's powers were delegated to and exercised by the Standing Committee, which included Nuon Chea who is identified as the 'Deputy Secretary' of Pol Pot.<sup>42</sup> According to the Trial Chamber, the Standing Committee was 'responsible for monitoring and implementation of CPK policy nationwide'.<sup>43</sup>
  - b. The Trial Chamber Judges describe how Duch—pursuant to the CPK's vertical reporting obligations—'received instructions from his superior, Son Sen and later [(after September 1977)] Nuon Chea'.<sup>44</sup>
  - c. In describing the structure of the Revolutionary Army of Kampuchea, the Trial Chamber found Nuon Chea to have been a member of the Military Committee.<sup>45</sup>

In this regard, the Trial Chamber has already determined that Nuon Chea was: a member of the CPK Standing Committee; the Deputy Secretary of the CPK; one of those responsible for monitoring and implementing CPK policy on a national level; Duch's superior at S-21 from September 1977; and a member of the CPK Military Committee.

11. While Nuon Chea does not dispute that he was nominally the Deputy Secretary of the CPK,<sup>46</sup> he has consistently denied all of the charges laid against him,<sup>47</sup> in particular his membership in the Military Committee and involvement in *any* security-related work.<sup>48</sup>

<sup>39</sup> Closing Order, para 877.

<sup>40</sup> *Ibid*, para 878, 879.

<sup>41</sup> *N.B.* The Closing Order further accuses Nuon Chea of receiving S-21 confessions (paras 963–967), awareness of the practice of serious mistreatment during the interrogation of S-21 prisoners (para 968), and delivery of orders for the execution of prisoners at S-21 (paras 970–974).

<sup>42</sup> Duch Judgment, para 85.

<sup>43</sup> *Ibid*, para 85.

<sup>44</sup> *Ibid*, para 90; *see also ibid*, paras 95, 109, 131, 166, 170.

<sup>45</sup> *Ibid*, para 95.

<sup>46</sup> *See* Document No D-20, 'Written Record of Initial Appearance', 19 September 2007, ERN 00148814–00148818 (the 'Initial Appearance'), p 4 ('I was Deputy Secretary of the Party and President of the Assembly.')

<sup>47</sup> *See* Initial Appearance, p 4 ('I would like to declare that I deny all of these charges on the ground that I joined the Revolution honestly in order to liberate the nation and the people from French colonialism.')

<sup>48</sup> *See* Initial Appearance, p 4 ('So I was not in the Military Committee.');

*see also* Document No C-8, 'Written Record of Adversarial Hearing', 19 September 2007, ERN 00148696–00148700, p 4 ('The Military Committee had the task of national defence [...]. As for me, I was on the legislative side.')

### III. RELEVANT LAW

#### A. Impartiality of the Judiciary

12. Article 128 of the Cambodian Constitution mandates an impartial judiciary: ‘The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of citizens.’ This fundamental concept is reflected in the ECCC Agreement and the Law, which provide that all judges ‘shall be persons of high moral character, *impartiality*, and integrity’.<sup>49</sup> Substantively identical guarantees are contained in the International Covenant on Civil and Political Rights (the ‘ICCPR’),<sup>50</sup> the European Convention on Human Rights (the ‘ECHR’),<sup>51</sup> the American Convention on Human Rights,<sup>52</sup> the African Charter on Human and Peoples’ Rights,<sup>53</sup> as well as the statutes of the ICC,<sup>54</sup> ICTY,<sup>55</sup> and ICTR.<sup>56</sup> Indeed, the UN Human Rights Committee has stated that the guarantee of impartiality ‘is an *absolute right that may suffer no exceptions*’.<sup>57</sup> As consistently held by the European Court of Human Rights (the ‘ECtHR’): ‘What is at stake is the confidence which the courts in a democratic society must inspire in the public’.<sup>58</sup>

#### B. Disqualification of Judges

13. Rule 34 provides, in pertinent part:

<sup>49</sup> ECCC Agreement, Article 3(3) (emphasis added); *see also* ECCC Law, Article 10 new (‘The judges of the Extraordinary Chambers [...] shall have high moral character, a spirit of impartiality and integrity [...].’).

<sup>50</sup> Article 14(1) (‘Everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.’)

<sup>51</sup> Article 6(1) (‘[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’)

<sup>52</sup> Article 8(1) (‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.’)

<sup>53</sup> Article 7(1) (‘Every individual shall have the right to have his cause heard. This comprises: [...] (d) the right to be tried within a reasonable time by an impartial court or tribunal.’) *See, e.g., Constitutional Rights Project v Nigeria*, African Commission on Human and People’s Rights, Case No 87/93 (1995), Judgment, para 14 (‘Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1(d).’)

<sup>54</sup> Article 67(1) (chapeau) (‘In the determination of any charge, the accused shall be entitled [...] to a fair hearing conducted impartially [...].’)

<sup>55</sup> Article 13 (‘The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.’)

<sup>56</sup> Article 12(1) (‘The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.’)

<sup>57</sup> *Gonzalez del Rio v Peru*, Communication No 263/1987, UN Doc CCPR/C/46/D/263/1987, 28 October 1992 (emphasis added).

<sup>58</sup> *Ferrantelli and Santangelo v Italy*, ECtHR App Nos 48/1995 & 554/640, ‘Judgment’, 7 August 1996 (the ‘Ferrantelli Judgment’), para 58.

Any party may file an application for disqualification of a judge in any case [...] concerning which the Judge has, or has had, any association which *objectively* might affect his or her impartiality, or *objectively* give rise to the appearance of bias.<sup>59</sup>

The applicant ‘shall clearly indicate the grounds and shall provide supporting evidence’,<sup>60</sup> and the ‘application shall be filed as soon as the party becomes aware of the grounds in question’.<sup>61</sup> An application ‘against a Trial Chamber judge, concerning matters arising before the trial’ must be submitted ‘at the initial hearing’.<sup>62</sup> In such case, the application is properly submitted to the Trial Chamber itself.<sup>63</sup> Once the application is filed, the ‘judge in question may continue to participate in the judicial proceedings pending a decision. However, he [...] may decide to step down voluntarily at any point in the following proceedings’.<sup>64</sup> Should the impugned judge choose to do so, he ‘shall be replaced in the Chamber by a reserve judge for the purposes of the application only’.<sup>65</sup> In the case of a multiple-disqualification application where ‘it is impossible to convene a Chamber to hear the applications, the Judicial Administration Committee shall choose additional judges from amongst the ECCC judges’.<sup>66</sup>

14. In applying Rule 34 at the investigative stage of these proceedings, the PTC adopted the test initially formulated by the ICTY Appeals Chamber in the case of Anto Furundžija.<sup>67</sup> According to that PTC/*Furundžija* standard, a judge will be considered to lack independence and impartiality (and therefore be subject to disqualification) if either ‘it is shown that actual bias exists’ (the ‘Subjective Test’) or there is an unacceptable ‘appearance of bias’ (the ‘Objective Test’).<sup>68</sup>

<sup>59</sup> Rule 34(2) (emphasis added).

<sup>60</sup> Rule 34(3).

<sup>61</sup> *Ibid.*

<sup>62</sup> Rule 34(4)(c).

<sup>63</sup> See Rule 34(5) (‘An application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber. In any other case it shall be submitted to the Chamber in which the judge in question is sitting. [...]’).

<sup>64</sup> Rule 34(5).

<sup>65</sup> Rule 34(6).

<sup>66</sup> *Ibid.*

<sup>67</sup> See Document No C-11/29, ‘Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea’, 4 February 2008 (the ‘Ney Thol Decision’), ERN 00160734–00160742 (citing *Prosecutor v Furundžija*, IT-95-17/1-A, ‘Judgment’, 21 July 2000 (the ‘Furundžija Judgment’)).

<sup>68</sup> Ney Thol Decision, para 20 (citing Furundžija Judgment, para 189). This approach comports with that of the UN Human Rights Committee, which—in its interpretation of Article 14 of the ICCPR—has underlined the importance of avoiding not only actual bias but also the appearance of bias: ‘the tribunal must also appear to a reasonable observer to be impartial’. Human Rights Committee, General Comment no 32 [90], 24 July 2007, para 21. The Committee employs the following test in making such determination: ‘the standpoint of those claiming that there is reason to doubt [a judge’s] impartiality is significant but not decisive. What is decisive is whether the fear can be *objectively justified*.’ Human Rights Committee, *Maria*



15. The Objective Test is met where ‘[t]he circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias’.<sup>69</sup> A reasonable observer ‘must be “an informed person, with knowledge of all of 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”’.<sup>70</sup> In other words, as set out by a special chamber of the ICTY: ‘The Chamber must determine whether the perception of the hypothetical fair-minded observer, with sufficient knowledge of the circumstances to make a reasonable judgment, would be that [the impugned Judge/s] might not bring an impartial and unprejudiced mind to the issues arising in the case.’<sup>71</sup>
16. Similarly, the ECtHR has consistently applied the following objective test<sup>72</sup>: an unacceptable appearance of bias exists ‘if the earlier judgments contain findings that actually prejudge the question of guilt of an accused in such subsequent proceedings’.<sup>73</sup> Something more than a ‘passing’ mention of the accused is required.<sup>74</sup> On the particular issue of adverse judicial findings in previous proceedings with respect to an accused presently facing trial before the same judge/s, the cases of *Ferrantelli and Santangelo*<sup>75</sup> and *Rojas-Morales*<sup>76</sup> are instructive. In both cases, the fact that the judge/s who had presided over previous cases of co-perpetrators had, in so doing, expressed their opinions as to the guilt of the applicants led to violations of Article 6(1) of the ECHR.

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*Cristina Lagunas Castedo v Spain*, Communication No 1122/2002, views of 20 October 2008, para 9.7 (emphasis added).

<sup>69</sup> Ney Thol Decision, para 20 (citing Furundžija Judgment, para 189).

<sup>70</sup> *Ibid.*, para 21 (citing Furundžija Judgment, para 190).

<sup>71</sup> *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)’, 22 July 2009 (the ‘Karadžić Decision’), para 18 (internal citations omitted).

<sup>72</sup> *See Poppe v The Netherlands*, ECtHR App No 32271/04, ‘Judgment’, 24 March 2009 (the ‘Poppe Judgment’), para 25 (‘As regards impartiality from an objective standpoint, it must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. [...] This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the perception of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.’)

<sup>73</sup> *Poppe Judgment*, para 26.

<sup>74</sup> *See Poppe Judgment*, para 28 (where the court found that applicant had been ‘mentioned in passing, merely to illustrate and clarify the leading role played in the criminal organisation by the persons [previously] convicted’). *N.B.* The court ultimately held that there had been no violation of Article 6. *Ibid.*, para 30.

<sup>75</sup> *See Ferrantelli Judgment*, paras 34, 54–60 (where the president of the court which convicted the applicants had already expressed his firm view that they were guilty in another trial concerning a co-perpetrator of the same offence).

<sup>76</sup> *See Rojas-Morales v Italy*, ECtHR, App No 39676/98, ‘Judgment’, 16 November 2000 (the ‘Rojas-Morales Judgment’), paras 34–35 (where two judges who determined the merits of the charges against the applicant had participated in the previous judgment against a co-accused which contained numerous references to the applicant and his role within the criminal organization of which he was suspected to be a part).

In other words, the applicants' claims that the judges lacked the requisite degree of impartiality were objectively justified.

17. The party seeking disqualification bears the burden of adducing sufficient evidence that the judge in question is not subjectively or objectively (as the case may be) impartial.<sup>77</sup>

### **C. Substantive Law**

#### ***1. Crimes Against Humanity***

18. According to the jurisprudence of this Chamber: 'Offences listed in Article 5 of the ECCC Law can constitute crimes against humanity only if the following *chapeau* prerequisites are established to the required standard: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) it must be directed against any civilian population; (iv) it must be on national, political, ethnical, racial, or religious grounds; (v) there must be a nexus between the acts of the accused and the attack; and (vi) the accused must have the requisite knowledge.'<sup>78</sup>

#### ***2. Grave Breaches***

19. As to those offences listed in Article 6 of the ECCC Law, 'an accused may be found responsible for grave breaches only when these are perpetrated against persons or property regarded as "protected" by the Geneva Conventions and within the context of an international armed conflict.'<sup>79</sup> Moreover, the following *chapeau* prerequisites 'must be established to the required standard: (i) the existence of an armed conflict; (ii) the international character of the armed conflict; (iii) a nexus between the acts of the accused and the armed conflict; (iv) the "protected persons" status of the victims under the Geneva Conventions; and (v) the knowledge of the accused'.<sup>80</sup>

#### ***3. Commission of Crimes by Way of a Joint Criminal Enterprise***

20. According to the jurisprudence of this Chamber, the general *actus reas* 'elements shared by all three [...] categories of joint criminal enterprise [( 'JCE' )]'<sup>81</sup> are as follows: (i) a plurality of persons; (ii) the existence of a common purpose that amounts to or involves

<sup>77</sup> Furundžija Judgment, para 196.

<sup>78</sup> Duch Judgment, para 297.

<sup>79</sup> *Ibid.*, para 409.

<sup>80</sup> *Ibid.*, para 410.

<sup>81</sup> *N.B.* Discussion of the peculiarities of the three categories of JCE is beyond the scope of this application.

the commission of a crime over which the tribunal has jurisdiction; and (iii) the significant participation of the accused in the common criminal purpose.<sup>82</sup>

#### ***4. Ordering Crimes***

21. ‘Ordering requires that a person in a position of authority instructs another person to commit a crime. No formal superior-subordinate relationship between the two persons is required. The person giving the order need only possess the authority, be it in law or in fact, to order the commission of the crime. Liability for ordering a crime may ensue where an accused issues, passes down, or otherwise transmits the order, including through intermediaries.’<sup>83</sup>

#### ***5. Superior/Command Responsibility for Crimes***

22. ‘For an accused to be held responsible for the criminal conduct of his or her subordinates pursuant to superior responsibility, three elements must be fulfilled: (a) there must have been a superior-subordinate relationship between the accused and the person who committed the crime; (b) the accused must have known, or had reason to know, that the crime was about to be or had been committed; and (c) the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator.’<sup>84</sup> ‘Formal designation as a commander or a superior is not required in order to trigger superior responsibility: such responsibility can arise by virtue of a superior’s power, whether in law or in fact, over those who committed the crime.’<sup>85</sup> ‘Factors that would demonstrate that an accused exercised effective control over a subordinate include [*inter alia*]: the nature of the accused’s position, including his or her position within the military or political structure [...].’<sup>86</sup> Further, ‘superior responsibility may ensue on the basis of both direct and indirect relationships of subordination’.<sup>87</sup>

### **IV. ARGUMENT**

#### **A. The Application is Timely and Admissible**

23. As required by Rule 34(3), the instant application clearly indicates the grounds for disqualification and provides supporting evidence. The Defence became ‘aware of the

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<sup>82</sup> Duch Judgment, para 508.

<sup>83</sup> Duch Judgment, para 527.

<sup>84</sup> *Ibid.*, para 538.

<sup>85</sup> *Ibid.*, para 540.

<sup>86</sup> *Ibid.*, para 541.

<sup>87</sup> *Ibid.*, para 542.

grounds in question'<sup>88</sup> shortly after the filing of the Closing Order when it had the opportunity to compare the particular charges set out therein with the findings contained in the Duch Judgment. As this Chamber was not seized of the case file until 14 January 2011, the instant application could not have been previously filed. While Rule 34(4)(c) suggests that a request such as this one should be submitted 'at the initial hearing',<sup>89</sup> the Defence does not wish to risk running afoul of the strict terms of Rule 34(3). Moreover, given the significance of the relief requested herein, the application should be dealt with as soon as possible.<sup>90</sup> However, should the Chamber determine that the initial hearing is indeed the proper time to raise the issue, the Defence would be prepared to make further oral submissions at that stage.

**B. All of The Trial Chamber Judges Should Step Down and a Special Chamber Should Be Convened to Hear the Application**

24. As the instant application concerns the entire composition of Trial Chamber, the Defence submits that: (i) all of the judges should 'decide to step down voluntarily',<sup>91</sup> and (ii) the Judicial Administration Committee (the 'JAC') should convene a special chamber composed of 'additional judges from amongst the ECCC judges'<sup>92</sup> to consider and decide the instant application.
25. In making its determination, the JAC should not be unduly influenced by any practical consequences which may flow from an adverse decision—in particular, the fact that the ECCC is organized and financed in such a fashion that only one trial chamber exists. The unavailability of additional judges—or, more generally, the lack of judicial resources—is in no way an acceptable justification for the violation of Nuon Chea's absolute right to be tried by impartial judges. As the ECtHR, has held: 'Contracting States are under the obligation to organize their legal systems so as to ensure compliance with the requirements of Article 6(1) [of the ECHR], impartiality being unquestionably one of the foremost of those requirements'.<sup>93</sup> Echoing this finding, the Defence submits

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<sup>88</sup> Rule 34(3).

<sup>89</sup> Rule 34(4)(c).

<sup>90</sup> See Document No E-5/3, Public 'Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests', 28 January 2011, ERN 00640427–00640435, para 2 (where the Trial Chamber, noting the 'contrast' between Rules 34(3) and 34(4)(c), 'the parties' obligations of due diligence', and 'the interests of effective trial management', accepted the Ieng Sary application as timely 'prior to the initial hearing').

<sup>91</sup> Rule 34(5).

<sup>92</sup> Rule 34(6).

<sup>93</sup> Poppe Judgment, para 23.

that the current organizational and/or financial structure of the ECCC cannot be taken into consideration when deciding the instant application.

**C. The Factual Findings in the Duch Judgment Would Lead a Reasonable Observer, Properly Informed, to Conclude That The Trial Chamber Judges are Biased Against Nuon Chea**

*1. Preliminary Observations*

26. The crux of this application is simple: the Trial Chamber Judges' factual findings in the Duch Judgment (as outlined above and taken in conjunction) 'objectively give rise to the appearance of bias'<sup>94</sup> against Nuon Chea. It must be stressed at the outset that the Defence is not claiming the existence of any *subjective* (actual) bias on the part of any of the Trial Chamber Judges. Rather, on an *objective* analysis, their previous factual determinations in Case 001 'would lead a reasonable observer, properly informed, to reasonably apprehend'<sup>95</sup> a lack of impartiality on their part. In this case, the reasonable observer is an informed individual with knowledge of the Duch Judgment and the Closing Order, as well as the various duties of the Trial Chamber Judges in Case 002.<sup>96</sup>
27. The notion of culpability in an international criminal trial is comprised of personal, as well as contextual, aspects. Specifically, in order to establish the commission of international crimes (such as crimes against humanity and grave breaches) against alleged senior perpetrators, three categories of evidence are generally required: (i) the broad contextual, or *chapeaux*, elements which form the threshold of international criminal liability; (ii) the existence of actual prohibited activity on the ground, at the so-called 'crime bases'; and (iii) most importantly, evidence somehow linking the accused to such violations. This formulation is especially apposite in the instant case, where Nuon Chea has not been accused of the *direct physical* commission of any crimes.<sup>97</sup>
28. As discussed in greater detail below, the Trial Chamber Judges have already—to a significant extent—established all three categories of evidence with regard to Nuon

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<sup>94</sup> Rule 34(2).

<sup>95</sup> Furundžija Judgment, para 189.

<sup>96</sup> See Ney Thol Decision, para 21 (quoting Furundžija Judgment, para 190) (noting that the reasonable observer is one aware of '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'.)

<sup>97</sup> *N.B.* According to the Closing Order, Nuon Chea is responsible for various international crimes by way of: (i) participation in a JCE (para 1532); (ii) planning (para 1545); (iii) instigating (para 1548); (iv) aiding and abetting (para 1551); (v) ordering (para 1554); and (vi) failing to prevent or punish the crimes of subordinates (paras 1559–1560). Nowhere in the Closing Order is it suggested that Nuon Chea *personally and physically* committed any crimes.

Chea's alleged culpability at the S-21 crime base. More than mere 'passing' references,<sup>98</sup> these various factual findings (taken in conjunction) appear to 'actually prejudice the question of [Nuon Chea's] guilt' in Case 002. Like the applicants in *Ferrantelli* and *Rojas-Morales*, Nuon Chea's fear of an unacceptable appearance of bias is objectively justified.<sup>99</sup>

***2. The Trial Chamber Judges Have Already Conclusively Determined That Crimes Against Humanity and Grave Breaches Occurred at S-21***

29. Nuon Chea's ultimate responsibility for crimes against humanity and grave breaches at S-21 can only be established if all chapeaux elements are proven to the required standard.<sup>100</sup> As noted above, the Trial Chamber Judges have already determined that these elements are established beyond a reasonable doubt.<sup>101</sup> Nuon Chea will not, therefore, be able to argue at trial that such factual findings are erroneous. In a similar vein, the Trial Chamber Judges have already established, beyond a reasonable doubt, that *particular* crimes against humanity and grave breaches were in fact committed at S-21.<sup>102</sup> Again, such questions will not be subject to debate in Case 002 as the Trial Chamber has already laid them to rest. In short, what should be a 'live issue'<sup>103</sup>—the essential question of S-21 *qua* international-crime base—is now a foregone conclusion. All that remains for the OCP is to link Nuon Chea to this 'system of ill-treatment'.<sup>104</sup> Unfortunately for the Defence, the Trial Chamber Judges have already done the job.

***3. The Trial Chamber Judges Have Already Linked Nuon Chea to the S-21 Crime Base***

30. The Trial Chamber Judges have reached conclusions on, and otherwise made reference to, Nuon Chea's alleged personal role and responsibility during the DK period.<sup>105</sup> In particular, these findings are relevant to his alleged culpability at S-21 for: (i) the commission of crimes by way participation in a joint criminal enterprise (significant

<sup>98</sup> See Poppe Judgment, para 28.

<sup>99</sup> See para 16, *supra*.

<sup>100</sup> See paras 18–19, *supra*.

<sup>101</sup> See paras 3–6, *supra*.

<sup>102</sup> See paras 7–8, *supra*.

<sup>103</sup> See Ieng Thirith Disqualification Application, para 24.

<sup>104</sup> See Duch Judgment, para 514 ('[Duch] acted [...] to operate the S-21 complex, a facility dedicated to the unlawful detention, interrogation and execution of perceived enemies of the CPK, both domestic and foreign. A concerted system of ill-treatment and torture was purposefully implemented in order to subjugate detainees and obtain their confessions during interrogations [...].')

<sup>105</sup> See para 10, *supra*.

participation in the common criminal purpose);<sup>106</sup> (ii) ordering crimes (position of authority over one to whom criminal instructions have been given);<sup>107</sup> and (iii) failing to prevent and/or punish the commission of crimes pursuant to the doctrine of superior/command responsibility (superior-subordinate relationship between the accused person and the individual/s who physically carried out the crime/s).<sup>108</sup>

31. Notably, the Duch Judgment recognizes that Nuon Chea held various positions of authority within the CPK; namely, that he was: Deputy Secretary of the Party; a member of its Central and Standing Committees; a member of its Military Committee; the individual in charge of Office S-21; and, as such, the indirect (and later direct) superior of Duch.<sup>109</sup> Additionally, given his (now apparently established) position as a member of the Central and Standing Committees, Nuon Chea has been deemed by the Trial Chamber to be one of those responsible for monitoring and implementing CPK policy on a national level.<sup>110</sup>
32. As Duch has already been convicted for a variety of crimes in connection with his role as chairman of S-21, the Trial Chamber Judges' factual findings on Nuon Chea's position of responsibility as Duch's superior and co-participant are extremely problematic. Given that this Chamber has already 'made extensive findings regarding the criminal nature of the S-21 system supervised by [Duch], which clearly resonate with the systemic form of joint criminal enterprise',<sup>111</sup> the Trial Chamber Judges' additional findings regarding Nuon Chea's alleged 'participation' therein could be seen by the reasonable observer as 'significant' and therefore indicative of his guilt by way of JCE liability.<sup>112</sup> Moreover, if it is already taken for granted—as it would appear to a reasonable observer—that Duch received instructions from Nuon Chea within this criminal context, the Accused's liability for ordering crimes is similarly impacted.<sup>113</sup> Finally, if Duch, '[a]s Deputy and then Chairman and Secretary of S-21, [...] was deeply enmeshed in this criminal system, and contributed substantially to its implementation and development',<sup>114</sup> then Nuon Chea, by extension as Duch's (now apparently established) superior, should have prevented such

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<sup>106</sup> See para 20, *supra*.

<sup>107</sup> See para 21, *supra*.

<sup>108</sup> See para 22, *supra*.

<sup>109</sup> See para 10, *supra*.

<sup>110</sup> *Ibid*.

<sup>111</sup> Duch Judgment, para 514.

<sup>112</sup> See para 20, *supra*.

<sup>113</sup> See para 21, *supra*.

<sup>114</sup> Duch Judgment, para 514.

crimes or punished Duch for their commission had Nuon Chea been aware of Duch's activity<sup>115</sup>—as the Trial Chamber Judges suggest he was.<sup>116</sup>

33. In sum, the foregoing amounts to sufficient evidence that the Trial Chamber Judges *appear* to have prejudged Nuon Chea's guilt with respect to S-21 and, therefore, cannot *objectively* be considered impartial arbiters of justice in Case 002. Any presumption of impartiality that attaches to them by virtue of their positions has been overcome by their particular factual findings in the Duch Judgment. Accordingly, the Objective Test has been met and the Trial Chamber Judges should be disqualified.

## VI. CONCLUSION

34. For the reasons stated above, the Defence requests the Trial Chamber Judges to:
- a. admit the application;
  - b. step down voluntarily pursuant to Rule 34(5) and request the JAC to convene a special panel to determine the application; or (in the alternative)
  - c. order the immediate and permanent disqualification of the Trial Chamber Judges from any further proceedings against Nuon Chea in Case 002.

Given the nature of the instant application, the Defence requests the Chamber to treat it as a matter of urgency.

CO-LAWYERS FOR NUON CHEA



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<sup>115</sup> See para 22, *supra*.

<sup>116</sup> See para 10, *supra*.