BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENG SARY'S REQUEST FOR INVESTIGATION CONCERNING *EX PARTE* COMMUNICATIONS BETWEEN THE INTERNATIONAL CO-PROSECUTOR, JUDGE CARTWRIGHT AND OTHERS

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Judge NIL Nonn
Judge YOU Ottara
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge THOU Mony
Reserve Judge Claudia FENZ

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

All Civil Parties

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rules 35, 41 and 93 of the ECCC Internal Rules ("Rules"), this Request for investigation concerning *ex parte* communications between the International Co-Prosecutor, Mr. Andrew Cayley, Judge Cartwright and others. This Request is made necessary so that full disclosure is made of all *ex parte* communications between Mr. Cayley and Judge Cartwright, specifically including: **a.** a list of all meetings where Mr. Cayley and Judge Cartwright participated in *ex parte* communications, regardless of whether such meetings were also attended by others,[1] where the discussions touched upon Case 002 either directly or indirectly; and **b.** all relevant facts and details concerning these *ex parte* meetings,[2] including but not limited to their agenda and/or minutes (even if only informal and/or hand-written notes were taken) (together, the "Requested Information"). *Ex parte* communications between a judge and a prosecutor sitting on the same case violate applicable rules of professional conduct and may give rise to an objective appearance of bias. As this conduct may also have interfered with the administration of justice, the Defence requests the Trial Chamber to exercise its powers to investigate by: **a.** *summoning* Mr. Cayley to provide the Requested Information; and **b.** *encouraging* Judge Cartwright to make a statement providing the Requested Information,[3] notwithstanding that this Request is not an application for disqualification.[4] The Defence requests a public, oral hearing, or in the alternative leave to reply to any submissions made in response to this Request. As a matter of best practice, Judge Cartwright should: **a.** recuse herself from deciding this Request; and **b.** not participate in any pending matters or conduct any activities in preparation for Case 002 until this Request has been determined, so that any such matters will not be tainted if she is later disqualified. This Request is made in good faith and is not intended to delay or obstruct the proceedings. Since there is a reserve judge, and to the best knowledge of the Defence, the Deputy International Co-Prosecutor is not linked with any *ex parte* communications, any

[1] For example, with UN personnel or members of the diplomatic community representing donor States.
[2] Such as, for example, how the current crises and negative media coverage concerning Case 003 and 004 impact on Case 002.
[3] As is provided for, by way of analogy, by Rule 34(7).
[4] *See* Response to IENG Sary's Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge the Independence of Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, 1 November 2009, 3, para. 2, where Judges Downing and Lahuis filed written submissions responding to an application made for "appropriate measures," rather than disqualification *per se*. *See also Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] 2 WLR 870 at 477-78: "When applying the test of real danger or real possibility (as opposed to the test of automatic disqualification …) it will very often be appropriate to inquire whether the judge knew of the matter relied on as appearing to undermine his impartiality…. While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at face value…. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge."

recusal, disqualification, resignation, or disciplinary action resulting from these *ex parte* meetings will not delay the commencement of the trial in Case 002.

I. THE TRIAL CHAMBER'S AUTHORITY TO INVESTIGATE

1. Rule 35(2) authorizes the Trial Chamber to conduct further investigations when it has "reason to believe" that there are sufficient grounds for instigating proceedings against a person who has knowingly and willfully interfered with the administration of justice. The reason-to-believe standard has been held to be "an extremely low threshold."[5]
2. Rule 41(1) codifies the Trial Chamber's authority to summon any person to appear before it. Rule 41 may operate in conjunction with Rules 35 and 93, permitting the Trial Chamber to interview witnesses and seize evidence in additional investigations.

II. BACKGROUND

3. On 27 October 2011, Michiel Pestman, International Co-Lawyer for Mr. NUON Chea, emailed Knut Rosandhaug, Deputy Director of Administration, to inform him that he had been told that Judge Cartwright, Mr. Cayley and Mr. Rosandhaug himself were "meeting on a regular basis in your office to talk about Court related issues." Mr. Pestman requested to know whether this information was correct and, if so, what the purpose of such meetings, which excluded representatives of the other parties, would be.[6] Having received no reply, Michael G. Karnavas, International Co-Lawyer for Mr. IENG Sary (who had been copied to Mr. Pestman's email), followed up with Mr. Cayley.[7]
4. On 1 November 2011, Mr. Rosandhaug responded to Mr. Pestman acknowledging that *ex parte* communications between Judge Cartwright, Mr. Cayley and himself had been ongoing since April 2010.[8]

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[5] Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, D314/1/12, para. 37. The Pre-Trial Chamber has also stated that: "Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and the trial stages. Integrity of the process is guaranteed through the judicious application of this Rule when … a Chamber consider[s] actions taken by an individual threaten the administration of justice." *Id.*, para. 38.

[6] Email from Mr. Pestman to Mr. Rosandhaug, 27 October 2011.

[7] *See, e.g.*, Email from Mr. Karnavas to Mr. Cayley, 30 October 2011: "Hi Andrew! First, congratulations on being short-listed [for the post of Prosecutor at the International Criminal Court.] I truly hope you get the post. Second, as you can see from all that is going around these days re the ECCC, it may be good for you to respond to this message to Knut. The sooner the better! Cheers, Michael."

[8] Email from Mr. Rosandhaug to Mr. Pestman, 1 November 2011. Mr. Rosandhaug explained that the suggestion of regular meetings between Judge Cartwright, Mr. Cayley and Mr. Rosandhaug was made by the Ms. Patricia O'Brien, Under-Secretary General for Legal Affairs and UN Legal Counsel, during her visit to the ECCC in April 2010. According to Mr. Rosandhaug, the "aim was to add focus to communication between the UN component of the ECCC and UN Headquarters," while "keeping their Cambodian counterparts closely informed." He added that such meetings "replicate, in an informal way, the coordination committees that are standard in the other UN and UN-assisted tribunals." They "concern administrative and organisational matters and do not deal in any way with the substance of the cases before the ECCC." *Id.*

5. On 2 November 2011, Mr. Ang Udom and Mr. Karnavas, Co-Lawyers for Mr. IENG Sary, replied by letter to Mr. Rosandhaug. They observed that:

> [A] cloud of an appearance of impropriety will generally hang over the proceedings whenever a prosecutor and judge in Case 002 are meeting to discuss even administrative matters touching on the ECCC in general…. [I]n light of the *sui generis* nature of this particular national court which is being assisted by the UN, comparisons between what may occur at the [International Criminal Tribunal for the former Yugoslavia ("ICTY")] and what is being done here are inapposite. If the intention is for the UN component of the ECCC to have better coordination with UN headquarters, then why exclude representatives of the Defence and Civil Parties, particularly when you have the International Co-Prosecutor (who is also directly participating in the proceedings in Case 002) and a member of the Trial Chamber (who is sitting on the proceedings in Case 002 – as opposed to the Prosecutor and the President of the Tribunal, such as at the ICTY) meeting and discussing issues which impact the general administration of justice at the ECCC… [S]uch meetings could very well impact on the ongoing case in which both the prosecutor and the trial judge are participating… [W]e find disquieting any contact between members of the OCP and members of the Trial Chamber that would in any way give rise to suspicions of ongoing ex parte communications, [and] subscribe to the wise observations of Lord Hewart C.J. in *R v. Sussex Justices, Ex parte McCarthy*: 'Justice must not only be done, but should manifestly and undoubtedly be seen to be done.'… [W]e see no reason why minutes of the meetings which have taken place thus far should not be shared with DSS, the Defence teams and Civil Parties.[9]

6. On 3 November 2011, Mr. Pestman emailed Judge Cartwright informing her that the NUON Chea Defence "look[s] forward to receiving the minutes of these meetings, which will allow us to determine whether any issue has been discussed which, in our view, may effect [sic] the substantive rights of our client." Mr. Pestman noted that the NUON Chea Defence had "seen information suggesting other meetings have taken place between [Judge Cartwright] and the [international] co-prosecutor, without the UN Administrator [Mr. Rosandhaug]." Mr. Pestman sought confirmation of whether this information was correct, and if so, "precisely what issues were discussed at these meetings?"[10]
7. On 4 November 2011, Mr. Cayley emailed Mr. Pestman requesting to be provided with "the basis for the very serious allegation you made against me." Mr. Cayley claimed that he was "surprised" by Mr. Ang Udom's and Mr. Karnavas's letter dated 2 November, asserting that "there is mendacity taking place and I will not tolerate it." Mr. Cayley added that he would not accept "speculative allegations" made for the purposes of what he described as "defence tactics." Mr. Cayley concluded his email by requesting Mr. Pestman to "provide to me the address of the Dutch Bar Association. I want to see your

[9] Letter from IENG Sary Defence to Mr. Rosandhaug, 2 November 2011.
[10] Email from Mr. Pestman to Judge Cartwright, 3 November 2011 (emphasis added).

rules on professional conduct."[11] Mr. Pestman replied to Mr. Cayley the same day accommodating his request.[12]

8. Also on 4 November 2011, the NUON Chea Defence wrote to Presiding Judge Nil Nonn:

> In light of the rapidly approaching opening statements in Case 002, we hereby urgently request the Trial Chamber to disclose: (i) a comprehensive list of all meetings that have taken place between Judge Cartwright and any members of the Office of the Co-Prosecutors and/or Mr Rosandhaug; and (ii) the agenda and/or minutes of any such meeting.[13]

9. On 7 November 2011, Mr. Rosandhaug responded to Mr. Ang Udom's and Mr. Karnavas's letter dated 2 November 2011. He noted that as the meetings between him, Mr. Cayley and Judge Cartwright "are of an informal, ad hoc nature and are held to discuss administrative and operational matters only," no minutes are taken. The Defence's request to participate in the meetings was refused.[14]

10. On 7 November 2011, *The Cambodia Daily* reported on the issue. Mr. Cayley was quoted:

> [I]n answer to these representations by the Nuon Chea and Ieng Sary teams: Administrative management meetings such as these take place in the ICC, ICTY, and ICTR. They are normal. If they did not take place, these institutions, including the ECCC, would be paralyzed.
>
> In answer to the Karnavas [and Ang Udom] letter [dated 2 November 2011], which suggests that the President and Prosecutor of the ICTY are not involved in casework: this is a total misrepresentation of the truth.... The President and Vice President of the ICTY are judges directly involved in cases (and if Karnavas disputes this I can provide examples to him from 1995 onwards). Unlike Mr. Karnavas I worked in the Office of the Prosecutor of the ICTY for 10 years. I know.[15]

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[11] Email from Mr. Cayley to Mr. Pestman, 4 November 2011.

[12] Email from Mr. Pestman to Mr. Cayley, 4 November 2011:

> Dear Andrew, If you want to file a complaint against me I suggest you contact the Amsterdam Bar. They have a decent website in English explaining what to do and to whom to address your complaint: 'INFORMATION REGARDING THE COMPLAINT PROCEDURE AGAINST LAWYERS': http://www.advocatenorde amsterdam.nl/item.html&objID=4696. The Dean of the Amsterdam Bar is Mr. G.J. Kemper; I will copy this e-mail to him so that he knows your complaint is on its way. As you probably know, I am also a member of the Phnom Penh Bar. They have very interesting Code of Conduct. I am sure you will find this helpful as well. The President of the PP Bar is Mr. Chiv Song Hak. He speaks English very well and can be reached on his mobile: [telephone number]. I have a meeting with him tomorrow morning at 10. If there is anything you would like me to convey to him, please let me know before then. Michiel.

[13] Letter from Mr. Pestman, Victor Koppe, Andrew Ianuzzi, and Jasper Pauw to Judge Nil Nonn, re 'Request for information related to ex-parte meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug', 4 November 2011, E137.

[14] Letter from Mr. Rosandhaug to Mr. Ang Udom and Mr. Karnavas, 7 November 2011.

[15] Julia Wallace, *KRT Defense Alleges Ex Parte Meetings*, CAMBODIA DAILY, 7 November 2011, p. 2.

11. On 8 November 2011, *The Cambodia Daily* published a letter to the editor from Mr. Karnavas and Mr. Ang Udom responding to Mr. Cayley's remarks the previous day:

> In Michael G. Karnavas' ten years' experience as Defence counsel at the [ICTY], he is unaware of any instance where a prosecutor in a case holds regular meetings with the registrar and one of the judges sitting in the same case. Mr. Cayley is directly involved in Case 002, as is Judge Cartwright. At present, the ECCC Trial Chamber – where Judge Cartwright sits – is only dealing with Case 002…. We have an ethical obligation to look diligently into the matter of ex-parte communications once raised. Mr. Cayley should know this.[16]

12. On 15 November 2011, the NUON Chea Defence filed a Request for Information Regarding *Ex-Parte* Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration.[17] To date, neither Judge Cartwright nor Mr. Cayley have been forthcoming with further information.

III. APPLICABLE LAW

A. *Ex parte* communications

13. Article 9 of the Cambodian Code of Ethics for Judges ("Cambodian Code of Ethics") states, in relevant part: "According to the [adversarial][18] principle, judges shall not communicate with any party during the case proceeding in the absence of another party except where the law permits or with consent of another party." Paragraph 50 of New Zealand's Guidelines for Judicial Conduct states: "Care should be taken to avoid direct social contact with practitioners who are engaged in current cases before the judge."

14. The 1985 United Nations Basic Principles on the Independence of the Judiciary ("Basic Principles") does not contain a provision which expressly prohibits *ex parte* communication. Principle 4, however, states in part that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process" and Principle 6 states that "[t]he principle of the independence of the judiciary entitles and requires the

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[16] Ang Udom & Michael G. Karnavas, *Andrew Cayley's Remarks 'Defensive and Deflective'*, CAMBODIA DAILY, 8 November 2011, p. 26.

[17] Request for Information Regarding *Ex-Parte* Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, 15 November 2011, E137/1: In its Request, the NUON Chea Defence, *inter alia*, "urge[d] the [Trial] Chamber to direct Judge Cartwright to provide the Defence with the previously-sought information, namely: (a) a list of all meetings that have taken place between Judge Cartwright and any members of the Office of the Co-Prosecutors…, regardless of whether such meetings were also attended by Mr Rosanhaug [sic], and (b) the agenda and/or minutes of any such meetings (even if only informal and/or hand-written notes were taken)… Additionally, the Defence would like to know whether substantive and/or Case-002 related issues were discussed during any meeting between or among Judge Cartwright, Mr Cayley, and/or Mr Rosandhaug. In particular, the Defence would like to know whether Judge Cartwright, Mr. Cayley (or any other member of the OCP) and/or Mr. Rosandhaug have ever discussed any of the following topics: a. continuing political interference by the Cambodian government at the ECCC; b. the effect of such interference on Cases 003 and 004; c. the effect of such interference on Case 002; d. the Defence request for an independent investigation into such interference." *Id.*, paras. 6-7.

[18] The word "adversarial" is missing from the English translation of Article 9, but this term is used in the official Khmer version.

judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

15. The 2002 Bangalore Principles of Judicial Conduct ("Bangalore Principles") were developed in order to strengthen the Basic Principles.[19] The Bangalore Principles contain one of the first studies on judicial conduct and are intended to apply to judges the world over.[20] The Bangalore Principles have been reviewed and revised in accordance with commentary from a large number of civil law and common law jurisdictions.[21] Value 2, Application 2.2 states that **"[a] judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."** The United Nations Office on Drugs and Crime Commentary to the Bangalore Principles explains in relation to this Principle and Application that *ex parte* communication must be avoided and that if a judge receives *ex parte* communication, the other parties must be informed and the court record noted accordingly.[22]

16. Though the ECCC Code of Judicial Ethics does not contain a provision specifically prohibiting *ex parte* communications, such prohibition can be inferred because the ECCC Code of Judicial Ethics was enacted to incorporate "both national and international norms,"[23] which prohibit such communication,[24] and from Articles 1 and 2 of the ECCC Code of Judicial Ethics.[25]

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[19] ECOSOC Resolution 2007/22, *available at* http://www.un.org/ecosoc/docs/2007/Resolution%202007-22.pdf.
[20] Working Group on Judicial Conduct, European Network of Councils of Justice, Consiglio Superiore Della Magistratura, p. 25.
[21] For a description of this process, *see* The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, March 2007, p. 9-18, *available at* http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF.
[22] United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, para. 64, *available at* http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf ("UNODC Commentary to the Bangalore Principles"). The UNODC Commentary to the Bangalore Principles further states in relation to Value 4 (Propriety) that: "Propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. What matters more is not what a judge does or does not do, but what others think the judge has done or might do. For example, a judge who speaks privately and at length with a litigant in a pending case will appear to be giving that party an advantage, even if in fact the conversation is completely unrelated to the case. Since the public expects a high standard of conduct from a judge, he or she must … ask the question, 'How might this look in the eyes of the public?'" *Id.*, para. 111.
[23] ECCC Code of Judicial Ethics, preamble.
[24] *See e.g.*, UNODC Commentary to the Bangalore Principles, para. 64; the Kosovo Code of Ethics and Professional Conduct for Judges, which states in part III (A)(7), that "[e]xcept in cases provided by law, a judge shall avoid and discourage *ex-parte* communication. Upon occurrence of such communication the judge has to disclose promptly the relevant information to the other parties involved and, when possible, procure their attendance," *available at* http://www.courtethics.org/Kosovo.pdf; Universal Charter of the Judge, which was drafted with input from judges around the world and was unanimously approved by delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999. *See also* The Judiciary of England and Wales, Guide to Judicial Conduct - Revised Version March 2008,

B. Recusal and Disqualification of Judges

17. The right to an independent and impartial tribunal is a key element of the fundamental right to a fair trial.[26] Reflecting this, Rule 34(2) states:

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

18. Interpreting this Rule, the jurisprudence of the ECCC has adopted the test articulated by the ICTY Appeals Chamber and has held:

> A judge is not impartial if it is shown that actual bias exists.
> There is an appearance of bias if:
> - A judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties.[27] Under these circumstances, a Judge's disqualification from the case is automatic; or

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which states in section 2.1 that "Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence" *available at* http://www.judiciary.gov.uk/docs/judges_council/judicialconduct_update0408.pdf; ABA Model Code of Judicial Conduct, February 2007, *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (emphasis added). Rule 2.9 of the American Bar Association Model Code of Judicial Conduct prohibits *ex parte* communications except for certain, limited and strictly controlled situations:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond….
> (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.
> (B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

[25] Articles 1 and 2 of the ECCC Code of Judicial Ethics state: "Article 1. Judicial independence: 1. Judges shall uphold the independence of their office and the authority of the Extraordinary Chambers in the Courts of Cambodia (hereinafter referred to as ECCC) and shall conduct themselves accordingly in carrying out their judicial functions. 2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. Article 2. Impartiality: 1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions. 2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest."

[26] *See* Article 14(1) of the International Covenant on Civil and Political Rights; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, para. 8 ("2004 *Karemera* Decision").

[27] This test has been adopted and elaborated also by international courts other than the ICTY. *See, e.g.*, ICC Statute, Art. 41(2)(a) and ICC Rules of Procedure and Evidence, Rule 34(1) (read together, requiring disqualification of any judge whose impartiality "might reasonably be doubted on any ground," including any prior involvement with or personal interest in the case, any relationship with the parties, or any position held or opinion expressed inconsistent with his impartiality). Rule 15 of the Rules of Procedure and Evidence of the ICTY and ICTR are in substance identical. *See also Prosecutor v. Norman*, SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 28.

- The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[28]

19. ECCC jurisprudence has further found that disqualification applications must seek the disqualification of a particular judge sitting on a particular case, not a general order of disqualification.[29]

C. Conduct rules applicable to the International Co-Prosecutor

20. Paragraph 301(a)(ii) and (iii) of the Code of Conduct of the Bar of England & Wales states that a barrister must not: "(a) engage in conduct whether in pursuit of his profession or otherwise which is: … (ii) prejudicial to the administration of justice; or (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute."

D. Judge Cartwright's duty of disclosure

21. Paragraphs 85 and 86 of New Zealand's Guidelines for Judicial Conduct state in pertinent part:[30]

> 85… Disclosure of any matter which might give rise to objection should be undertaken even if the judge has formed the preliminary view that there is no basis for disqualification. There may be circumstances not known to the judge which may be raised by the parties consequentially upon such disclosure.
>
> 86. Disclosure should be made as early as possible before the hearing….

E. Defence's due diligence obligation

22. Rule 34(3) states that an application for disqualification shall be filed as soon as the party becomes aware of the grounds in question. Defence counsel are required to act with due diligence to safeguard their clients' interests.[31]

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[28] Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests, 28 January 2011, E5/3 ("*Nil Nonn* Decision"), para. 6. *See also* Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29 ("*Ney Thol* Decision"), paras. 20-21 (equating a "reasonable observer" with an "informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold"); *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189. *See also Prosecutor v. Sesay et al.*, SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 51; 2004 *Karemera* Decision, para. 9; Decision on Mr. El Sayed's Motion for the Disqualification of Judge Riachy from the Appeals Chamber Pursuant to Rule 25, STL President (CH/PRES/2010/08), 5 November 2010, para. 19.

[29] Rule 34(2); *Nil Nonn* Decision, paras. 7, 8, 17; *Ney Thol* Decision, paras. 9-11. *See also Prosecutor v. Delalić et al.*, IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 October 1999, paras. 8-9 (distinguishing between the administrative determination as to whether a person is qualified to act as a judge, on the one hand, and an application for disqualification, which pertains to the judge's impartiality with respect to a *particular case*, on the other).

[30] New Zealand Guidelines for Judicial Conduct *available at* http://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct/Guidelines-for-Judicial-Conduct-June-2011.pdf (emphasis added).

IV. ARGUMENT

A. *Ex parte* communications between Judge Cartwright and Mr. Cayley are problematic

23. *Prima facie* evidence exists showing that *ex parte* communications have occurred between a Trial Chamber judge and the International Co-Prosecutor. As part of the Defence's due diligence obligations, it must seek disclosure from Mr. Cayley and a statement from Judge Cartwright to determine whether there are grounds to move for Judge Cartwright's disqualification, and/or to seek appropriate disciplinary action against Mr. Cayley.

> ***Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.***[32]

24. Judges, according to the Establishment Law, "shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source."[33] According to what is reported by Mr. Rosandhaug, Judge Cartwright participated in meetings with Mr. Cayley for purportedly administrative reasons which do not touch on Case 002. This seems irrational at best. It is chimerical to simply assume that matters claimed to be "administrative" as opposed to substantive are necessarily benign due to the label attached, thus negating the obligation of due diligence. Judge Cartwright is not (or least should not be) connected with the appeal of Case 001 or the investigation in Case 003 or Case 004. From all available facts, Judge Cartwright was not attending these (and perhaps other meetings) in a capacity as a member or representative of the Judicial Administration Committee ("JAC")[34] and there is no express legal basis for these *ex parte* meetings. No national judge was present or privy to these "administrative" matters, which were apparently initiated by Ms. Patricia O'Brien.

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[31] *Black's Law Dictionary* defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 468 (7th ed. 1999). The ICTY has stated that the purpose of according the accused certain rights under the ICTY Statute "was that the accused should exercise due diligence in utilizing them." JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 306 (Transnational Publishers Inc., 2002), *discussing Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998. In the context of an application to reopen a case, an ICTY Appeals Chamber has stated that the primary consideration of a Chamber in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it could not have been found with the exercise of due diligence, the Chamber may exercise its discretion as to whether to admit the evidence. *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 283.

[32] ECCC Code of Ethics, Art. 1(2).

[33] Establishment Law, Art. 10 new.

[34] *See* Rule 19.

25. It appears that Judge Cartwright participated in these *ex parte* meetings in her capacity as a Judge in Case 002, but without any express authorization by the JAC. Further, it appears that Judge Cartwright discussed matters with Mr. Cayley, who has in the past and will continue to appear before her in Case 002. In instances where close calls, i.e. where decisions on legal or factual issues of importance could tip the balance one way or the other, it is not inconceivable to imagine that a judge who is predisposed to a prosecutor as a result of these numerous *ex parte* contacts would, if not intentionally, rule in that party's favor.

26. That no minutes of these meetings (or notes) are claimed to be available, coupled with the fact that there is a disinclination to provide details (not to mention Mr. Cayley's refusal to acknowledge any basis for allegations of impropriety and continuing refusal to answer questions on the issue forthrightly)[35] gives the Defence, and for that matter the objective observer, every reason to be concerned that Judge Cartwright may not have acted independently at all times in relation to Case 002.

> ***Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.***[36]

27. The Judges at the ECCC must not only conduct their duties independently, but must conduct them impartially.[37] According to Article 128 new of the Cambodian Constitution, "[t]he Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens." Article 3(3) of the Agreement affirms that the Judges "shall be persons of high moral character, impartiality and integrity" and that they "shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source." According to Rule 21(1)(a), "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the

[35] *See supra* paras. 7, 10, 11.
[36] ECCC Code of Ethics, Art. 2(1).
[37] "The notion of ***impartiality of the judiciary*** is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties." OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS, CHAPTER 4: INDEPENDENCE AND IMPARTIALITY OF JUDGES, PROSECUTORS AND LAWYERS 139 (2003), *available at* http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf. The UN Human Rights Committee states that the principle of impartiality "implies that judges must not harbour any preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." Human Rights Committee, Communications No. 387/1989 (*Karttunen v. Finland*), U.N. Doc. No. CCPR/C/46/D/387/1989, 2 November 1989, para. 7.2.

parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication."[38]

28. Judges at the ECCC cannot engage in *ex parte* communications with members of the OCP, including the International Co-Prosecutor, especially without informing the Defence. This conduct not only is prohibited by applicable Codes of Ethics and professional standards, but it also infringes upon the rights of the parties. The European Court of Human Rights has stated that:

> [t]he principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial… The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[39]

29. Although there may be limited instances where certain *ex parte* communications may not be harmful or prejudicial to a party, it bears recalling the words of Judge Robinson, current President of the ICTY: "[*Ex parte* communications] are warranted only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact of the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application."[40] In this situation, *ex parte* communications are not warranted: the Defence is prejudiced by Judge Cartwright's and Mr. Cayley's private meetings – irrespective of whether they occurred in the presence of Mr. Rosandhaug or others. Judge Cartwright's conduct strongly suggests that she is uninhibitedly engaging in matters that are not just beyond her mandate to serve as a judge in the Trial Chamber of the ECCC, but directly impact on the fair and just administration of Case 002.

> ***The principles embodied in this Code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties***[41]

30. Not only does it appear that Judge Cartwright violated her duty to conduct her judicial obligations as they relate to Case 002 independently and impartially, but in doing so it also appears that she violated her ethical obligations as a judge. Article 9 of the Cambodian Code of Ethics and various other national and international codes of judicial

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[38] Emphasis added.
[39] *Brandstetter v. Austria*, ECHR, Judgement, 28 August 1991, para. 66-67 (emphasis added).
[40] *Prosecutor v. Simić et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 39 (emphasis added).
[41] ECCC Code of Ethics, Art. 9(1).

conduct prohibit *ex parte* communication between a judge and a party exactly because it gives the appearance of impropriety and bias on the part of the judge. An international Judge has no more right to engage in *ex parte* communications than a national Judge.[42]

> ***Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary.***[43]

31. "Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge."[44] Absent any disclosure or statement made pursuant to this Request, by engaging in private meetings with Mr. Cayley, along with others known and unknown (or just the two of them), Judge Cartwright displays an appearance of bias – if not actual bias – in favor of the OCP. The surreptitious atmosphere under which these *ex parte* meetings were held and the apparent reticence to date in disclosing to the parties the information sought in order to determine their actual nature, cannot but lead to any other conclusion. Judge Cartwright's conduct appears to betray the rights guaranteed to Mr. IENG Sary and all other Accused, as set out in Article 128 of the Cambodian Constitution, Article 3(3) of the Agreement, Article 10 new of the Establishment Law and Rule 21(1)(a) of the Rules. The circumstances under which these *ex parte* meetings were held, if anything, engender a culture of suspicion at best, and impunity at worst.
32. Absent any disclosure or statement made pursuant to this Request, in applying the ECCC's test for judicial disqualification, the reasonable detached observer cannot but reasonably apprehend bias.[45] Any presumption of impartiality that a judge might hold by virtue of her position[46] would be overcome by infringements of judicial ethics which directly impact on the fair trial rights of the Accused. Judge Cartwright's conduct would appear to cause "[a]n informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold" to apprehend bias in this situation. Judge Cartwright's conduct is all the more disquieting when one considers that it is her duty to uphold the integrity and impartiality of this Tribunal. Instead, it appears that she has violated her obligations to act

[42] Article 12 of the Establishment Law states that the Judges [regardless of origin] shall enjoy equal status.
[43] ECCC Code of Ethics, Art. 3(1).
[44] The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, March 2007, p. 79, *available at* http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF.
[45] *See supra* n. 28.
[46] *See Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras. 196-97.

independently and impartially, avoid *ex parte* communications and inform all parties of any that she receives.

B. The Defence requests disclosure from Mr. Cayley and encouragement to Judge Cartwright to make a statement

33. In light of the fact that it is now openly acknowledged that *ex parte* communications have occurred between Judge Cartwright and Mr. Cayley, and considering that such communications violate the Cambodian Code of Ethics as well as practice norms in Mr. Cayley's and Judge Cartwright's home jurisdictions,[47] it is beyond cavil that both Mr. Cayley and Judge Cartwright are aware of matters which could (at a minimum) arguably be said to give rise to a reasonable apprehension of bias. In these circumstances, where no personal embarrassment has been caused to Mr. Cayley or Judge Cartwright, full clarification and disclosure of the precise nature of their *ex parte* communications is desirable as a matter of urgency. At the international level, in *Karemera at al.*, a Judge's failure to disclose facts which were probative of an association which might affect her impartiality was held to be material to a finding that circumstances existed which "could well lead a reasonable, informed observer to objectively apprehend bias."[48] And as the English Court of Appeal held in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] 2 WLR 870 at 478-79:

> If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could reasonably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it.[49]

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[47] *See supra* paras. 13, 20.

[48] *See Prosecutor v. Karemera*, ICTR-98-44-AR 15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 67. In the same case, but in relation to a separate application, it was held that "[w]hile the Statute and Rules do not explicitly provide for the disclosure of material from a Judge in connection with a request for disqualification, they also do not prevent a party from requesting disclosure of information in this regard…. Bearing [the presumption of impartiality] in mind, a request for disclosure must specifically identify the material or information in the possession of the Judge and make a *prima facie* showing that it would demonstrate actual bias or the appearance of bias." *Prosecutor v. Karemera*, ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 11.

[49] *See also* Paragraph 74 of New Zealand's Guidelines for Judicial Conduct, referring to the following "[c]ase law from New Zealand and Australia" as "of value to guide judges": *Aussie Airlines v Australian Airlines Pty Ltd* (1996) 135 ALR 753, paras. 34-44: "34. [I]t is desirable, at the outset, to state and distinguish between, the circumstances which may give rise to a duty of disclosure and those which give rise to a duty to disqualify. 35. A number of reasons can be identified for the existence of the duty to disclose. 36. First, it cannot be expected that the parties will be aware of, let alone enquire into, potentially disqualifying circumstances concerning a Judge or a Tribunal…. 39. In the usual course, the parties are entirely reliant upon disclosure in order to consider whether an issue of disqualification may arise, and if so whether an application to disqualify is to be

34. In order to meet its due diligence obligation, the Defence cannot remain passive when on notice of conduct which is indicative of an association which might affect Judge Cartwright's impartiality, or objectively gives rise to the appearance of bias. The importance of the obligation to act diligently in applications for judicial disqualifications has been explained by the ICTY *Čelebići* Appeals Chamber:

> the failure of counsel to object or to call attention to a judge's sleeping or inattention during the proceedings is relevant to the question of whether prejudice has been established. Failure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.[50]

C. *Ex parte* communications between Judge Cartwright and Mr. Cayley may give rise to breaches of rules of professional conduct applicable to Mr. Cayley

35. While the Defence empathizes with Mr. Cayley that it may at times not seem dignified to be required to answer questions when one's integrity is put in question, it cannot sympathize with Mr. Cayley when there is confirmation that *ex parte* communications have occurred, notwithstanding his protestations. As a Barrister of England & Wales, Mr. Cayley should or would have known that *ex parte* communications between a prosecutor and a judge may be prejudicial to the administration of justice and may diminish public

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made. 40. Second, the failure to disclose, of itself, can be one of the circumstances which together with others may give rise to a reasonable apprehension of bias. A party or the public may well be left with the impression that there was intentional concealment or non-disclosure, or that something was 'wrong about it all.' A failure to disclose no matter how unwitting, can undermine public confidence in the integrity of, and the administration of justice by, the judicial officer or the tribunal concerned. 41. Third, disclosure of itself, necessarily assists in securing the object that justice is 'seen' to have been done. That is particularly so where the duty to disclose may arise in respect of circumstances known to the tribunal and possibly some, but not all, of the parties or their legal representatives. In such circumstances the duty to disclose may be a duty owed by both the tribunal and the parties aware of the relevant circumstances. 42. The duty has been said to arise in respect of facts or circumstances that may be or are potentially disqualifying i.e. disclosure of 'any dealings which might create an impression of possible bias.' Gallop J has described the duty as one for a Judge 'to disclose a fact if it seems to him that it may be thought to have a bearing on his neutrality.' 43. It is important to emphasise that, however the duty may be formulated, the facts to be disclosed are those that might found or warrant a bona fide application for disqualification. It would defeat the purpose of the disclosure if it was only in respect of or perceived to be in respect of facts warranting disqualification. 44. Whether the facts disclosed warrant disqualification is the issue arising after the duty of disclosure is duly discharged. Accordingly the fact of disclosure, as opposed to non-disclosure, cannot constitute a circumstance in favour of disqualification." *But see Clenae Pty Ltd v. ANZ Banking Group Ltd*, HCA M2/2000, 7 December 2000: "A failure to disclose is relevant (if at all) only because it may cast some light on the ultimate question of reasonable apprehension of bias. A failure to disclose has no other legal significance."

[50] *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 631. *See also Prosecutor v. Karemera*, ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judges and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004; *Prosecutor v. Sesay et al.*, SCSL-2004-AR15-15, Decision on Defence Motion Seeking the Disqualification of Judge Robertson from the Appeals Chamber, 13 March 2004. In these cases, if the Defence had not acted with due diligence, the Judges in question who were ultimately found to be unfit to remain on the case due to partiality or the appearance of partiality would have remained on the case, jeopardizing their clients' rights to a fair trial.

confidence in the legal profession, or bring the profession into disrepute. The Cambodian Code of Judicial Ethics is applicable to Mr. Cayley,[51] including Article 9 (prohibiting *ex parte* communications between a judge and a party). Mr. Cayley should also know that opposing counsel, faced with this factual matrix, has no choice but to ascertain the truth. To paraphrase Mr. Cayley: the law ties the Defence to do this.[52] This is especially so in light of the "current crisis of credibility" afflicting the ECCC.[53]

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests Judge Silvia Cartwright to RECUSE herself from all proceedings until this Request has been decided and requests the Trial Chamber to:

A. INVESTIGATE whether Case 002-related issues were discussed during any meeting between or among Judge Cartwright and Mr. Cayley, either in the presence of any other person or otherwise;
B. SUMMON Mr. Cayley and COMPEL him to disclose the Requested Information;
C. ENCOURAGE Judge Silvia Cartwright to make a statement disclosing the Requested Information; and
D. GRANT a public, oral hearing to decide this Request, or in the alternative, LEAVE to reply to any submissions filed in Response to it.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 18th day of November, 2011

[51] The Cambodian Code of Ethics is applicable both to persons exercising prosecutorial and judicial functions. Article 1 of the Code of Ethics states: "In this Code of Ethics "judges" refers to sitting judges and prosecutors."
[52] *See* Andrew Cayley *quoted in* Voice of America, *UN Prosecutor: "The Law Ties Me to Do This,"* 4 November 2011, *available at* http://www.voanews.com/khmer-english/news/UN-Prosecutor-The-Law-Ties-Me-To-Do-This-133245133.html: "I have to follow the rules. I can't take instructions from the government. The government can't say to me, and indeed they've never said to me directly, "Sorry, you can't file that document with the court." It has to be brought to a legal ending. It has to be due process. The rules have to be followed. The law has to be followed, and we have to come to some kind of judicial conclusion in that case. That's the law. That's my obligation. That's my duty, to follow the law. I can't do anything else. The law ties me to do this."
[53] *See* Open Society Justice Initiative ("OSJI"), Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, November 2011, p.20 *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114.