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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S THIRD APPLICATION FOR DISQUALIFICATION OF JUDGE CARTWRIGHT

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 14 February 2012, the Defence for Nuon Chea ("Defence") filed a *Third application for disqualification of Judge Cartwright* ("Application").[1] The Application requests Judge Cartwright's disqualification under Rule 34(2) of the Internal Rules ("Rules"), or, in the alternative, her voluntary recusal under Rule 34(1),[2] on the basis of actual bias[3] or reasonable apprehension of bias.[4] The evidentiary basis for these assertions is an out-of-court statement attributed to Judge Cartwright in the New Zealand press on 4 February 2012,[5] read "in conjunction"[6] with one statement addressed to Co-Counsel for Nuon Chea during Case 002/01 trial proceedings on 30 January 2012.[7]

2. The present Application follows two prior requests by the Defence seeking the disqualification or voluntary recusal of Judge Cartwright,[8] either individually or together with the entire bench of the Trial Chamber ("Chamber"). Both requests were denied by the Chamber.[9]

3. In this response, the Co-Prosecutors submit that the Application is entirely devoid of merit. As such, the Co-Prosecutors request the Chamber to dismiss the Application.

II. THE APPLICATION FOR DISQUALIFICATION SHOULD BE DISMISSED

A. The test for actual bias is both context-specific and stringent

4. The very jurisprudence of the European Court of Human Rights (ECtHR) cited by the Defence establishes that the judicial assessment of the test for actual bias – the "Subjective Test" – is both context-specific and stringent. In *Olujić*, the ECtHR reaffirms that the test involves "endeavouring to ascertain the personal conviction or interest of a

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1 **E171** *Third application for disqualification of Judge Cartwright* ("Application"), 14 February 2012.
2 **E171** Application, *ibid.* at para. 1.
3 **E171** Application, *ibid.* at paras. 18-21.
4 **E171** Application, *ibid.* at para. 22.
5 **E171** Application, *ibid.* at para. 2.
6 **E171** Application, *ibid.* at para. 20.
7 **E171** Application, *ibid.* at para. 2.
8 **E54** *Nuon Chea's Urgent Application for the Disqualification of the Trial Chamber Judges*, 24 November 2011 ("First Disqualification Application") and **E137/2** *Urgent Application for Disqualification of Judge Cartwright*, 21 November 2011 ("Second Disqualification Application").
9 **E55/4** *Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony*, dated 23 March 2011 ("First Disqualification Decision") and **E137/5** *Decision on motions for disqualification of Judge Silvia Cartwright*, 2 December 2011 ("Second Disqualification Decision").

given judge in a particular case".[10] The means to prove actual bias will include, for example, "whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons."[11]

5. As the Defence acknowledges, the burden of proof rests with the applicant to rebut the presumption of "personal impartiality" that attaches to a professional judge.[12] Both this Chamber and the Pre-Trial Chamber have held that a similar presumption of impartiality attaches to ECCC judges on the basis of their oath of office and qualifications for their appointment.[13] The ICTY Appeals Chamber, in a judgment cited by the Defence in support of the Application, has found that the presumption of impartiality is fully justified, as professional judges are able to "disabuse their minds of any irrelevant personal beliefs or predispositions."[14] Even where it could be "established" that a judge sitting on a case "expressly shared the goals and objectives" of an organisation that advocated against certain crimes allegedly committed by the accused, the judge concerned was held to be able to put aside that inclination in the particular case before her and render an impartial decision.[15]

6. A review of the facts addressed in the ECtHR cases cited by the Defence reveals that press statements or comments in trial proceedings by a judge raise concerns of actual bias where comments are specifically and personally directed against an accused and particularly inflammatory and insulting or otherwise amounting to a prejudgment of issues central to the culpability of the accused or the outcome of the case.

7. In *Olujić*, the ECtHR held that a press statement by one Member of the National Judicial Council (NJC) of Croatia hearing a disciplinary proceeding against the applicant revealed actual bias. Referring to the applicant's statements, the Members stated:

> [...] *I see them mostly as comical, as I do the author himself. These fabricated and unsupported statements, coming from a man who held a number of highly*

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10 *Olujić v Latvia*, ECtHR Application No. 22330/05, Judgment, 5 May 2009 at para. 57 ("Olujić").

11 *Olujiić, ibid.* at para. 58

12 **E171** Application, *supra* note 1 at para. 9; *Olujiić, ibid.* at para. 58.

13 **E55/4** First Disqualification Decision, *supra* note 9 at para. 12; **E137/5** Second Disqualification Decision, *supra* note 9 at para. 14; **C11/29** *Decision on the Co-Lawyers' Urgent Application for the Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, 4 February 2008 at paras. 15-17.

14 *Prosecutor v Anto Furundžija*, Judgment, IT-95-15/1-A (ICTY Appeals Chamber), 21 July 2000 at para. 197 ("*Furundžija*").

15 *Furundžija, ibid.* at para. 200.

> *responsible functions in the Croatian judiciary, where, due to his lack of experience and knowledge, he was a* corpus alienum *(a foreign body), do not really deserve special attention because they belong to the place from which they originate, namely, the coffee-bars.* [16]

8. In *Lavents*, the presiding judge of a regional court made two press statements arising during the course of trial proceedings. The first statement, printed in two daily newspapers, contained the following comment:

> *If the defense was intelligent, they could argue on the evidence that is in the case file. During the hearing, they could express their objections and demonstrate the Public Prosecutor's mistakes. If they disagreed with the judgment, they could file an appeal before a higher jurisdiction. But the defense has decided to get rid of me by all means, and they are filling incessant recusal requests.*
>
> *[...] They consider that the accused are not guilty, that the Public Prosecutor is wrong. But today, I cannot say if the judgment will be a conviction or a partial acquittal [...]*[17]

The second press statement was: "Frankly, I don't understand the defense and the accused. They do not recognize themselves as being guilty [...]"[18]

9. The ECtHR held that the judge's comment that she did not know whether "the judgment would be a conviction or partial acquittal" indicated a pre-formed view that a full acquittal was not a possibility at all. The ECtHR considered that such declarations did not constitute a simple "negative appreciation of the case", but rather a real stance on the undecided case of the applicant and a clear preference for a finding of guilt.[19]

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16 *Olujic, supra* note 10, at para **22.**

17 *Lavents v Lettonie*, ECtHR Application No 58442/00, Judgment, 28 February 2003 at para. 30 ("Lavents") [Provisional translation of the original French: *D'ailleurs, s'ils étaient des gens vraiment intelligents, ils pourraient débattre les preuves qui se trouvent dans le dossier. Pendant le débat contradictoire, ils pourraient exprimer leurs objections et démontrer les erreurs du Parquet général. S'ils étaient en désaccord avec le jugement, ils pourraient former un recours devant une juridiction supérieure. Mais la défense a décidé de se débarrasser de moi par tout moyen, et les demandes en récusation s'enchaînent les unes après les autres...ils [la défense] considèrent que les accusés ne sont pas coupables, que 'accusation est fausse. Je ne puis pas encore dire aujourd'hui si 'le jugement portera condamnation ou acquittement partiel...*].

18 *Lavents, ibid,* at para. 31 [Provisional translation of the original French: *...Franchement, je ne comprends pas la défense et les accusés. Ils ne se reconnaissent pas coupables...*].

19 *Lavents, ibid.* at para. 19 [Provisional translation of original French : *Aux yeux de la Cour, de telles déclarations ne constituent pas une simple « appréciation négative de la cause » du requérant, mais une véritable prise de position sur l'issue de l'affaire, avec une nette préférence pour un constat de culpabilité de l'accusé*].

10. *Kyprianou*'s case,[20] cited by the Defence, concerns statements made by a judge during trial proceedings rather than in press statements. The ECtHR found that four aspects of the conduct of the judges in question disclosed actual bias. First, the judges had stated on record that they were "deeply insulted" "as persons" by the applicant – a lawyer charged with contempt of court. Second, the judges used "empathic language" throughout their judgment, conveying "indignation and shock", which the ECtHR found to "run counter to the detached approach expected of judicial pronouncements." Third, the judges sentenced the applicant to five days' imprisonment and immediately enforced the sentence. Fourth, the judges made a finding of the applicant's guilt for contempt of court at an early stage in their interaction and only provided an opportunity for him to justify why he should not be sentenced.[21]

11. On this basis, the Co-Prosecutors submit that an assessment of actual bias through press statements by sitting judges, or statements during trial proceedings, is necessarily context-specific and stringent. Such statements will not rebut the presumption of impartiality by disclosing actual bias unless such statements are (1) specifically and personally directed against the Accused; (2) particularly inflammatory or insulting; or (3) amount to a prejudgment of issues central to culpability of the Accused or the outcome of the case.

B. There is no evidentiary basis for actual bias

12. In support of the allegation of actual bias, the Defence suggests that "it must be assumed that, on its face, Judge Cartwright's assertions were directed at the Nuon Chea Defence Team – among others, perhaps."[22] The Co-Prosecutors observe that Judge Cartwright's comments regarding "Defence Counsel" in the New Zealand media were at no time ever directed against Nuon Chea, or his Defence in particular. The relevant portion of the article addresses, in general terms a number of recent issues which have faced the Court including, but not limited to, various applications seeking the disqualification of Judge Cartwright, the President and the Cambodian judges of the Chamber. This amounts, simply, to a statement of fact concerning matters on the public record.

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20 *Kyprianou v Cyprus*, ECtHR Application No 73797/01, Judgment, 15 December 2005 at para. 127 ("Kyprianou").

21 *Kyprianou, ibid.*at para. 130.

22 **E171** Application, *supra* note 1, at para. 2.

13. The generality of Judge Cartwright's observations are apparent in her factual statement regarding the practice of seeking disqualification of judges: "[I]t's a very common strategy by Defence Counsel." One might conclude that Judge Cartwright may well hold the view that a repeated pattern of disqualification requests may be a part of an emphasis on "disruption" by defence teams in general. In light of the ECtHR jurisprudence advanced by the Defence, such a statement cannot amount to a prejudgment of the outcome of any pending or future disqualification request, even concerning another judge. By way of relevant context, when disposing of the Defence's second disqualification application concerning Judge Cartwright, this Chamber (sitting with Reserve Judge Fenz in place of Judge Cartwright) publicly characterised Defence submissions as based on "unsupported allegations of impropriety", failing the "threshold evidentiary requirements" of Rule 34 and "devoid of merit". [23]

14. In view of the reasoning of the ECtHR in *Lavents,* it is clear that even if "Judge Cartwright's public statements clearly amount to expressions implying an unfavourable view of Nuon Chea's case" as claimed by the Defence,[24] such an "unfavourable view" alone without expressing any sort of prejudgment about ultimate issues otherwise undecided in the matter, such as the criminal responsibility of Nuon Chea, is insufficient to give rise to the actual bias.

15. As demonstrated by the approach of the ECtHR, an assessment of Judge Cartwright's comments in the course of trial proceedings on 30 January 2012 should be made in context and against the ongoing pattern of trial management issues regarding the Defence straying beyond the confines of Case 002/01. Indeed, immediately preceding the impugned intervention of Judge Cartwright on 30 January 2012, Co-Counsel for the Defence had been warned twice by the President to limit his questioning to matters falling within the scope of proceedings in Case 002/01:

> *7 Q. Ms. Prak Yut, have you ever heard of Case Number 4 before this*
> *8 Court?*
> *9 MR. PRESIDENT:*
> *10 Witness is not required to answer this question.*
> *11 [14.26.25]*

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23 **E137/5** Second Disqualification Decision, *supra* note 9 at paras. 19, 22.
24 **E171** Application, *supra* note 1, at para. 20.

12 The issue raised by counsel is not related to what we are
13 discussing now. It is not concerned with Case 002/1. Defense
14 counsel may continue with a new question and you are reminded to
15 stay within the limits of the segment.
16 You cannot expand, at your will, the scope of this Trial.
17 Please activate your mic when you speak.[25]

3 Q. What if I tell you that both Ta An and Im Chhean are suspects
4 in Case Number 4?
5 A. I do not know about that.
6 MR. PRESIDENT:
7 Counsel, you are just informed that Case 03 and 04 are separate
8 cases from Cases 002. Besides, for Case 002, the Chamber has set
9 the scope for the first trial that we are having now. I think you
10 are well aware of this and you are reminded to stay within the
11 limit that concerns the facts of Case 002/1, according to the
12 sequential segments.[26]

16. The written record clearly demonstrates that Judge Cartwright intervened to limit further wasted time in view of technical difficulties with translation, and that her intervention was followed by testimony from the bar by Co-Counsel. The Co-Prosecutors place on record the broader context of these proceedings:

6 MR. PRESIDENT:
7 Counsel, you are just informed that Case 03 and 04 are separate
8 cases from Cases 002. Besides, for Case 002, the Chamber has set
9 the scope for the first trial that we are having now. I think you
10 are well aware of this and you are reminded to stay within the
11 limit that concerns the facts of Case 002/1, according to the
12 sequential segments.
13 MR. PESTMAN:
14 Excuse me -- excuse me, Mr. President, my microphone of my
15 headphones are not working. I didn't hear the second half.
16 [14.29.52]
17 JUDGE CARTWRIGHT:
18 I'll tell you in English then, with the President's permission,
19 while you're looking for new headphones.
20 The President has ruled twice now that you are to remain within
21 the confines of Trial 2 and the first trial in Trial 2.
22 Is that clear enough now, Counsel?
23 MR. PESTMAN:
24 My questions are within the scope of the first---
25 JUDGE CARTWRIGHT:
1 -- Please don't argue. You have been asked to move onto your next
2 question, thank you.

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25 **E1/35.1** Transcript, 30 January 2012 at p. 74:7:17..
26 **E1/35.1** Transcript, 30 January 2012 at p. 75:3-76:20.

3 MR. PESTMAN:
4 I'd like to note to the record that I disagree with the decision.
5 I'm here to establish the government interference in Case Number
6 2 and, for that purpose, I'm asking these questions; and I think
7 they are well within the scope of this case, certainly Case
8 Number 2.
9 [14.30.51]
10 But I will continue with my questions.
11 JUDGE CARTWRIGHT:
12 I had understood that your role here was to represent and defend
13 your client. Please move on with your questions in relation to
14 this trial. Thank you.[27]

C. The test for reasonable apprehension of bias

17. To disqualify a judge based on an appearance of bias, the Defence must demonstrate that "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias",[28] (the "Objective Observer Test").

18. The Objective Observer Test is far from the *de minimis* standard submitted to the Chamber by the Defence. A "mere feeling or suspicion of bias by the accused is insufficient."[29] The Defence must show, in the form of "firmly established"[30] evidence, that the impugned judge, applying all of her expertise, would be unable to put a predisposition on an issue relevant to the case to the side and judge the case before her fairly. This test sets a high bar because "while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, so to[o] would disqualifying Judges on the basis of unfounded allegations of bias."[31]

19. The "reasonable observer" is "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that

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27 **E1/35.**1 Transcript, 30 January 2012 at p. 75:3-76:20.

28 **E55/4**, *First Disqualification Decision*, *supra* note 9 at para. 11; see also **E137/2** Second Disqualification Application, *supra* note 8 at para. 15. The test has also been explained as a response to the question, would "a reasonable, objective and informed person ... on the correct facts reasonably apprehend that [Judge Cartwright] has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel". *Furundžija*, *supra* note 14 at para. 186, quoting *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Judgment on Recusal Application, 1999 (7) BCLR 725 (CC), 3 June 1999.

29 *Prosecutor v Edouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings*, 20 February 2009, para. 5 ("*Nzirorera's Motion*").

30 *Furundžija*, *supra* note 14 at para. 197.

31 *Nzirorera's Motion*, *supra* note 29, at para. 6.

Judges swear to uphold."[32] This Chamber has explained that "the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment."[33] The Nuon Chea Defence must thus not only adduce sufficient evidence to carry the burden normally applicable to a moving party, but must also produce sufficient evidence to "displace[e] that presumption, which imposes a high threshold",[34] as set out above.[35]

20. *Buscemi*'s case, cited by the Defence, concerns a press statement by a judge which was held to disclose a reasonable apprehension of bias. A presiding judge hearing a custody dispute (with a long and protracted history) responded to an open letter from the applicant published in a newspaper with a further letter published in the same newspaper stating that the applicant's account of events was inaccurate and thereafter proceeding to give detailed information about the pending case (albeit without identifying information). The judge's press statement contained the following comments:

> [The applicant's] *account of events is inaccurate as regards the fundamental circumstances of the case* [...] *Custody of the child was awarded not to the father but to the mother. At home, both on account of the disputes between the parents and other circumstances of which I cannot give details, she was living in very difficult conditions, which led to episodes of violence, even physical violence, and which, over time, genuinely undermined the child's physical and psychological stability. It was absolutely necessary to remove her precisely in order to release her from an oppressive situation* [...][36]

21. The ECtHR held that these statements implied that the presiding judge "had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it."[37]

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32 **E55/4**, *First Disqualification Decision, supra* note 9 at para. 12, quoting *Furundžija, supra* note 14 at para. 190.

33 **E55/4**, *First Disqualification Decision, supra* note 9 at para. 12.

34 **E55/4**, *First Disqualification Decision, supra* note 9 at para. 12.

35 See Section A.

36 *Buscemi v Italy*, ECtHR Application No. 29569/95, Judgment, 16 September 1999 at para. 40 ("Buscemi").

37 *Buscemi, ibid.* at para. 68.

D. There is no evidentiary basis for a reasonable apprehension of bias

22. The evidence actually adduced in the Application does not disclose any basis for a reasonable observer to apprehend that Judge Cartwright had formed an unfavourable view of issues central to Nuon Chea's case – which concerns his alleged criminal responsibility.

IV. RELIEF REQUESTED

23. For these reasons, the Co-Prosecutors respectfully request the Chamber to dismiss the Application as devoid of merit.

Respectfully submitted,

Date	Name	Place	Signature
24 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		