BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO "IENG SARY'S RULE 34 APPLICATION FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT OR, IN THE ALTERNATIVE, REQUEST FOR INSTRUCTION AND ORDER TO CEASE AND DESIST FROM *EX PARTE* COMMUNICATIONS & REQUEST FOR DISCLOSURE OF *EX PARTE* COMMUNICATIONS"

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 24 November 2011, the Ieng Sary Defence ("Defence") filed an application for the disqualification of Judge Cartwright under Rule 34 and for an investigation under Rule 35, purportedly on the basis of learning of administrative meetings between Judge Cartwright, Deputy Director of Administration Knut Rosandhaug, and International Co-Prosecutor Andrew Cayley (the "First Request").[1] The investigatory request sought "information on all *ex parte* communications between Mr. Cayley and Judge Cartwright" including a list of all meetings, "all relevant facts and details concerning these *ex parte* meetings", and the agendas of the meetings.[2]

2. On 2 December 2011, the Trial Chamber ruled that the Defence's filing did "not meet the threshold evidentiary requirements contained in Internal Rule 34" for disqualification and was "devoid of merit."[3] The Trial Chamber also explained that administrative meetings of a similar nature at other internationalised tribunals "are commonplace" and "ensure the effective operation and coordination of administrative activities … and are necessary and integral to address the unique administrative challenges faced by international tribunals."[4] Although the Trial Chamber held that the Defence had failed to adequately state a request for an investigation under Rule 35 and therefore did not rule on that ground, the Trial Chamber did hold that the "IENG Sary request[] for information regarding these meetings [was] adequately addressed by the email of the Deputy Director of Administration of 7 November 2011."[5]

3. The Defence appealed, arguing that the Trial Chamber had erred and had "knowingly and wilfully interfered with the administration of justice by failing to investigate the *ex parte* meetings".[6]

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1 **E137/3** Ieng Sary's Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011. Later, the Defence claimed they had only made a request for investigation under Rule 35, however the Trial Chamber held that the Defence had made a disqualification motion and the Supreme Court, while holding the Defence's arguments also contained an investigation request, did not disturb the Trial Chamber's holding that the filing contained an application for disqualification.

2 **E137/3** Ieng Sary's Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, p. 1.

3 **E137/5** Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, para. 20.

4 *Ibid*, para. 19.

5 *Ibid*, para. 20.

6 **E 137/5/1/1** Ieng Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 5 January 2012, para. 47.

4. On 17 April 2012, the Supreme Court Chamber held that the Defence's filing contained an investigatory request under Rule 35[7], but was unsubstantiated.[8] It thus rejected the appeal.[9] It further noted: "According to Mr. Rosandhaug, the purpose of their meetings has been not to frustrate, but to facilitate trial proceedings. *The Defence does not dispute that claim,* and has conceded that a similar objective is served by the Coordination Councils functioning at other international tribunals."[10] After rejecting the Defence's appeal, the Supreme Court also stated:

> *That said, absent any institutional basis either in the ECCC founding documents or in the Internal Rules such meetings could be perceived as being related to a case or cases in which the attending judge has a concern. As such they may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge. Therefore, in order to avoid such appearances and giving rise to disqualification motions it would seem advisable to reconsider the make-up of any meetings that trial judges wish to have with the prosecutors by allowing the participation of the Defence Support Section or members of the defence teams, as appropriate.*[11]

Noting its own limited jurisdiction, which does not include immediate appeals from Rule 34 applications,[12] the Supreme Court Chamber left the Trial Chamber's rejection of the Defence's failed application for disqualification of Judge Cartwright undisturbed as the final ruling (*res judicata*) on that component of the filing.

5. On 19 April 2012, two days after the Supreme Court Chamber provided this guidance, Judge Cartwright circulated an email to the Case File Notification distribution list that was part of a brief discussion regarding how to assure compliance with the letter and spirit of the Supreme Court Chamber's guidance. The email stated: "Of course I was only trying to see the lighter side. As you know Andrew, I am seriously considering my own position. I shall not make a hasty ydecision [sic] Silvia".[13] The intended recipient of this email was queried by the Defence. In response, on 20 April 2012, the Trial Chamber's Senior Legal Officer provided the following explanation:

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7 **E137/5/1/3** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012.
8 *Ibid*, para. 23.
9 *Ibid*, p. 10.
10 *Ibid,* para. 23 (emphasis added).
11 *Ibid,* para. 24.
12 *Ibid*, para. 11.
13 **E191.1** Email from Judge Silvia Cartwright to Case File Notification Distribution List, 19 April 2012.

> *The emailed message sent yesterday to a number of recipients was intended for the Deputy Director of Administration and Andrew Cayley, International Co-Prosecutor.*
>
> *The message was part of a brief discussion among Judge Cartwright, Mr Cayley and Mr Rosandhaug concerning the appropriate reaction to the recent SCC decision in which an appeal against a refusal to recuse Judge Cartwright had been dismissed. The management meetings which were the subject of the recusal motion were originally convened at the request of the Office of Legal Affairs, but in light of the SCC comments, a decision has been made to discontinue them.*[14]

6. The Defence filed the instant Application and Request on 30 April 2012.[15] The Application and Request seeks to revive the Defence's failed applications for disqualification and investigation, claiming that evidence of the very same types of administrative discussions – upon which they premised their previous submissions, and which were rejected outright by the Trial and Supreme Court Chambers – had become evidence of "*ex parte* dialogue regarding the strategic and tactical modalities of how to proceed."[16] The Defence requests Judge Cartwright's disqualification on grounds of actual bias and appearance of bias; an instruction to Judge Cartwright and order to International Co-Prosecutor Andrew Cayley to cease further communications; and an instruction to Judge Cartwright and order to International Co-Prosecutor Andrew Cayley to disclose all communications between them since 24 November 2011, and information relating to any meetings held.[17]

7. The Co-Prosecutors respond that the Application is inadmissible because it fails to bring evidence supporting its claims *prima facie,* and fails to meet its evidentiary burden on a motion for disqualification to show that Judge Cartwright is actually biased or would be perceived to be biased by a reasonable objective observer. Also the disclosure and "cease and desist" components of the Request should be dismissed in this instance, as falling beyond the established scope of Rule 34. Furthermore the Co-Prosecutors submit that the disclosure component of the Request amounts to a veiled attempt to re-argue matters

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14 **E191.1.3** Email from Ms. Susan Lamb to IENG Sary Defence, 20 April 2012 and Email from IENG Sary Defence to parties, 20 April 2012.

15 **E191** Ieng Sary's Rule 34 Application for Disqualification of Judge Silvia Cartwright or, in the Alternative, Request for Instruction and Order to Cease and Desist from *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications, 27 April 2012 ("Application and Request").

16 *Ibid*, para. 7.

17 *Ibid*, p. 9.

already judicially considered and dismissed both at first instance by the Trial Chamber and on appeal by the Supreme Court Chamber.[18]

II. THE APPLICATION FOR DISQUALIFICATION SHOULD BE DENIED

8. Rule 34 governs applications for the disqualification of judges:

> *Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.*[19]

A. The Application is Inadmissible

9. Rule 34 sets out the requirements for admissibility of an application for disqualification. In particular, sub-rules (3), (4) and (5) set out four threshold requirements for admissibility. The Defence, as the filing party, is required to (i) "clearly indicate the grounds"; (ii) "provide supporting evidence"; (iii) file the application diligently (*i.e.* "as soon as the party becomes aware of the grounds in question"); and (iv) file the application concerning a Trial Chamber judge to that Chamber prior to final judgment. These requirements are cumulative.

10. The admissibility requirements in Rule 34 are filtering mechanisms to prevent the misuse of judicial time and resources to address manifestly unfounded or unsubstantiated complaints. This is entirely consistent with the model adopted by the Rules of Procedure and Evidence of the International Criminal Court, and its subordinate Regulations, in addressing complaints of misconduct against a judge or prosecutor. These legal texts direct the Presidency to conduct a preliminary assessment and set aside complaints that are "anonymous or manifestly unfounded",[20] with no further consideration necessary. The European Court of Human Rights, Inter-American Commission on Human Rights and Committee against Torture confirm that a complaint will be "manifestly ill-founded" or "manifestly groundless" and *therefore inadmissible* if it fails to disclose at least a *prima facie* evidentiary basis or is based upon speculation.[21] The Co-Prosecutors submit that the

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18 **E137/5/1/3** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012; **E137/5** Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011.

19 Internal Rule 34(2).

20 ICC Rules of Procedure and Evidence, Rule 26(2); ICC Regulations of the Court, Regulations 120-121.

21 For the ECHR, see: *Gomes v Sweden* (Decision on admissibility, Application no. 34566/04, 7 February 2006) at p. 11 (requiring "substantial grounds to believe" as a threshold for admissibility); For the IACHR, see: *Monsi Lilia Velarde Retamozo v Peru*, Case 12.165, Report No. 85/03, Inter-Am. C.H.R.,

Trial Chamber should apply similar standards in disposing of the Application and Request.

11. The application for disqualification fails to meet threshold admissibility requirements because it does not disclose an evidentiary basis in support of the grounds for disqualification asserted by the Defence. At most, the Defence provides evidence relating to the administrative meetings that it challenged in its immediately prior application for disqualification of Judge Cartwright, which application this Trial Chamber held to be "devoid of merit."[22] The email from Judge Cartwright shows the administrative body discussing how to appropriately heed the guidance of the Supreme Court Chamber shortly after that guidance was issued. The remainder of the Defence's support for disqualification is premised on speculative conjuring of "permit[ting] a situation to crystallize"[23], and "an *ex parte* dialogue regarding the strategic and tactical modalities of how to proceed from the SCC Decision"[24]. The Defence has therefore failed to meet its *prima facie* burden for admissibility and the Trial Chamber should reject the Application as inadmissible under Rule 34(3).

B. Even if the Application is Admissible, the Defence Fails to Approach its Weighty Burden of Proof

12. The Defence argues that Judge Cartwright is actually biased, or, in the alternative, that their evidence shows the appearance of bias.[25] As the Supreme Court Chamber has recently confirmed, "[a] party applying under Rule 34 must demonstrate that a judge is unable to impartially resolve disputes, or that there is an objective appearance of a lack of impartiality in a particular case."[26] The Defence fails on both counts. Neither the

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OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 437 (2003) at para. 45; see also *V. v Bolivia*, Case 270-07, Report No. 40/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008) at para 79; *Herrera y Vargas (La Nación)*, Costa Rica, Case No. 12,367, December 3, IACHR, Report No. 128/01, 2001 at para. 50; Report No. 4/04, Petition 12,324, *Rubén Luis Godoy*, Argentina, February 24, 2004 at para. 43 and Report No. 29/07, Petition 712-03, *Elena Tellez Blanco*, Costa Rica, April 26, 2007 at para. 58; for the CAT see: General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22 (11/21/1997) A/53/44, annex IX, CAT General Comment No. 01. (General Comments) at paras. 4-6; 6 *H.I.A. v Sweden*, Communication No. 216/2002, U.N. Doc. CAT/C/30/D/216/2002 (2003) (Decisions of the Committee Against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Thirtieth session - Communication No. 216/2002) at paras. 6.1-6.2.

22 **E137/5** *supra* note 3, para. 20.

23 **E191** *supra* note 15, para 10.

24 **E191** *supra* note 15, para 7.

25 *Ibid*.

26 **E137/5/1/3** *supra* note 7, para 15.

communication of 19 April, nor the communication of 20 April—the totality of the evidence brought by the Defence—substantiate this claim.

i. The Communications Did Not Relate To The Substance of Proceedings

13. This Trial Chamber has recently observed that where "communication between a prosecutor and a judge is … unrelated to the substance of proceedings in any case, *ex parte* communications have been held not to demonstrate bias or an appearance of bias."[27]

14. The evidence put forth by the Defence is not of communications related to the substance of proceedings in any case. The principals participating in these meetings, as part of their administrative functions, respectfully considered the *obiter dictum* of the Supreme Court Chamber relating to the conduct of these meetings. They had to do this. While the *obiter dictum* of the Supreme Court Chamber decision is not binding, it still carries great weight and necessitated consideration. This consideration was not in any way related to the substance of ongoing trial proceedings in Case 002.

15. The Defence cannot, by force of filing an application seeking disqualification and investigation of Judge Cartwright – on the basis of administrative meetings ultimately held not to be related to the substance of proceedings in Case 002 and not to show cause for an investigation – then claim reasonably that an appellate decision that necessarily discusses those very same meetings thereby *becomes* related to the proceedings in Case 002.[28]

16. Indeed, the very term "*ex parte*" is misapplied in this situation, as it is a legal term-of-art describing communication by one party with a judge regarding the substance of proceedings before that judge without the other party included. When the communications concern matters relating to the administration of UNAKRT, there are no "proceedings" within which Judge Cartwright is serving in a judicial rather than

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[27] **E137/5** *supra* note 3, para. 16.

[28] To place the Defence's claim in stark relief, an example of a communication on a matter truly related to the substance of proceedings would be *ex parte* discussions relating to whether certain witnesses would or would not be admitted. In fact, contrary to the Defence's claim that "to the best of [their] knowledge, no Defence teams have attempted to communicate *ex parte* with members of the Trial Chamber regarding Case 002 proceedings", they need look no further than the 16 March 2012 filing by the defence for Nuon Chea where they proudly claim that "the Defence has been informed informally by a representative of the Trial Chamber that [certain] witnesses will not, in fact, be called." **E182** Nuon Chea's Request to hear Defence witnesses and to take other Procedural Measures in Order to Properly Asses Historical Context, 16 March 2011, at para. 4 note 8.

administrative capacity, and thus there is no other "party" that has any claim to representation in such discussions. As such, the communications are not "*ex parte*".

ii. Even if the Communication Regarding how to Apply the Supreme Court's Guidance is Deemed Related to the Substance of Proceedings, the Defence Fails to Show the Appearance of, or Actual, Bias

17. As the Trial Chamber is aware "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."[29] This test sets an imposing hurdle because "while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias."[30] The 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 "displac[e] that presumption, which imposes a high threshold."[31]

18. "A charge of partiality must be supported by a factual basis."[32] "[M]atters which are ordinarily insufficient to require recusal are speculation, beliefs, conclusions, suspicions, opinion, and similar non-factual matters."[33] "[J]udicial disqualification cannot be established by unsupported allegations of impropriety."[34]

19. Furthermore, because the Defence makes reference to decisions of the Trial Chamber as indicative of bias[35], it is important to note that "[w]here allegations of bias are made on the basis of a Judge's decisions … [w]hat must be shown is that the rulings are, or would reasonably be perceived as, attributable to *a pre-disposition against the applicant*, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts."[36]

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29 **Special PTC 02(3)5** Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, paras. 6-7; see also *Olujić v. Latvia*, ECtHR Application No. 22330/05, Judgment, 5 May 2009 at para. 57-58; **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, 23 March 2011, at para 12.

30 **E137/5** *supra* note 3, para. 15; see also **Special PTC 02(3)5** *supra* note 28, para. 7

31 **E55/4** *supra* note 28 at para. 12.

32 **Special PTC 02(3)5** *supra* note 28, para. 8.

33 *Ibid*, para. 8 (internal quotations omitted).

34 **E137/5** *supra* note 3, para. 22.

35 **E191**, *supra* note 15, para. 12-14.

36 **Special PTC 02(3)5** *supra* note 28, para. 9 (emphasis added).

a) The Defence Fails to Meet its Burden to Demonstrate Actual Bias

20. The Defence fails to meet the test for actual bias—the "Subjective Test". In *Olujić,* the European Court for Human Rights (ECtHR) reaffirms that the test involves "endeavouring to ascertain the personal conviction or interest of a given judge in a particular case".[37] The Defence does not substantiate a showing of a personal conviction or interest of Judge Cartwright in Case 002. Indeed, Judge Cartwright was engaged in the exact opposite of what the Defence tried to brand "disregard[ing] guidance issued by the Supreme Court Chamber and the Trial Chamber regarding the legal effect of *ex parte* communications".[38] Rather, the administrative group was engaged in a good faith attempt to effectuate the Supreme Court's guidance.

21. Nevertheless, even in a case where a Trial Chamber is "intransigen[t] in the face of the Appeals Chamber's express direction on remand"—which is emphatically not the instant situation—such conduct will not evidence bias where "[a] more likely explanation for the Trial Chamber's actions readily suggests itself".[39] Here, rather than being intransigent on an express direction on remand, the members of the administrative group were attempting to *effectuate* the Supreme Court's suggested guidance. The "more likely explanation" that "readily suggests itself" is that after receiving the Supreme Court's guidance on administrative meetings, the administrative body was discussing how to proceed and within two days concluded that it was best to terminate such meetings.

b) The Defence Fails to Meet its Burden to Demonstrate the Appearance of Bias

22. An appearance of bias is established if:

> *(a) a judge is a party to the case or has a financial or proprietary interest in the outcome of the case, or the judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*[40]

23. The Defence makes no claim that Judge Cartwright satisfies any of the criteria under part (a), and thus to succeed they must carry their burden in showing that "the circumstances

[37] *Supra* note 29 *Olujić v. Latvia*, para. 57.
[38] **E191** *supra* note 15, para. 10.
[39] *Prosecutor v. Vidoje Blagojević et al.,* IT 02 60, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003, para. 14.
[40] **E137/5** *supra* note 3, para. 13; **E171/2** Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012, para. 12, quoting **E137/5**, *supra* note 3, para. 13.

would lead a reasonable observer, properly informed, to reasonably apprehend bias" [41] (the "objective observer test").

1. The Objective Observer Test

24. "As the Trial Chamber has consistently noted, a reasonable observer in this regard is '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.'"[42]

25. The presumption of impartiality that must be applied by the objective observer, in addition to establishing an extra hurdle for any party claiming disqualification to surmount, also requires the objective observer to presume that even in situations where a party can demonstrate some predisposition by the judge on an issue relevant to the case, "that the Judges of the International Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions.'"[43] Judge Cartwright is a "highly qualified and experienced jurist[]," thus the reasonable observer apprised of all the relevant circumstances would not "lightly assume" that she would engage in improper conduct in violation of her judicial ethics and in contravention of her professional obligations.[44]

26. "An application that is speculative or based on a mere feeling or suspicion of bias by an accused is insufficient."[45] The Defence must show, in the form of "firmly established"[46] 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

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41 **E55/4** *supra* note 13 at para. 11; see also **E137/2** Nuon Chea's Urgent Application for disqualification of Judge Cartwright, 21 November 2011Application, 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". *Prosecutor v. Furundžija*, IT-95-17/1-A, *Judgment Appeals Chamber*, 21 July 2000, para 186, 190, 197, 200, 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.

42 **E171/2** *supra* note 36, para. 12 (internal citations omitted); **E55/4** *supra* note 28 at para. 12, quoting *Furundžija*, *supra* note 37 at para. 190.

43 *Furundžija*, *supra* note 37 at para. 197. The principle of due regard for a Judge's ability to put aside personal considerations in judging a particular case is well-established. For example, the ICTY Appeals Chamber held that even in a case where it could be "established" that a judge sitting on a case "expressly shared the goals and objectives" of an organization that advocated against certain crimes allegedly committed by the accused in the case, the Judge would be able to put aside that inclination in the particular case before her and impartially decide it. *Ibid,* at para. 200.

44 **E55/4** *supra* note 28 at para. 17.

45 **E171/2** *supra* note 36, para. 13(internal quotations omitted).

46 *Furundžija, supra* note 37 at para. 197.

fairly. The Appeals Chamber of the ICTY has warned of the perils of countenancing too readily undeserving applications for disqualification:

> *Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.*[47]

2. Application of the Objective Observer Test

27. The reasonable objective observer in this situation would be familiar with: (1) the administrative roles that both Judge Cartwright and International Co-Prosecutor Andrew Cayley fulfil at the ECCC; (2) the Defence's and the defence for Nuon Chea's prior challenges to the administrative meetings, and the outcome of those proceedings; (3) that under normal circumstances, an administrative body would discuss Supreme Court Chamber guidance related to the functioning of that body; and, (4) the pattern and practice of the Defence in repeatedly attempting to disqualify judges at the ECCC.

28. This Trial Chamber recently stated that the administrative "meetings would not create a reasonable apprehension of bias by an informed person, with knowledge of all relevant circumstances, in particular as these meetings were unrelated to substantive matters in any case before the ECCC."[48] Although the Supreme Court Chamber stated that the meetings "may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge", that possibility has not been effectuated here, particularly because as explained: the communication took place in the immediate aftermath of the Supreme Court's decision wherefore it was decided to discontinue such meetings.

29. The Defence argues that the Trial Chamber should reference an appellate decision in the *Karemera* case in making its determination.[49] This case – the sole case relied on by the Defence – concerned a judge's "close association and *cohabitation* with a Prosecution counsel"[50]. Against this bar, the weakness of the Defence's application for disqualification becomes crystal clear.

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47 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, *Judgment*, 20 February 2001, para 707 (citations omitted).

48 **E137/5** *supra* note 26, para. 22.

49 **E191** *supra* note 15, para. 11.

50 *Edouard Karemera et al. v. Prosecutor,* ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 67 (emphasis added).

III. ANY DISCLOSURE OF COMMUNICATIONS SHOULD NOT BE LIGHTLY ORDERED

30. The Defence requests that the Chamber "order" the International Co-Prosecutor, and "instruct" Judge Cartwright to disclose, in the interests of justice:

> […] *all* ex parte *communications between them since 24 November 2011, including all correspondence, and in relation to* ex parte *meetings, the number of meetings held, their dates, their agenda, and any actions taken at and pursuant to such meetings.*[51]

31. The stated purpose of the requested disclosure is to "determine whether any additional submissions are necessary."[52] Disclosure is sought irrespective of factual and legal findings on the merits of the request for disqualification itself.[53]

32. The Co-Prosecutors submit that the request for disclosure should be dismissed on two principal grounds: (1) the request merely re-argues an earlier request denied both at first instance and on appeal[54]; and (2) the requested disclosure order (or instruction) finds no legal basis in Rule 34 or relevant practice.[55]

33. The Co-Prosecutors submit that this request for disclosure amounts to a veiled attempt to re-argue the substance of the First Request (**E137/3**), which included an application for investigative action under Rule 35 that was judicially considered and denied on the merits by the Supreme Court Chamber.[56] The Co-Prosecutors' position is underscored by three facts: first, the Defence expressly identified the First Request as "necessary so that full disclosure is made of all *ex parte* communications between the International Co-Prosecutor, Mr. Andrew Cayley, Judge Cartwright, and others"[57]; second, the date from which the Defence is seeking disclosure of communications is expressly identified as "the date of the Request for Investigative Action"[58]; and third, the Defence's "Requested Information" in its First Request is strikingly similar to the instant request for disclosure:

> *(a) a list of all meetings where Mr. Cayley and Judge Cartwright participated in* ex parte *communications, regardless of whether such*

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51 **E191** *supra* note 15, para. 22 [request for relief, item (c)].
52 *Ibid* p. 1; see also para. 22 (using the more tentative language: "whether additional submissions may be necessary.")
53 *Ibid* para. 20.
54 **E137/5** *supra* note 3; **E137/5/1/3** *supra* note 7.
55 **Special PTC02(3)5** *supra* note 28 at para. 10.
56 **E137/5/1/3** *supra* note 7 at para. 23.
57 **E137/3** *supra* note 1, p. 1 and para. 33 [emphasis added].
58 **E191** *supra* note 15, para. 20.

> *meetings were also attended by others, where the discussions touched upon Case 002 either directly or indirectly; and (b) all relevant facts and details concerning these* ex parte *meetings, including but not limited to their agenda and/or minutes (even if only informal and/or hand-written notes were taken).*[59]

34. Furthermore, Rule 34 contains no provisions on investigation or investigative powers and provides no express legal basis for a disclosure order (or instruction) against a sitting Judge or Co-Prosecutor. The Defence has already recognised this in basing the First Request on the investigative powers of the Trial Chamber pursuant to Rules 41, 35 and 93, read "in conjunction", with no reference to Rule 34.[60] As the Pre-Trial Chamber has observed, in disposing of a previous "inadmissible and unfounded"[61] Rule 34 request by the Defence for Ieng Sary:

> *The remedy envisaged in Internal Rule 34 [...] is judicial disqualification, which requires the moving party to demonstrate that the judge in question possesses an objective appearance of bias. It follows that the [Chamber] is not required to act where this burden is not met. The Chamber has no jurisdiction under the Internal Rules to undertake [...] a general inquiry, and no power to order investigation into any allegation of partiality or bias which are not supported by sufficient evidence. To find otherwise would displace the heavy evidentiary burden on the applicant necessary to rebut the presumption of impartiality.*[62]

35. The First Request was duly considered and denied for lack of merit by the Supreme Court Chamber.[63] As the Defence is now fully aware from rulings on two of its previous submissions, "Rule 35 is not the proper mechanism to procure evidence in support of a motion for disqualification."[64] Neither is Rule 34. As cited above, the Pre-Trial Chamber has found that a Chamber cannot undertake a general inquiry, or indeed any investigation under the Internal Rules concerning the conduct of a judge, unless the applicant has first displaced their "heavy evidentiary burden."[65]

36. This interpretation of Rule 34 is supported by procedural rules established at the international level, to which the Chamber may refer pursuant to Article 33 new of the ECCC Law. In *Prlić* et al., Mr Michael Karnavas (for Jadranko Prlić) sought

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59 Compare **E137/3** *supra* note 1 at p. 1 and **E191** *supra* note 15, para. 22(c).
60 **E137/3** *supra* note 1 p. 1 and para. 2.
61 **Special PTC02(3) 5** *supra* note 28, para. 15.
62 **Special PTC02(3)5** *supra* note 28, para. 10 [emphasis added].
63 **E137/5/1/3** *supra* note 7 at para. 23.
64 **E137/5** *supra* note 3, para. 14, citing by comparison Decision on Ieng Sary's Rule 35 application for the disqualification of Judge Marcel Lemonde, 23 March 2010.
65 **Special PTC02(3) 5** *supra* note 28, para. 10

disqualification of Judge Árpád Prandler of Trial Chamber III on the basis of allegations of bias arising from his "previous association" with a United Nations Civil Affairs officer.[66] After lengthy litigation, the President of the ICTY, Judge Robinson, eventually found that the *Prlić* defence had "failed to substantiate any of their claims"; held the disqualification request to be "without any merit whatsoever"; and declined to convene a disqualification panel.[67] As part of his chosen legal strategy, Mr Karnavas had sought disclosure of alleged "*ex parte* communications" between Judge Prandler and the Presiding Judge in the *Prlić* case, Judge Jean-Claude Antonetti, claiming that non-disclosure would violate his client's fair trial rights.[68] Not surprisingly, this disclosure request was denied by the Presiding Judge of Trial Chamber III, Judge O-Gon Kwon. Judge Kwon, by virtue of his administrative responsibilities as Presiding Judge, also communicated privately with Judge Prandler concerning the pending disqualification request. On review by the President, his decision to deny disclosure was upheld as a fully competent exercise of judicial discretion.[69]

37. Before the ECCC, the line of decisions in *Prlić et al.* was applied by the Trial Chamber in disposing of the First Request, as a source of law concerning alleged *ex parte* communications unrelated to the "substance of proceedings" in a given case.[70] The Co-Prosecutors submit that this line of decisions additionally supports the position that disclosure of communications should not be countenanced as a means for the party requesting disqualification to *procure* evidence in the course of disqualification proceedings, especially in the context of allegations of misconduct that have been judicially tested and found to be wholly without merit.[71]

38. As the Supreme Court Chamber has recently noted: "there is no prescribed jurisdiction for any of the Chambers of the ECCC to deal with disciplinary matters in respect of any of the judges of the ECCC beyond the limits of Internal Rule 34."[72] While "a judge is at least in principle within the jurisdiction of Internal Rule 35," this requires that "her alleged conduct rises to the level of an interference with the administration of justice

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66 *Prosecutor v Jadranko Prlić et al.*, IT-04-74-T, Jadranko Prlić's motion for disqualification of Judge Prandler, 30 August 2010.
67 *Prosecutor v Jadranko Prlić et al.*, IT-04-74-T, Decision of the President on Jadranko Prlić's motion to disqualify Judge Árpánd Prandler, 4 October 2010.
68 *Ibid.* at para. 4.
69 *Ibid.* at para. 13.
70 **E137/5** *supra* note 3 at para. 17.
71 *Ibid.* and **E137/5/1/3** *supra* note 7.
72 **E137/5/1/3** *supra* note 7, para. 13.

within the meaning of that Rule."[73] Thus, beyond these two rules, the requested "instruction" to Judge Cartwright and "order" to International Co-Prosecutor Cayley to disclose communications manifestly lack a basis in law.

39. Were this Chamber to consider ordering disclosure of communications on the basis of more general or implied powers, the Co-Prosecutors submit that great restraint is warranted, particularly as the object of the requested disclosure is simply to churn the ocean for potential "additional submissions."[74] The Co-Prosecutors' position is further reinforced by the single, telling difference between the First Request and the instant Request for disclosure: the elimination of any connection between the requested materials and Case 002.[75]

IV. THE REQUEST FOR "ALTERNATIVE RELIEF" SHOULD BE DISMISSED

40. The Defence additionally requests that the Chamber "order" the International Co-Prosecutor, and "instruct" Judge Cartwright to:

> *cease and desist from continuing their* ex parte *communications and for all future ECCC-related communications between them to be copied to a member of DSS or the defence teams, as appropriate.*[76]

41. As set out in section II(B) above, the communication of 19 April 2012 cannot, in itself, be considered as an *ex parte* communication, as it concerned matters unrelated to ECCC proceedings before the Co-Investigating Judges or Trial Chamber. The earlier meetings and communications concerned matters internal to UNAKRT, to which the Defence properly cannot be a "party". Mr Rosandhaug, whose role is neutral between the parties to ECCC proceedings, has confirmed that earlier communications and meetings merely addressed "a range of operational issues affecting the international component of the ECCC".[77] As described by the Trial Chamber itself, these meetings were concerned with "certain administrative matters which pertain exclusively to the United Nations component of the court."[78] The Trial Chamber's Senior Legal Officer has also clarified that these "management meetings" were "originally convened at the request of the [United Nations] Office of Legal Affairs" and that the communication of 19 April 2012

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73 **E137/5/1/3** *supra* note 7, para. 14.
74 **E191** *supra* note 15, para. 22.
75 Compare **E137/3** *supra* note 1, p. 1 with **E191** *supra* note 15, para. 22(c).
76 **E191** *supra* note 15, para. 17.
77 **E137/5** *supra* note 3, para. 20 [emphasis added].
78 **E137/5** *Ibid* [emphasis added].

formed part of a "brief discussion", leading to a decision to discontinue the meetings in light of the comments of the Supreme Court Chamber.[79]

42. In addition, as noted above, the Supreme Court Chamber has confined the scope of disciplinary action against judges to the four corners of Rules 34 and 35, provided the respective evidentiary thresholds are met.[80] Thus, beyond these two rules, the requested "instruction" to Judge Cartwright and "order" to International Co-Prosecutor Cayley to "cease and desist" from communications manifestly lack a basis in law.

V. CONCLUSION AND REQUESTED RELIEF

43. As set out above, the Application and Request of the Defence is manifestly unfounded in both law and fact. Furthermore, the request for disqualification cannot be viewed in isolation from the many other attempts by defence teams to obtain the disqualification of judges in Case 002, none of which were held to be adequately substantiated. This is at least the tenth application by a defence team for disqualification of judges connected to Case 002. It is the fifth such application pursued by the Defence for Ieng Sary. Judge Cartwright has been the subject, either solely or as part of a group, of six of these defence motions for disqualification, and fully half of them were filed by the Ieng Sary Defence. Every single application has been rejected.

44. For these reasons, the Co-Prosecutors respectfully request the Trial Chamber to dismiss the Ieng Sary Defence Application and Request as inadmissible, manifestly unfounded, dilatory and/or not in the interests of justice.

Respectfully submitted,

Date	Name	Place	Signature
10 May 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

[79] **E191.1.3** Email from Ms. Susan Lamb to IENG Sary Defence, 20 April 2012 and Email from IENG Sary Defence to parties, 20 April 2012.

[80] See above, para. 37.