

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 9 March 2011**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

IENG SARY'S REQUEST FOR CLARIFICATION AS TO HOW THE TRIAL CHAMBER INTENDS TO ACT UPON PARTIES' MOTIONS IN LIGHT OF THE APPLICATIONS TO DISQUALIFY THE ENTIRE TRIAL CHAMBER

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The Trial Chamber Judges:

Judge NIL Nonn

Judge THOU Mony

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge YOU Ottara

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

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All Defence Teams

Mr. IENG Sary, through his Co-Lawyers (“the IENG Sary Defence”), hereby requests clarification as to how the Trial Chamber intends to act upon all of the Parties’ motions in light of the Applications to disqualify the Trial Chamber Judges (“the Applications”). This motion is made necessary for transparency and in order to assist in the protection of Mr. IENG Sary’s fair trial rights. The IENG Sary Defence submits that it has a right to be aware of what steps, if any, the Trial Chamber is taking in ensuring that its orders and decisions are fair, pending a decision on the Applications. Specifically, the IENG Sary Defence requests: **a.** clarification by way of a timetable and updates regarding the status of the Applications; **b.** clarification as to why the Trial Chamber has not stayed the proceedings pending the outcome of the Applications; and **c.** clarification as to the how the Trial Chamber Judges intend to consider pending matters in light of the Applications.

I. BACKGROUND

1. On 1 February 2011, the IENG Thirith Defence filed an Application for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony (“IENG Thirith Application”).¹ On 3 February 2011, the Trial Chamber Judges indicated that they would not file any response to the IENG Thirith Application.²
2. On 2 February 2011, Judge Nil Nonn sent an Interoffice Memorandum to the Judicial Administration Committee (“JAC”) requesting the JAC to choose two Cambodian Judges and one international Judge from amongst the ECCC Judges in order to compose a chamber to deal with the Applications.³
3. On 8 February 2011, the NUON Chea Defence emailed an English courtesy copy to all the Parties in Case 002 of its Urgent Application for Disqualification of the Trial Chamber Judges (“NUON Chea Application”). On 24 February 2011, the NUON Chea

¹ *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, IENG Thirith Defence Application for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 1 February 2011, E28, ERN: 00641075-00641090.

² *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, Memorandum from the Trial Chamber Judges to the President of the Judicial Administration Committee, 3 February 2011, E28/2, ERN: 00643803-00643804.

³ *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, Memorandum from Judge Nil Nonn to the JAC, Regarding Assignment of Judges under IR 34(6), 2 February 2011, E28/1, ERN: 00643800-00643800.

Application was filed.⁴ On 24 February 2011, the Trial Chamber Judges indicated that they would not file any response to the NUON Chea Application.⁵

4. On 9 February 2011, H.E. Kong Srim, President of the JAC, sent an Interoffice Memorandum to Judge Nil Nonn, President of the Trial Chamber, and all JAC members informing them that a bench of Judges had been named to determine the Applications. The bench was comprised of Judges You Ottara, Claudia Fenz, Mong Monychariya, Katinka Lahuis, and Hout Vuthy.⁶

5. On 11 February 2011, the IENG Sary Defence provided courtesy copies in English of its Motion to support and join the Applications to the Trial Chamber and all Parties to Case 002 (“IENG Sary Motion”). On 24 February 2011, the IENG Sary Motion was filed.⁷ On 24 February 2011, the Trial Chamber Judges indicated that they would not file any response to the IENG Sary Motion.⁸

6. On 23 February 2011, the OCP responded to the Applications to disqualify all the Trial Chamber Judges (“OCP Response”).⁹ The OCP submitted that the threshold for establishing an appearance of bias has not been met and the Applications should accordingly be dismissed.¹⁰ On 1 March 2011, the IENG Sary Defence¹¹ and the IENG

⁴ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, NUON Chea’s Urgent Application for Disqualification of Trial Chamber Judges, 24 February 2011, E54, ERN: 00641862-00641877.

⁵ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum from the Trial Chamber Judges to the President of the Judicial Administration Committee, 24 February 2011, E54/1, ERN: 00647781-00647782.

⁶ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum from H.E. Kong Srim, President of the JAC, to Judge Nil Nonn, President of the Trial Chamber, Regarding Decision of the JAC regarding the constitution of bench following disqualification motions, 9 February 2011, E28/1/1, ERN: 00643802-00643802.

⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Motion to Support IENG Thirith and NUON Chea’s Applications for Disqualification of the Trial Chamber Judges & IENG Sary’s Motion to Join IENG Thirith’s Application for the Trial Chamber to be Replaced - for the purposes of Adjudicating the Applications - by Reserve Judges of the Trial Chamber or Additional Judges to be chosen by the Judicial Administration Committee, 17 February 2011, E53, ERN: 00643507-00643514.

⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Memorandum from the Trial Chamber Judges to the President of the Judicial Administration Committee, 24 February 2011, E53/1, ERN: 00647779-00647780.

⁹ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Joint Response to IENG Thirith, IENG Sary and NUON Chea’s Applications for Disqualification of the Judges, 23 February 2011, E55, ERN: 00647348-00647355.

¹⁰ *Id.*, para. 2.

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Reply to Co-Prosecutors’ Joint Response to IENG Thirith, IENG Sary and NUON Chea’s Applications for Disqualification of the Judges, 1 March 2011, E55/2, ERN: 00648827-00648835.

Thirith Defence¹² replied to the OCP Response. On 2 March 2011, the NUON Chea Defence replied to the OCP Response.¹³

II. REQUEST

7. The IENG Sary Defence requests a timetable and updates regarding the status of the Applications. This will result in their transparent resolution.

8. Rule 34(5) states in pertinent part that “[t]he Judge in question may continue to participate in the judicial proceedings pending a decision. However, he or she may decide to step down voluntarily at any point in the following proceedings.” The Trial Chamber Judges appear to still be partaking in Case 002’s proceedings.¹⁴ The IENG Sary Defence requested that “[u]ntil this Application has been decided, the Trial Chamber Judges must not participate in any pending matters or conduct any activities in preparation for Case 002, so that these matters will not be tainted, should the Trial Chamber Judges later be disqualified.”¹⁵ This concern has yet to be addressed by the Trial Chamber Judges. Should the Trial Chamber Judges be disqualified, this will be because the Chamber deciding the disqualification found that there is an appearance of bias. Their previous participation in matters for Case 002 will taint Case 002 with an appearance of bias, which in turn, will taint the entire legacy of the ECCC.

9. The IENG Sary Defence’s concern is enhanced because the removal of all Trial Chamber Judges is being sought, not just one.¹⁶ Even though the Rules state that “[a]ny act done before the determination of an application for disqualification shall be deemed to

¹² *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, IENG Thirith’s Reply to ‘Co-Prosecutors’ Joint Response to IENG Thirith, IENG Sary and NUON Chea’s Applications for Disqualification of the Judges’, 1 March 2011, E55/1, ERN: 00648644-00648647.

¹³ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Reply to Co-Prosecutors’ Joint Response to IENG Thirith, IENG Sary and NUON Chea’s Applications for Disqualification of the Judges, 2 March 2011, E55/3, ERN: 00648899-00648904.

¹⁴ *See for example, Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Order to IENG Sary Defence on Filing of Preliminary Objections, 25 February 2011, E51/6, ERN: 00648420-00648421, which is signed by Trial Chamber President Judge Nil Nonn, one of the Judges whose disqualification is sought by the Applications.

¹⁵ IENG Sary Motion, para. 15.

¹⁶ *See e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC), IENG Sary’s Request for Appropriate Measure 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, 20 October 2009, 1, ERN: 00390853-00390868; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC), IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, ERN: 00386956-00386968; *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Application to Disqualify Judge Nil Nonn due to his Purported Admission that he has Accepted Bribes & Request for a Public Hearing or in the Alternative for Leave to Reply to any Submissions Presented by Judge Nil Nonn in Response to this Application, 14 January 2011, E5, ERN: 00636122-00636137.

be valid,”¹⁷ the lingering stain from the previous participation of a Judge who is subsequently disqualified for appearing to be biased will remain. The proceedings will be tainted with an appearance of bias. In order to avoid any of its actions being tainted by an appearance of bias where the disqualification of only one or two Judges of a Chamber is sought, a Chamber could either participate without the Judge whose disqualification application is pending, or with a reserve Judge.¹⁸ The present situation, where the disqualification of the entire Bench is sought, is different. To avoid any of its actions being tainted, the entire Trial Chamber must step down. If this is done, there would be no sitting Trial Chamber, and even if the reserve Judges could replace the Trial Chamber Judges, there would not be the requisite five Trial Chamber Judges. The IENG Sary Defence thus reasoned that it will be judicially prudent for the Trial Chamber to stay the proceedings until the Applications have been resolved.¹⁹

10. The Trial Chamber has itself described the ECCC as a “model court” capable of providing encouragement and “underscor[ing] the significance of institutional safeguards of judicial independence and integrity.”²⁰ In light of the above factors, clarification is required as to why the Trial Chamber Judges have not stayed the proceedings pending a decision on the Applications. The requested clarification will provide a record and transparency enabling the IENG Sary Defence to ascertain whether the Trial Chambers’ continued participation and conduct in Case 002, pending a decision on the Applications, is fair to Mr. IENG Sary and is not objectively capable of staining the ECCC’s legacy as a model court for Cambodia. As eloquently explained by Lord Hewart C.J., “It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”²¹

11. As the Trial Chamber appears to be partaking in the proceedings with the Applications pending, and in light of the possibility that all previous decisions of the Trial

¹⁷ Rule 34(9). See also *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge NIL Nonn and Related Requests, 28 January 2011, E5/3, ERN: 00640427-00640435 (“Nil Nonn Disqualification Decision”), para. 4, which states that “decisions of the [Trial] Chamber would not be nullified should a sitting judge subsequently be disqualified.”

¹⁸ The Rules are not clear on this issue. Rule 34(5) permits a Judge “to step down voluntarily at any point in the following proceedings,” but is unclear whether the Chamber may continue without this Judge or requires a reserve Judge to take his or her place.

¹⁹ IENG Sary Motion, para. 15.

²⁰ Nil Nonn Disqualification Decision, para. 14.

²¹ *R v. Sussex Justices ex parte McCarthy* [1924], 1 KB 256, 9 November 1923.

Chamber in Case 002 may become tainted if the Trial Chamber Judges are found to have an appearance of bias, the IENG Sary Defence requests clarification as to how the Trial Chamber Judges intend to consider pending matters in light of the Applications. Even though according to the Rules,²² there would be no effect on previous judicial action of the Trial Chamber, in the eyes of the public, all previous matters in Case 002 with which the Trial Chamber Judges were concerned would be tainted with an appearance of bias. Clarification as to how the Trial Chamber Judges intend to consider pending matters, so as not to taint them with an appearance of bias, would allow for transparency and avoid any potential staining of the ECCC's legacy which arises as a result of the Trial Chamber's appearance of impartiality. As stated by Lord Diplock, "If the way the courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."²³

WHEREFORE, for all the reasons stated herein, the Defence respectfully REQUESTS:

- a. clarification by way of a timetable and updates regarding the status of the Applications;
- b. clarification as to why the Trial Chamber has not stayed the proceedings pending the outcome of the Applications; and
- c. clarification as to the how Trial Chamber Judges intend to consider pending matters in light of the Applications.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 9th day of **March, 2011**

²² Rule 34(9).

²³ *Attorney-General v. Leveller Magazine* [1979] A.C. 440, 450.