

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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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

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 34 of the ECCC Internal Rules (“Rules”), this Application to Disqualify Judge Nil Nonn. This Application is made necessary because Judge Nil Nonn purportedly admitted to documentary filmmaker Amanda Pike that as a matter of practice – with which he saw nothing wrong – he accepted gratuities from grateful litigants (effectively bribes) in cases over which he presided while serving as the President of the Provincial Court in Battambang. In concert with and connected to this Application, the Defence has filed IENG Sary’s Request for Investigative Action Regarding IENG Sary’s Application to Disqualify Judge Nil Nonn for Purportedly Admitting to Accepting Bribes by Requesting or Ordering Filmmaker Amanda Pike to Disclose the Video Footage of her Interview with Judge Nil Nonn and his Signed Release Form (“Request for Investigation”),<sup>1</sup> the purpose of which is to obtain the actual video footage where Judge Nil Nonn is alleged to have made this incriminating admission. In light of this Application and the related Request for Investigation, it is submitted that Judge Nil Nonn should recuse himself from all matters related to Case 002 until a decision on this Application has been issued. A public hearing is requested. Should a hearing not be granted, the Defence requests leave to file a reply to any submissions made by Judge Nil Nonn in response to this Application.

## I. PRELIMINARY MATTERS

### A. Admissibility and Timing of this Application

1. Rule 34(4) states that an application for disqualification must be submitted against a Trial Chamber Judge at the initial hearing when it concerns matters arising before the trial. Rule 34(3), however, states that the application shall be filed as soon as the party becomes aware of the grounds in question. Thus, in order to meet its due diligence obligation,<sup>2</sup> the Defence cannot sit blissfully idle or lay in wait so as to spring this issue on the Trial Chamber at the

<sup>1</sup> See *Case of IENG Sary*, 002/13-01-2011-ECCC/TC, IENG Sary’s Request for Investigative Action Regarding IENG Sary’s Application to Disqualify Judge Nil Nonn for Purportedly Admitting to Accepting Bribes by Requesting or Ordering Filmmaker Amanda Pike to Disclose the Video Footage of her Interview with Judge Nil Nonn and his Signed Release Form, 14 January 2011.

<sup>2</sup> Defence counsel are required to act with due diligence to safeguard their clients’ interests. *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 (7<sup>th</sup> 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.



initial hearing when the Trial Chamber is already seized with the Case File.<sup>3</sup> The importance of the obligation to act diligently in applications for judicial disqualifications has cogently been explained by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Čelebići*:

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.<sup>4</sup>

2. All members of the Trial Chamber must be equally prepared for the start of a potential trial. According to Rule 34(10), if a judge is disqualified, a reserve judge may be appointed to take the judge's place. According to Article 11 new of the Establishment Law, however, reserve Cambodian judges may continue to perform their regular duties in their respective courts. The reserve Cambodian judge is not expected to spend full time preparing for a possible trial in Case 002 while sitting full-time as a regular judge. Time for preparation may be lost if the application to disqualify Judge Nil Nonn is not filed until the initial hearing. In the interests of justice this matter *must* be resolved expeditiously.
3. Furthermore, the preliminary matters which precede the initial hearing and the trial are of the utmost importance since they will involve preliminary objections concerning the jurisdiction of the ECCC to try Mr. IENG Sary.<sup>5</sup> These matters cannot be left to the determination of a judge who may not be objectively independent and impartial. Mr. IENG Sary's rights cannot adequately be protected unless the Defence submits this Application at the earliest possible moment. Rule 34(9) stipulates "[a]ny act done before the determination of an application for disqualification shall be deemed to be valid."

**B. Request that Judge Nil Nonn Recuse himself from Determining this Application and any Matters Pending before this Application is Decided**

4. Rule 34 does not require a judge who is the subject of a disqualification application to recuse himself while the application is pending. "However, he or she may decide to step down

<sup>3</sup> See Rules 69, 79.

<sup>4</sup> *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 631. See also *Prosecutor v. Karemera*, ICTR-98-44-AR15bis.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.

<sup>5</sup> Rule 89 allows the Parties to file preliminary objections to jurisdiction to the Trial Chamber within 30 days of the Closing Order becoming final.

voluntarily at any point in the following proceedings.”<sup>6</sup> It would breach the ECCC Code of Judicial Ethics for a judge to decide the matter of his own disqualification. Article 2(2) of the ECCC Code of Judicial Ethics requires that “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.” Judge Nil Nonn *must* therefore recuse himself from deciding on this matter. This would be consistent with the established practice before the ECCC.<sup>7</sup> Additionally, until this Application has been decided, Judge Nil Nonn *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 Judge Nil Nonn later be disqualified.

**C. Request for a Public Hearing, or in the Alternative, Leave to Reply to any Submissions filed by Judge Nil Nonn in Response to this Application**

5. A public oral hearing is necessary. This Application involves Mr. IENG Sary’s fundamental fair trial right to be tried by an independent and impartial tribunal. There are no justifiable reasons why this Application should not be discussed and debated transparently and in full view of the public. The people of Cambodia, having an inherent interest in the objective independence and impartiality of the ECCC’s judges, are entitled to scrutinize these proceedings.<sup>8</sup> Lack of transparency and accountability at the UN has plagued its credibility in the past and steps have been taken to improve the situation.<sup>9</sup> The ECCC should likewise take steps to ensure that its proceedings are transparent and its decision-makers accountable.
6. In the alternative, should a public hearing not be granted, the Defence requests to be permitted to reply to any written submissions filed by Judge Nil Nonn pursuant to Rule 34(7).

<sup>6</sup> Rule 34(5).

<sup>7</sup> See *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public 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, ERN 00160734-00160742 (“Ney Thol Disqualification Decision”); *Case of IENG Sary*, 002/20-10-2009-ECCC/PTC(03), 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, ERN: 00398615-00398622, para. 2.

<sup>8</sup> As the Pre-Trial Chamber has previously recognized, “one of the primary bases for holding a public hearing is to allow public scrutiny of the fairness of the proceedings.” *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on KHIEU Samphan’s Request for a Public Hearing, 4 November 2008, A190/I/8, ERN: 00236251-00236254. As noted by the Open Society Justice Initiative, “Absent demonstration of a compelling need for confidentiality in a concrete matter, rules favoring transparency should govern, in order to allow the public to observe the work of the court.” *Political Interference in the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE, June 2010, p. 27 (“OSJI Report”).

<sup>9</sup> See Neil Macfarquhar, *UN Approves New Anti-Corruption Chief*, INTERNATIONAL HERALD TRIBUNE, 30 July 2010, p. 3, where the outgoing director of the Office of Internal Oversight Services, Ms. Inga-Britt Ahlenius, is reported to have stated in her internal end-of-assignment report that at the UN (at least with respect to rooting out financial corruption) “[t]here is no transparency; there is a lack of accountability.”

While the Rules are silent on the issue of whether the Defence may submit a reply in such a situation, replies have been permitted when hearings are not granted.<sup>10</sup>

## II. BACKGROUND

7. In 2002, documentary filmmaker Amanda Pike travelled to Cambodia on an International Reporting Project Fellowship from the Paul H. Nitze School of Advanced International Studies of Johns Hopkins University<sup>11</sup> and produced the documentary “Cambodia: Pol Pot’s Shadow.”<sup>12</sup>
8. While filming this documentary, Ms. Pike also conducted other research which was turned into several articles as part of a diary series which were posted on the Frontline/World website, where they can still be found today.<sup>13</sup> Among those interviewed by Ms. Pike was Judge Nil Nonn, the then President of the Provincial Court of Battambang. This interview served as the basis of her article “Battambang: The Judge.” In this article, Ms. Pike reported:
 

**We talk with Judge Nil, who says that he’s upset by people’s lack of faith in the justice system. He laments that he often has to defend his profession to friends. He admits that, yes, he does take bribes – of course – but only after a case is over. After all, he earns only \$30 a month, not nearly enough to provide for his family. What else, he asks with that toothy grin, is he supposed to do?**<sup>14</sup>
9. In June 2006, Judge Nil Nonn reportedly denied that he had ever taken payments from the public or participated in an interview with Ms. Pike.<sup>15</sup> Later that same month, he was contacted by The Cambodia Daily reporters James Welsh (who presently is the Managing Editor) and Prak Chan Thul to comment on what Ms. Pike reported, i.e., that he had admitted to accepting money from litigants satisfied with his decisions. Judge Nil Nonn responded, according to The Cambodia Daily article titled “Filmmaker: KR Judge Says He Accepted Cash,” of 10-11 June 2006, “I don’t know. I don’t give information.” The article further states:

<sup>10</sup> Article 8.4 of the Practice Direction on the Filing of Documents before the ECCC states, “A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the response to which the participant is replying.” Replies have been accepted many times in the past. *See, e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC29), IENG Sary’s Reply to the Co-Prosecutors’ Response to IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 14 December 2009, D130/7/3/4, ERN: 00414501-00414508.

<sup>11</sup> *See* <http://www.internationalreportingproject.org/stories/detail/665/>.

<sup>12</sup> Available at <http://www.pbs.org/frontlineworld/stories/cambodia/>.

<sup>13</sup> *See* <http://www.pbs.org/frontlineworld/stories/cambodia/diary01a.html>.

<sup>14</sup> *See* Amanda Pike, *Cambodia: Pol Pot’s Shadow*, FRONTLINE/WORLD, October 2002, available at <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html> (emphasis added).

<sup>15</sup> James Welsh & Prak Chan Thul, *Filmmaker: KR Judge Says He Accepted Cash*, CAMBODIA DAILY, 10-11 June 2006. Khmer translation also available in the Table of Authorities.

Amanda Pike, producer of 'Cambodia: Pol Pot's Shadow,' wrote in an email received Friday that she had thoroughly reviewed all the tapes and transcripts of the interview with Nil Nonn.

'We interviewed Judge Nil Nonn on camera for an hour and 45 minutes on March 21, 2002 in Phnom Penh. We filmed proceedings in his Battambang courtroom on April 12, 2002,' Pike wrote.

'We also have Nil Nonn's signed release form, in which he consents to be filmed for our documentary,' she added.

**Pike said that during the interview she asked Nil Nonn if people ever offered him money to try to have their side win case [sic].**

**'He answered: Yes, it happens to me as it does to others as well, but it is not through any effort on my part. However, if after a trial people feel grateful to me and give me something, that's normal I don't refuse it.'**

According to Pike, Nil Nonn added: 'I've settled the case for them and people feel grateful. Living conditions these days are difficult for me. But if you are talking about pressuring people for bribes – no.'<sup>16</sup>

10. Having learned of this article, the Defence took steps to locate Ms. Pike and to obtain the video footage of her interview with Judge Nil Nonn and Judge Nil Nonn's release form to be filmed.<sup>17</sup> On 8 September 2010, Ms. Pike responded by email, noting that she and her producing partner Adam Kecker were the owners of the requested material, that due to "journalistic grounds" they would not "voluntarily" provide the requested material, and that any future correspondence about this matter should be addressed to their attorney, John Kecker, at the firm of Kecker & Van Nest, 710 Sansome Street, San Francisco, CA 94111, USA, (415) 391-5400.<sup>18</sup>
11. On 9 September 2010, the Defence hand-delivered a letter to Mr. Welsh at The Cambodia Daily.<sup>19</sup> Through this letter, the Defence requested a copy of the email exchange between Ms. Pike and The Cambodia Daily concerning the interview with Judge Nil Nonn. On 16 September 2010, the Defence received an emailed letter from Mr. Welsh in which he stated that his professional and ethical obligations prohibit him from providing the Defence with a copy of email exchange.<sup>20</sup>
12. On 17 September 2010, the Defence filed an application to disqualify Judge Nil Nonn and a related request for investigative action to the Trial Chamber, but was informed that the Trial Chamber was not yet seized of the Case File and could not accept the filings.<sup>21</sup>
13. On 13 January 2011, the Trial Chamber became seized with the Case File.<sup>22</sup> The Defence now files this Application.

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> See email from Michael G. Karnavas to Ms. Pike, Annex A.

<sup>18</sup> See Annex B.

<sup>19</sup> See Annex C.

<sup>20</sup> See Annex D.

<sup>21</sup> See Annex E for a 23 September 2010 memorandum from the Pre-Trial Chamber to the Trial Chamber and a 28 September 2010 memorandum from the Trial Chamber to the Defence related to these filings.

### III. APPLICABLE LAW

#### A. The Requirement of an Independent, Impartial and Uncorrupt Judiciary

14. According to Article 128 New of the Cambodian Constitution, “[t]he Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”<sup>23</sup> According to Article 31 of the Cambodian Constitution, “[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human [R]ights, the covenants and conventions related to human rights, women’s and children’s rights.”
15. According to Article 3(3) of the Agreement, judges “shall be persons of high moral character, impartiality and integrity” and they “shall be independent in the performance of their functions and shall not seek any instructions from any government or any other source.”
16. According to Article 10 new of the Establishment Law, in almost identical wording, judges “shall have high moral character, [and] a spirit of impartiality and integrity...” and they “shall be independent in the performance of their functions and shall not seek any instructions from any government or any other source.”
17. According to Article 1 of the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (“UNTAC Code”) (applicable in 2002 and today):

#### Article 1: Independence of the Judiciary

1. The independence of the judiciary must be guaranteed in accordance with *The Basic Principles on the Independence of the Judiciary*, adopted by the United Nations. Judges must decide in complete impartiality, on the basis of facts which are presented to them, and in accordance with law, refusing any pressure, threat or intimidation, direct or indirect, from any of the parties to a proceeding or any other person.

2. The judiciary must be independent of the executive and legislative authorities and of any political party. Persons selected for judicial functions must be honest and competent.

3. The principle of the independence of the judiciary entitles and requires judges to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. They must have decent and sufficient material conditions for the exercise of their functions. Judges must receive suitable training and be remunerated adequately to ensure their impartiality and independence.

18. According to Article 38 of the UNTAC Code:

#### Article 38: Extortion<sup>24</sup>

1. Without prejudice to possible disciplinary action, any civil servant, military personnel or official agent of any of the four Cambodian parties to the Paris

<sup>22</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OIJ(PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 13 January 2011, D427/1/26, ERN: 00634887-00634891. See also Rules 69, 79.

<sup>23</sup> 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

<sup>24</sup> Another translation of the UNTAC code translates this same Article as “Corruption.” A closer translation to the Khmer would simply be “bribe-taking.”

Agreement, or any political official who, while performing official duties or tasks related to such duties, solicits or attempts to solicit or who receives or attempts to receive property, a service, money, staff, a professional position, a document, an authorization or any benefit in exchange for any one of these same elements is guilty of the felony of extortion and shall be subject to a punishment of three to seven years in prison.

2. The court may remove the convicted person from elective office and may also prohibit him or her, after serving the sentence, from standing for election or from holding any position in the public administration for a period of two years.

3. The penalty for this felony shall also include a fine of double the sum of money or value of the property extorted.<sup>25</sup>

19. According to Rule 21(1), “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect: a) ECCC proceedings shall be fair...”

20. According to Rule 34(2), “[a]ny 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.”

21. According to Article 14(1) of the International Covenant on Civil and Political Rights, “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

22. According to Articles 2-4 of the Cambodian Code of Ethics for Judges, judges must act with independence, impartiality, and honesty. Similarly, according to Articles 1-3 of the ECCC Code of Judicial Ethics:

**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.

**Article 3. Integrity**

(Amended on 5 September 2008)

<sup>25</sup> This conduct is criminalized in other countries as well. In France, for example, the Penal Code criminalizes the taking of bribes by anyone holding a judicial function. See French Criminal Code, N. C PÉN., Art. 434-9.



1. Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary.
2. Judges shall not directly or indirectly accept, offer, or provide any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions or the independence of their office.<sup>26</sup>

23. Cambodian law and the Cambodian and ECCC Codes of Judicial Ethics are not unique in requiring judges to be independent, impartial, and to act with integrity. Many States have similar requirements in their codes of judicial ethics. According to the New Zealand Guidelines for Judicial Conduct, for example, “[i]mpartiality is the essential quality required of the judge”<sup>27</sup> and “[l]ack of integrity or propriety in private dealings and financial affairs, such as would expose the judge to the censure of reasonable, fair-minded, and informed persons, may also be viewed as incompatible with judicial office.”<sup>28</sup>
24. According to Values 1-4 of the 2002 Bangalore Principles of Judicial Conduct (“Bangalore Principles”):<sup>29</sup>

*Value 1:*

**INDEPENDENCE**

*Principle:*

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

*Application:*

1.1 A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

...

<sup>26</sup> Adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, amended on 5 September 2008. See also Article 4 of the ICC Code of Judicial Ethics, adopted and entered into force on 9 March 2005, which describes the judges’ duty of impartiality in exactly the same terms.

<sup>27</sup> New Zealand Guidelines for Judicial Conduct, para. 8 available at:

<http://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct/Guidelines-for-Judicial-Conduct.pdf>.

<sup>28</sup> *Id.*, para. 35.

<sup>29</sup> The Bangalore Principles contain one of the first studies on judicial conduct and are intended to apply to judges the world over. Working Group on Judicial Conduct, European Network of Councils of Justice, Consiglio Superiore Della Magistratura, p. 25. The Bangalore Principles have been referred to as “the preeminent international instrument relating to judicial conduct.” See American Bar Association, Analysis of the Draft Code of Judicial Conduct for the Kingdom of Cambodia, 5 December 2005, p. 2. The Bangalore Principles have also been cited by the Pre-Trial Chamber. See *Case of IENG Sary*, 002-09-10-2009-ECCC/PTC(01), Decision on IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, 7, ERN: 00407716-00407724, para. 19. The Bangalore Principles were developed in order to strengthen the 1985 United Nations Basic Principles on the Independence of the Judiciary and were supported *inter alia* by the United Nations High Commissioner for Human Rights and were drafted by the Judicial Integrity Group in 2001 and revised in 2002. They have been reviewed and revised in accordance with commentary from a large number of Civil Law and Common Law jurisdictions. 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>. See also ECOSOC Resolution 2007/22, available at <http://www.un.org/ecosoc/docs/2007/Resolution%202007-22.pdf>.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

...

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

...

*Value 2:*

### **IMPARTIALITY**

*Principle:*

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

*Application:*

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 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.

...

*Value 3:*

### **INTEGRITY**

*Principle:*

Integrity is essential to the proper discharge of the judicial office.

*Application:*

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

...

*Value 4:*

### **PROPRIETY**

*Principle:*

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

*Application:*

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

...

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.<sup>30</sup>

#### **B. Test of *Bias* or *Appearance of Bias***

25. The ECCC follows the test for bias set out by the ICTY Appeals Chamber in the *Furundžija* case.<sup>31</sup> In *Furundžija*, the Appeals Chamber found that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the

<sup>30</sup> Bangalore Principles of Judicial Conduct, 2002, available at

[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (emphasis added).

<sup>31</sup> Ney Thol Disqualification Decision, para. 20.

surrounding circumstances which objectively gives rise to an appearance of bias.”<sup>32</sup> It then stated the following principles:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

- i) 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. Under these circumstances, a Judge’s disqualification from the case is automatic; or
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>33</sup>

26. In relation to the reasonable observer prong of the second principle, the *Furundžija* Appeals Chamber adopted “the approach that the ‘reasonable person must be 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 apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.’”<sup>34</sup>

#### IV. APPLICATION FOR DISQUALIFICATION

##### A. Preliminary Observations

27. Judges who are corrupt fail to act independently, impartially, or with integrity. “[C]orruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.”<sup>35</sup> Governments strive to stamp out judicial corruption in order to ensure that judges act with the independence, impartiality, and integrity that their position requires. Prime Minister Samdech Akka Moha Sena Padei Techo Hun Sen insisted on nothing less when he instituted an “iron fist” campaign in 2005 to crack down on corrupt judges.<sup>36</sup>

28. Speaking of the need to have an incorruptible judiciary, Justice Michael Kirby, former Justice of the High Court of Australia, elegantly remarked: “The law may differ from country to country. But the expectation of an uncorrupted judge is, or ought to be, universal.”<sup>37</sup> Thus,

<sup>32</sup> *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, para. 190, quoting *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997. The Special Court for Sierra Leone has employed the same test. Concerning the reasonable observer prong, its Appeals Chamber noted that “[i]n relation to the objective test, this requires that the Judge is not only impartial, but also appears to be impartial. Furthermore, the threshold for an appearance of bias does not require proof of actual bias.” *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 9 (emphasis added).

<sup>35</sup> Criminal Law Convention on Corruption, Council of Europe, 27 January 1999, preamble, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>.

<sup>36</sup> See LICADHO, *Human Rights in Cambodia: the Charade of Justice*, December 2007, p. 22, available at <http://www.licadho-cambodia.org/reports/files/113LICADHOREportCharadeJustice07.pdf>.

<sup>37</sup> Michael Kirby, *Tackling Judicial Corruption Globally*, available at: [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_stjames.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames.htm).

unsurprisingly, Judge Sylvia Cartwright, when commenting on her participation as a Judge at the ECCC and the possibility of the function of the ECCC being compromised by corruption, stressed: “a number of the judges would pack our bags and go away.”<sup>38</sup> Tolerating a judge to remain on the bench who has had a sustained history of effectively taking bribes is unquestionably a form of corruption: **“If when faced with evidence of interference, international officials of the court delay or are unwilling to invoke the protective provisions, they become complicit.”**<sup>39</sup>

29. Mr. IENG Sary has an unqualified right to be tried by an independent and impartial tribunal.<sup>40</sup> Mr. IENG Sary thus has the right to expect that the judges who try his case will act with independence, impartiality, and integrity. The Trial Chamber must seriously address this Application, and, as requested in the Request for Investigation, it must take all necessary measures to ascertain whether Judge Nil Nonn did in fact make the incriminating admissions attributed to him in Frontline/World and The Cambodia Daily as represented by Ms. Pike.

**B. Judge Nil Nonn’s Purported Admission to Taking Money from Litigants Calls into Question his Independence, Impartiality, and Integrity, Creating the Appearance of Bias**

30. Judge Nil Nonn appears to have publicly admitted to taking bribes – although he claims these were merely gratuities from successful litigants.<sup>41</sup> This is exactly the sort of conduct that prevents a judge from executing his judicial affairs independently and impartially. Moreover, Judge Nil Nonn’s purportedly admitted actions are violations of Cambodian law,<sup>42</sup> his ethical codes (then existing and that of the ECCC),<sup>43</sup> and international standards of justice. Thus, assuming the video footage validates the representations made by Ms. Pike in her article and to The Cambodia Daily, Judge Nil Nonn *must* be disqualified pursuant to Rule 34.

31. Rule 34 allows for any party to seek 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

<sup>38</sup> *Tough Job Ahead for NZ Judge*, TVNZ, 29 March 2009, available at: <http://tvnz.co.nz/world-news/tough-job-ahead-nz-judge-2594965>.

<sup>39</sup> OSJI Report, p. 23. The Open Society Justice Initiative further states, “While international officials need not be overseers of their national colleagues, they must be active guardians of the integrity of the court and cannot ignore or acquiesce to situations where political interference is apparent. This responsibility is heightened to the extent processes are held in secret.” OSJI Report, p. 30.

<sup>40</sup> The necessary qualities of independence and impartiality are interrelated. Theodor Meron, former President and current Judge of the Appeals Chamber of the ICTY, has explained that “it scarcely bears repeating that a dependent judge can hardly be impartial.” Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT’L L. 359, 361 (2005) (“Meron”).

<sup>41</sup> As discussed *infra*, the timing is immaterial and money accepted at any time in relation to a case is equally prohibited by the law and applicable codes of judicial ethics.

<sup>42</sup> See UNTAC Code, Art. 38.

<sup>43</sup> See Cambodian Code of Judicial Ethics, Arts. 2-4.

the appearance of bias.”<sup>44</sup> Accordingly, judges must not only be independent and impartial, they must appear to be independent and impartial to an objective observer. This is because “judicial independence ... depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.”<sup>45</sup> Because justice must be seen to be done, national<sup>46</sup> and international<sup>47</sup> courts have regularly held that judges must recuse themselves or be disqualified if they possess actual bias or if there exists even the objective appearance of bias.<sup>48</sup>

32. The test is not whether a member of the Office of the Co-Prosecutors or one of the Civil Parties would offer a bribe to Judge Nil Nonn in return for a favorable outcome at trial. The Defence submits that this is improbable given the integrity of the Co-Prosecutors and the Civil Party lawyers.<sup>49</sup> The test is not whether in this case Judge Nil Nonn is likely to take bribes, but whether in the past he has (and it would appear from his attributed remarks that this was an ongoing practice), in which case, he has compromised and forfeited his judicial integrity. Indeed, Judge Nil Nonn’s conduct would lead a reasonable observer to believe that his decisions and judgements are for sale or rendered based on extrajudicial considerations.

<sup>44</sup> Emphasis added. The Pre-Trial Chamber has held that “[t]he test for bias to be applied ... is provided in Internal Rule 34.2 ... which refers to actual or perceived bias.” Ney Thol Disqualification Decision, para. 12. “The jurisprudence of the international tribunals is consistent in the test for bias applied here.” *Id.*, para. 20.

<sup>45</sup> Meron, at 369. The appearance of impartiality is important because, “[f]or example, a judge may be capable of rendering unbiased decisions even if he belongs to a discriminatory organization, but rather than asking the public to take that on faith, judges are prohibited from belonging to organizations that practice invidious discrimination. Similarly, a judge may be able to render a fair decision even if her nephew is the attorney in the case, but rather than give the parties a basis for questioning the decision, the judge is required to disqualify.” Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 65 (2005) (“Gray”), discussing the American Bar Association Model Code of Judicial Conduct.

<sup>46</sup> The *Talić* Pre-Trial Chamber at the ICTY notes that in Italy, for example, a judge will be disqualified in circumstances which would lead a reasonable person to doubt his impartiality due to personal interest or other reasons. *Prosecutor v. Talić*, IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 13, *citing* Codice di Procedura Penale, Article 36.

<sup>47</sup> See e.g., *Prosecutor v. Milošević*, IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, paras. 17-19.

<sup>48</sup> According to ICTY Judge Trechsel, “the [European Court of Human Rights] often says that ‘appearance may be of a certain importance’. I would not hesitate to go a step further and say that when the impartiality of the tribunal is assessed, appearances are not just the wrapping or the façade. They are themselves the issue.” STEPHAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 63 (Oxford University Press, 2005).

<sup>49</sup> Furthermore, even if Judge Nil Nonn is not offered a bribe in the present case, actual bias as well as the appearance of bias may occur. In *Bracy v. Gramley*, the United States Supreme Court agreed with a petitioner that “compensatory bias” may occur even when a judge is not offered or has not accepted a bribe in a particular case, if the judge has been shown to accept bribes in other cases. This may occur where a judge finds against a defendant in a criminal case in order to avoid being seen as suspiciously soft on criminal defendants; in order to cover for the fact that he has found in favor of other criminal defendants who have bribed him to obtain favorable results. See *Bracy v. Gramley*, 520 U.S. 899, 905, 909 (1997).

33. Even if the remarks attributed to Judge Nil Nonn are viewed in the light most favorable to him, the acceptance of “gratuities” after a case is over (even without soliciting these gratuities) is a violation of Cambodian law and of the Cambodian Code of Judicial Ethics and creates the appearance of bias.<sup>50</sup> Articles 1 (Independence of the Judiciary) and 38 (Extortion/Corruption) of the UNTAC Code were as applicable when Judge Nil Nonn made his admission to Ms. Pike in 2002 as they are today. It could very well be the case that the best time for a litigant to offer a bribe or “gratuity” to a judge in order to achieve a desired outcome would be after the case is over. Why offer money when the result one seeks is not yet certain? It may make more sense to intimate to the judge that a gratuity will be forthcoming once a satisfactory result is achieved and only offer the gratuity after obtaining that result. It also makes sense to rule in favor of the party who has the most to offer.
34. Former ECCC spokesman Reach Sambath – now Chief of Public Affairs – has stated that the issue of Judge Nil Nonn’s corruption is irrelevant since Judge Nil Nonn “has already denied it and this happened long ago.... It doesn’t affect the tribunal. This work is extraordinary. Everything is very new.”<sup>51</sup> Reach Sambath also stated that the Cambodian judges “can have the opportunity to rebuild their reputation” through their work at the ECCC.<sup>52</sup>
35. It is deplorable that an ECCC spokesperson would attempt to downplay this issue. Although the ECCC’s judges are appointed by the Supreme Council of the Magistracy (“SCM”),<sup>53</sup> rather than the United Nations, UNAKRT should have enquired into the issue of Judge Nil Nonn’s bribe-taking and suggested that the SCM appoint an independent and impartial judge to replace Judge Nil Nonn. The Agreement between the Royal Cambodian Government and the United Nations requires that “[t]he judges shall be persons of high moral character,

<sup>50</sup> “[A]n appearance that a judge is trying ‘to collect for past deeds’ can arise from actions taken by a judge after a decision is issued. In *Adams v. Commission on Judicial Performance*, after awarding an automobile dealer \$ 5 million in a complex civil case against a bank, while the case was pending on appeal, the judge entered into several business transactions with the dealer, for example, buying a used Mercedes for his wife and a used Jeep for his daughter. During his case before Judge Adams, the automobile dealer had been represented by Patrick Frega, and in several of the transactions, the judge relied on Frega who, without the judge’s knowledge, arranged for the judge to receive favorable terms. The California Supreme Court concluded that the record did not contain clear and convincing evidence that the judge had initiated the transactions with ‘the expectation of receiving a financial favor’ from the dealer. However, the court found that, by actively soliciting the assistance of a litigant to whom he had rendered an exceedingly large monetary judgment and whose interests remained before him, the judge created an appearance of impropriety. ... In addition, Judge Adams had accepted a sweater valued at \$ 150 from the dealer the same year as the judgment and had attended a dinner hosted by Frega in celebration of the satisfaction of the judgment in the litigation over which the judge had presided. The court found that, although the judge did not solicit the gift, ‘under the circumstances it was incumbent upon him to return it ... to avoid any doubt regarding the judge’s independence or any appearance of impropriety.’” Gray, at 80-81 (emphasis added).

<sup>51</sup> James Welsh & Prak Chan Thul, *Filmmaker: KR Judge Says He Accepted Cash*, CAMBODIA DAILY, 10-11 June 2006. Khmer translation also available in the Table of Authorities.

<sup>52</sup> Prak Chan Thul, *KR Trial will Redeem Judges: Spokesman*, CAMBODIA DAILY, 6-7 May 2006. Khmer translation also available in the Table of Authorities.

<sup>53</sup> See Establishment Law, Art. 11 new.

impartiality and integrity.... They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”<sup>54</sup>

36. The fact that Judge Nil Nonn denied stating that he had accepted bribes is not the end of the matter. Judge Nil Nonn would hardly be expected to admit to accepting bribes now that his position at the ECCC could be threatened by such an admission. His denial does nothing to dispel the appearance of dependence and partiality created from his bribe-taking disclosure.
37. It furthermore does not matter whether Judge Nil Nonn only took bribes “long ago” or whether he still takes bribes to this day. Nor does it matter that the ECCC is “very new” and is “extraordinary.” Judge Nil Nonn’s alleged past conduct is so egregious and demonstrates such contempt for the necessary judicial qualities of independence, impartiality, and integrity that a reasonable observer would never believe that Judge Nil Nonn could be trusted to decide Mr. IENG Sary’s case in an independent and impartial manner. The issue is not whether Judge Nil Nonn is biased against Mr. IENG Sary. Neither is the question whether he might bring an impartial and unprejudiced mind to the issues before him. The issue is whether a hypothetical fair-minded and informed observer would perceive that Judge Nil Nonn “might not bring an impartial and unprejudiced mind to issues arising in the case.”<sup>55</sup>

#### V. CONCLUSION AND RELIEF REQUESTED

38. The ECCC is not a place for a judge to “rebuild his reputation.” The United Nations implemented the UNTAC Code in Cambodia in 1992. This Code specifically sets out the responsibility of judges to be independent and decide cases “in complete impartiality”<sup>56</sup> and it further forbids them to solicit, receive, or attempt to receive “property, a service, money, staff, a professional position, a document, an authorization or any benefit” in exchange for the performance of an official duty.<sup>57</sup>
39. The ECCC was established with international assistance to ensure that the judicial proceedings would meet international standards of justice. According to the ECCC website:

The government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice. An agreement with the UN was ultimately reached in June 2003 detailing how the international community will assist and participate in the Extraordinary Chambers. This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian

<sup>54</sup> Agreement, Art. 3 (emphasis added).

<sup>55</sup> See *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189 (emphasis added).

<sup>56</sup> UNTAC Code, Art. 1.

<sup>57</sup> *Id.*, Art. 38.

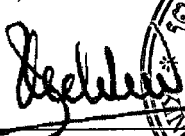
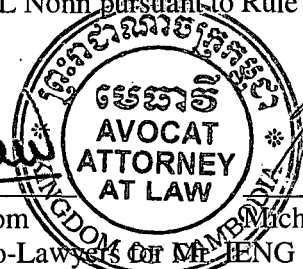
court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.<sup>58</sup>

40. The Trial Chamber judges deciding on this Application must not be swayed by the camaraderie present among judges of a chamber, nor by the impact that disqualification might have on Judge Nil Nonn. These are not valid considerations when the fundamental right to be tried by an independent and impartial tribunal is at stake.<sup>59</sup> Nor is the fact that the defence in Case 001 did not seek his disqualification. This does not whitewash his purported egregious past behavior. The *Duch* Defence may not have been aware of Judge Nil Nonn's past conduct or may have had other reasons for failing to raise this matter. The Trial Chamber must solely consider whether Judge Nil Nonn "has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias."<sup>60</sup>
41. The ability to decide this Application solely based on the applicable law is a test of the very independence and impartiality of the Trial Chamber as a whole. Allowing a corrupt judge to remain on the bench affects the integrity and legacy of the ECCC. A decision on the present Application affords the Court an exquisite opportunity to demonstrate that the rule of law must be applied in Cambodia.<sup>61</sup>

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests Judge Nil Nonn to RECUSE himself from all proceedings and preparation until this Application has been decided and requests the Trial Chamber to:

- A. GRANT the Defence a PUBLIC HEARING on this matter, or in the alternative, a REPLY to any submissions filed by Judge Nil Nonn in Response to this Application;
- B. CONSIDER the Request for Investigation along with the present Application; and
- C. DISQUALIFY Judge NIL Nonn pursuant to Rule 34(2).

Respectfully submitted,

  
  
 ANG UDOM  
 Co-Lawyer of MICHAEL G. KARNAVAS  
 IENG SARY

Signed in Phnom Penh, Kingdom of Cambodia on this 14<sup>th</sup> day of January, 2011

<sup>58</sup> Available at: [http://www.eccc.gov.kh/english/about\\_eccc.aspx](http://www.eccc.gov.kh/english/about_eccc.aspx). (Emphasis added).

<sup>59</sup> The Defence notes that even if these *were* valid considerations, they should not affect the outcome of the present Application, as the trial has not yet started and Judge Nil Nonn has not yet invested time and energy into it, nor worked closely with his colleagues on this case.

<sup>60</sup> Rule 34(2).

<sup>61</sup> "From the outset, UN negotiators were concerned that widespread corruption in the domestic Cambodia judicial system, as well as lack of capacity and a history of politicized justice, would prevent the court from meeting international standards." OSJI Report, p. 2.