

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENG SARY'S REQUEST FOR INVESTIGATIVE ACTION REGARDING IENG SARY'S APPLICATION TO DISQUALIFY JUDGE NIL NONN FOR PUPORTEDLY 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

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rules 41 and 93 of the ECCC Internal Rules (“Rules”), this 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. In concert with and connected to this Request, the Defence has filed 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 (“Disqualification Application”).¹ This Request is made necessary because documentary filmmaker Amanda Pike has reported that Judge Nil Nonn, during a videotaped interview, admitted accepting bribes, while Judge Nil Nonn has reportedly denied that he ever made such an admission or was ever even interviewed by Ms. Pike. While “the starting point for any determination of an allegation of partiality is the presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment,”² since there is a public article in which it is represented that Judge Nil Nonn admitted to accepting bribes (cash gratuities from grateful litigants), Judge Nil Nonn can no longer be shielded by any presumption of impartiality. Indeed, it is submitted that *prima facie* evidence exists to the contrary; hence the Disqualification Application. Since Ms. Pike refuses to voluntarily provide to the Defence the video footage, it is in the interests of justice that a request be made or an order issued by the Trial Chamber, compelling Ms. Pike to expeditiously produce the video footage of her interview with Judge Nil Nonn, and the attendant release form signed by Judge Nil Nonn. Should it be deemed necessary to take testimony from Ms. Pike, the Trial Chamber should also order Ms. Pike’s appearance before the ECCC.

I. BACKGROUND

1. In 2002, documentary filmmaker Amanda Pike travelled to Cambodia on an International Reporting Project Fellowship from the Paul H. Nitze School of Advanced International

¹ *Case of IENG Sary*, 002/17-09-2010-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, 17 September 2010.

² *Case of IENG Sary*, 002/20-10-2009-ECCC/OCIJ(PTC 03), Decision on IENG Sary’s Request for Appropriate Measures Concerning Some Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, 5, ERN: 00404595-00404601, para. 6.

Studies of Johns Hopkins University³ and produced the documentary "Cambodia: Pol Pot's Shadow."

2. While filming this documentary, Ms. Pike also conducted other research which was turned into several articles as part of a diary series which were then posted on the Frontline/World website, where they can still be found today.⁴ 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 titled "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?⁵

3. In June 2006, Judge Nil Nonn reportedly denied that he ever taken payments from the public or ever participated in an interview with Ms. Pike.⁶ 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:

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.'

³ See <http://www.internationalreportingproject.org/stories/detail/665/>.

⁴ See <http://www.pbs.org/frontlineworld/stories/cambodia/diary01a.html>.

⁵ 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).

⁶ James Welsh & Prak Chan Thul, *Filmmaker: KR Judge Says He Accepted Cash*, CAMBODIA DAILY, 10-11 June 2006.

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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.'⁷

4. 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.⁸ On 8 September 2010, Ms. Pike responded by email, noting that she and her producing partner Adam Keke 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 Keke.⁹
5. On 9 September 2010, the Defence hand delivered a letter to Mr. Welsh at The Cambodia Daily.¹⁰ 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.¹¹

II. APPLICABLE LAW

6. Rule 41 provides:

1. A summons is an order to any person to appear before the ECCC. It may be issued to a Suspect, Charged Person or Accused, Civil Party or witness and shall set out the capacity in which the person is being summoned.
2. Unless otherwise provided in these IRs, the minimum period between service of the summons and the date of the appearance before the ECCC shall be 5 (five) days. However, where the summons concerns a detained person, or where the Investigator(s) or the Co- Investigating Judges(s) conduct witness interviews in the field, or in exceptional circumstances, such period shall not apply.
3. All summonses shall be served at the last known address by the Greffier, the Judicial Police or any other authorised officer of the ECCC, by any appropriate means. A person in detention shall be summoned through the head of the detention facility. Service of a summons shall be recorded in a written report of service setting out the means used, time, date and place of service, as well as any other relevant circumstances, which shall be signed by the officer and placed on the case file.

⁷ *Id.* (emphasis added).

⁸ See Disqualification Application, Annex A.

⁹ See Disqualification Application, Annex B.

¹⁰ See Disqualification Application, Annex C.

¹¹ See Disqualification Application, Annex D.

4. Any persons requested to serve a summons shall comply with the request and use their best endeavours to obtain acknowledgement of receipt. Such acknowledgement shall be appended to the report of service.¹²

7. Rule 93 provides:

1. Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.

2. Such judge(s) may, under the same conditions as the Co-Investigating Judges:

a) go anywhere within the territorial jurisdiction of the ECCC;

b) interview witnesses;

c) conduct searches;

d) seize any evidence; or

e) order expert opinions.

3. For the purposes of such additional investigations, the judge(s) may issue Rogatory Letters to the Judicial Police.¹³

III. REQUEST

8. The Defence requests the Trial Chamber to obtain: 1) the video footage of the interview between Judge Nil Nonn and Ms. Pike, which is the best evidence of whether the interview took place and whether, as reported, Judge Nil Nonn did make the incriminating admission of taking bribes; and 2) the release form Judge Nil Nonn signed, in which he consented to be filmed and interviewed by Ms. Pike. The Defence further requests that should it be deemed necessary, the Trial Chamber should order Ms. Pike to appear before the ECCC and give evidence.

9. The Defence recognizes that it bears the burden of providing supporting evidence to its Disqualification Application. Rule 34(3) states, "A party who files an application for disqualification of a judge shall clearly indicate the grounds and shall provide supporting evidence." In accordance with this, the Pre-Trial Chamber has held that "the burden of proof lies entirely with the applicant." The impartiality of a judge is to be presumed until there is proof to the contrary. Evidence to displace the presumption must be adduced at the time of the application."¹⁴ However, the Defence has exhausted all of the steps within its power to obtain the requested information. Ms. Pike has stated that for professional

¹² Emphasis added.

¹³ Emphasis added.

¹⁴ *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. 15.

- reasons, she is unwilling voluntarily to provide the Defence with the video footage or other requested material.¹⁵ Therefore, the Trial Chamber must obtain this information.
10. The Rules do not appear to prohibit a single judge on his or her own initiative from simply requesting the video footage, release form and appearance of Ms. Pike. Should a more formal approach be preferred, through Rule 41, the Trial Chamber may issue a summons to Ms. Pike to appear. According to Rule 41, a “summons is an order to any person to appear before the ECCC.”¹⁶ Through Rule 93, the Trial Chamber may order additional investigations. Rule 93(1) provides that “[w]here the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations.” Nothing in the language of the Rules limits the scope of the investigation that the Trial Chamber may request.
11. Rule 35(1)(b) allows the Chamber to sanction any person who “fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers.” Thus, the Rules clearly contemplate that the Chambers first have the authority to order a person to attend or produce documents or other evidence. Furthermore, Rule 35(2)(b) provides that when “the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may: b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings.” Thus, the Trial Chamber’s power to conduct investigations is not limited to investigations concerning the Indictment.
12. If the Trial Chamber were to refuse to employ its inherent power to conduct the requested investigation simply because the Defence was unable to obtain the information itself – after having exhausted all avenues of inquiry – this would violate Mr. IENG Sary’s fundamental right to be tried by an independent and impartial tribunal. Indeed, the Trial Chamber would effectively be shielding itself deliberately to avoid critical evidence that may be unpleasant or inconvenient to one of its members. In doing so, the Trial Chamber would give the appearance of being complicit to or of aiding and abetting in an endeavor to cover up potential judicial impropriety committed by a member of the Trial Chamber.
13. Rule 21(1) requires that “[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

¹⁵ See Disqualification Application, Annex C, email from Ms. Pike to Michael G. Karnavas dated 8 September 2010, where Ms. Pike states, “On journalistic grounds, we will not voluntarily provide the materials you are requesting.”

¹⁶ Emphasis added.

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and transparency of proceedings...¹⁷ As noted by the Open Society Justice Initiative, “Attempts to interfere with judicial independence are easily hidden. It is only by ensuring transparency throughout the entire judicial system – from the appointment of judges to the reasoning of judicial decisions – that the public has a chance to determine if the process is free from impropriety.”¹⁸

14. Failure to investigate a matter which clearly impacts upon Mr. IENG Sary’s fundamental fair trial rights would amount to an obstruction of justice and a blow to the integrity of the proceedings. The Trial Chamber must not remain willfully blind to this matter. As explained by Judges Marchi-Uhel and Downing, “the Chamber is under an obligation to ensure that the integrity of the proceedings is preserved.”¹⁹ It would be a simple matter for the Trial Chamber to request or order the necessary investigations to uncover the truth. This is an opportunity to demonstrate that the judges of the ECCC will act based on the law and on the requirement that the proceedings be fair, rather than basing their decisions on the camaraderie of the Chamber or any other extraneous consideration.

IV. INFORMATION TO ASSIST THE TRIAL CHAMBER IN CARRYING OUT THE REQUESTED INVESTIGATIONS

15. Rule 45(1) on the “Formalities Relating to Summonses and Orders for Arrest and Detention states:

All summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders shall be dated, signed and sealed by the issuing authority and contain the following information:

- a) the name and, where known, the date and place of birth and the address of the person, and any other information allowing identification;
- b) a reference to any associated order and/or charge;
- c) the ECCC issuing authority;
- d) where appropriate, the location, date, and time of hearing; and
- e) an indication whether the person has the right to legal assistance and any other defence rights under these IRs.

16. Ms Pike’s date of birth is unknown. She has stated that she wishes all communication regarding this matter to go through her attorney, John Kecker. Mr. Kecker may be contacted at:

John Kecker

¹⁷ Emphasis added.

¹⁸ Political Interference in the Extraordinary Chambers in the Courts of Cambodia, OPEN SOCIETY JUSTICE INITIATIVE, June 2010, p. 27.

¹⁹ *Case of NUON Chea*, 002-19-09-2007-ECCC/OCIJ(PTC 51), Second Decision on NUON Chea’s and IENG Sary’s Appeal Against the OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/2/10, ERN: 00600748-00600774, para. 10.

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V. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- A. ORDER Amanda Pike to provide the Trial Chamber with:
- the video footage of her interview with Judge Nil Nonn; and
 - Judge Nil Nonn's signed release waiver;
- B. If Necessary, SUMMON Amanda Pike to give evidence explaining the context and background of her interview with Judge Nil Nonn, including:
- Why she chose to interview Judge Nil Nonn;
 - When she interviewed Judge Nil Nonn;
 - Where she interviewed Judge Nil Nonn;
 - What language the interview was conducted in; and
 - Whether a translator or interpreter was employed during the interview and if so, who this interpreter or translator was; and
- C. DISQUALIFY Judge NIL Nonn pursuant to Rule 34(2).

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 14th day of January, 2011