

**BEFORE THE SUPREME COURT CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/SC**Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 5 January 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON  
MOTIONS FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT**

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Judge Agnieszka KLONOWIECKA-MILART  
Judge Chandra Nihal JAYASINGHE  
Reserve Judge SIN Rith  
Reserve Judge Florence MUMBA**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104(1) and 104(4)(d) of the ECCC Internal Rules (“Rules”), hereby appeals the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright (“Impugned Decision”).<sup>1</sup> This Appeal is made necessary because the Trial Chamber mischaracterized and misconstrued the IENG Sary Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others (“Request for Investigation”)<sup>2</sup> as an application for disqualification pursuant to Rule 34, failing to conduct the requested investigation into *ex parte* meetings between Judge Silvia Cartwright, International Co-Prosecutor Andrew Cayley and Deputy Director of Administration Knut Rosandhaug. Consequently, the Trial Chamber interfered with the administration of justice. Both for this reason, and because the Request for Investigation was made pursuant to Rule 35, this appeal is admissible. For the sake of judicial economy, the Defence incorporates by reference paragraphs 1-2, and 13-34 of the Request for Investigation.

## I. GROUND OF APPEAL

*Ex parte communications are prohibited between a judge and a party when they occur without legal authority or the consent of other parties. The Trial Chamber was presented with prima facie evidence of ex parte meetings occurring between Judge Silvia Cartwright, International Co-Prosecutor Andrew Cayley and Deputy Director of Administration Knut Rosandhaug, without legal basis or the consent of the other parties in Case 002. Did the Trial Chamber err by improperly dismissing the Request for Investigation and failing to conduct an investigation into the meetings?*

## II. SUMMARY OF ARGUMENT

1. Given the *prima facie* evidence presented by the Defence regarding *ex parte* meetings between Judge Cartwright, Mr. Cayley and Mr. Rosandhaug, the Trial Chamber should have investigated the meetings pursuant to Rules 35, 41 and 93. The Supreme Court Chamber should annul the Impugned Decision and investigate the *ex parte* meetings pursuant to Rule 35(2).

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<sup>1</sup> Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5.

<sup>2</sup> IENG Sary’s Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3.

2. *Ex parte* communications between a Judge and a prosecutor are prohibited under the Cambodian Code of Ethics for Judges and international norms if they are not based in law or occur without the consent of other parties. The ECCC Code of Judicial Ethics incorporates national and international norms and, as such, incorporates a prohibition against *ex parte* communications. International judges should not be held to a different standard of conduct than national judges. The *ex parte* meetings between Judge Cartwright, Mr. Cayley and Mr. Rosandhaug give rise to the appearance of a knowing and willful interference with the administration of justice.
3. Neither Judge Cartwright's nor Mr. Cayley's non-judicial or administrative responsibilities justify these *ex parte* meetings. If coordination by the United Nations ("UN") component of the ECCC is necessary, as the Trial Chamber found, then such coordination should be arranged in accordance with the ECCC legal framework and provisions.
4. The Request for Investigation was properly filed as a Rule 35 request for an investigation based on the presentation of *prima facie* evidence indicating "reason to believe" that the *ex parte* meetings may have interfered with the administration of justice. The Request to Investigate demonstrated that: **a.** *ex parte* meetings between Judge Cartwright and Mr. Cayley have occurred periodically; **b.** Mr. Cayley has and will continue to appear before Judge Cartwright in Case 002; and **c.** there is no express legal basis for these *ex parte* meetings. Pursuant to Rules 35, 41 and 93, the Trial Chamber should have conducted an investigation. By treating the Request for Investigation as a Rule 34 request – seemingly in order to avoid having to carry out an investigation – the Trial Chamber violated its obligations under the Constitution, the Establishment Law, the Agreement, and the Rules.

### III. PRELIMINARY MATTERS

#### A. Admissibility of the Appeal

5. This Appeal is admissible pursuant to Rule 104(1)<sup>3</sup> because the Trial Chamber erred in law in its justifications for the *ex parte* meetings and erred in fact or, in the alternative, abused its discretion by treating the Request for Investigation as an application for

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<sup>3</sup> Rule 104(1) states: "The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds: (a) an error on a question of law invalidating the judgment or decision; or (b) an error of fact which has occasioned a miscarriage of justice. Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant."

disqualification. The Trial Chamber justified the *ex parte* meetings by finding that they are not prohibited by the ECCC Code of Judicial Ethics and that they are necessary for coordination of the UN component of the ECCC. *Ex parte* meetings between a party and a judge are prohibited by the Cambodian Code of Ethics for Judges and international norms, including the New Zealand Guidelines for Judicial Conduct and the Code of Conduct of the Bar of England and Wales, which apply to Judge Cartwright and Mr. Cayley respectively.<sup>4</sup>

6. In failing to recognize that the applicable law prohibits *ex parte* meetings such as those which occurred between Judge Cartwright and Mr. Cayley, the Trial Chamber erred in law. The Defence requested an investigation to determine whether Case 002-related issues were discussed during any meeting between Judge Cartwright and Mr. Cayley (and any other person), i.e., whether there has been a knowing and willful interference with the administration of justice.<sup>5</sup> No application for the disqualification of Judge Cartwright was made.<sup>6</sup> The Trial Chamber committed an error of fact or, in the alternative, abused its discretion by failing to consider the substance of the Request for Investigation.
7. The Decision is immediately appealable pursuant to Rule 104(4)(d) as it concerns an interference with the administration of justice.<sup>7</sup> The Defence submits that, contrary to the Pre-Trial Chamber's interpretation,<sup>8</sup> at the ECCC there is nothing in the Establishment Law, Agreement or the Rules which would prevent Rule 35 being applied against members of the Trial Chamber itself.<sup>9</sup>

<sup>4</sup> Request for Investigation, paras. 13, 20.

<sup>5</sup> *Id.*, p. 15.

<sup>6</sup> The Request for Investigation specifically stated that "this Request is not an application for disqualification." Request for Investigation, introduction.

<sup>7</sup> Rule 104(4)(d) states: "The following decisions of the Trial Chamber are subject to immediate appeal: decisions on interference with the administration of justice under Rule 35(6)."

<sup>8</sup> See Decision on IENG Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, Case 002/07-12-2009-ECCC/PTC(06), 5, 29 March 2010, paras. 11, 14: "There is no prescribed jurisdiction for any of the Chambers of the ECCC to deal with any disciplinary matters in respect of any of the judges of the ECCC. ... As the Application seeks the disqualification of Judge Lemonde as a sanction pursuant to Internal Rule 35 based on behavior of the judge in his cases qualified by the Co-Lawyers as amounting to the interference of justice and it is therefore not admissible."

<sup>9</sup> Considered in light of the inherent specificity of the ECCC as required by Rule 21, ECCC Rule 35 must be distinguished from Rule 77 of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")'s Rules of Procedure and Evidence. Whereas ICTY Rule 77 relates to the International Tribunal's "inherent power" to "hold in contempt" those who knowingly and willfully interfere with the administration of justice, a plain and ordinary reading of the ECCC's Rule 35 shows that proceedings pursuant to the latter rule are not limited to those suspected of contempt, as Rule 35 is silent on this topic. Any inherent power of the ECCC to find a

8. Immunity provided for under the Establishment Law and Agreement<sup>10</sup> does not operate to bar the admissibility of this Appeal as: **a.** the relief sought does not request *sanctions* as a remedy but merely an *investigation*; and **b.** the Pre-Trial Chamber itself has proceeded against international personnel pursuant to Rule 35, notwithstanding the immunity from legal process granted to international personnel pursuant to Article 42 new(2)(a) of the Establishment Law and Article 20(2)(a) of the Agreement.<sup>11</sup>
9. A judge can trespass on an Accused's constitutional rights without necessarily being corrupt or ill-willed, i.e. tainted by bias or the appearance of bias. It would simply be wrong to find that jurisdiction considering behavior of judges in their own cases is limited to Rule 34 applications for disqualification.<sup>12</sup> This distinction must be made otherwise legitimate challenges to judicial abuse at the interlocutory stage may be summarily dismissed unless *prima facie* evidence of explicit acts of judicial corruption or bias exists, such as encountering a judge – *in flagrante delicto* – taking a bribe.
10. The Pre-Trial Chamber's interpretation of Rule 35 – were it to be accepted – gives Trial Chamber judges *carte blanche* to act improperly by effectively limiting, stringently, the parties' rights of interlocutory appeal. Rule 35 cannot be so construed. Rule 21 requires all Rules to be interpreted in such a way so as to safeguard the interests of Mr. IENG Sary, and to ensure legal certainty and transparency. Indeed, Rule 35 applies to “any person” who knowingly and willfully interferes with the administration of justice. Rule 35(1) provides a non-exhaustive list of activities which may constitute interference with the administration of justice.<sup>13</sup> The Supreme Court Chamber has authority to grant the relief requested and conduct an investigation pursuant to Rule 35.<sup>14</sup>

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person liable for contempt is separate and distinguishable from the Chambers' power to find a person liable for knowing and willful interference with the administration of justice pursuant to Rule 35.

<sup>10</sup> Establishment Law, Arts. 41, 42 new; Agreement, Arts. 19 and 20.

<sup>11</sup> See Case File 002/14-12-2009-ECCC/PTC(08).

<sup>12</sup> I.e. if and when judges have a personal or financial interest or an association which objectively might affect their impartiality, or give rise to the appearance of bias. Cf. *Lemonde* Decision, para. 11.

<sup>13</sup> Rule 35(1) states in pertinent part: “The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, *including* any person who...” (emphasis added). At the ICTY, Rule 77(A) of the Rules of Procedure and Evidence also provides a non-exhaustive list of activities which may constitute an interference with the administration of justice. “The list of acts contained in Rule 77(A) (i)-(v) of the Rules is not exhaustive, merely representing examples of acts interfering with the Tribunal's administration of justice.” *Prosecutor v. Milošević*, IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the Initiation of Contempt Investigations, 18 July 2011, para. 11, *citing In the Case Against Florence Hartman*, IT-02-54-R77.5, Judgement on the Allegations of Contempt, 14 September 2009,

11. The Defence explicitly demonstrated that it met the Rule 35 “extremely low threshold”<sup>15</sup> of “reason to believe”<sup>16</sup> that an interference with the administration of justice has occurred because: **a.** *ex parte* meetings between Judge Cartwright and Mr. Cayley have occurred on a periodic basis;<sup>17</sup> **b.** Mr. Cayley has in the past and will continue to appear before Judge Cartwright in Case 002;<sup>18</sup> and **c.** there is no express legal basis for these *ex parte* meetings.<sup>19</sup> The Trial Chamber erroneously mischaracterized and misconstrued the Request for Investigation as a Rule 34 application for disqualification. In doing so, the Trial Chamber erred in summarily dismissing the Rule 35 Request for Investigation.

### **B. Request for a Public, Oral Hearing**

12. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) indicates that appeal hearings should generally be conducted in public.<sup>20</sup> This Appeal concerns the administration of justice. The issues raised are not confidential.

## **IV. BACKGROUND**

13. On 27 October 2011, Michiel Pestman, International Co-Lawyer for Mr. NUON Chea, emailed the ECCC’s Deputy Director of Administration, Mr. Knut Rosandhaug, to inform him that he had been told that Judge Cartwright, Mr. Cayley and Mr. Rosandhaug were “meeting on a regular basis in your office to talk about Court related issues.” Mr. Pestman requested to know whether this information was correct and, if so, what the purpose of such meetings, which excluded representatives of the other parties, would be.<sup>21</sup> Having received no reply, Michael G. Karnavas, International Co-Lawyer for Mr.

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para. 19; *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 39.

<sup>14</sup> See Rule 35(2): “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...” (emphasis added). See also Case File 002/14-12-2009-ECCC/PTC(08), wherein the Pre-Trial Chamber conducted such an investigation.

<sup>15</sup> The reason to believe standard has been held to be “an extremely low threshold.” Second Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, D314/1/12, para. 37. The Pre-Trial Chamber has also stated that: “Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and the trial stages. Integrity of the process is guaranteed through the judicious application of this Rule when ... a Chamber consider[s] actions taken by an individual threaten the administration of justice.” *Id.*, para. 38.

<sup>16</sup> Rule 35(2).

<sup>17</sup> Request for Investigation, paras. 4, 9-10.

<sup>18</sup> *Id.*, para. 25.

<sup>19</sup> *Id.*, para. 24.

<sup>20</sup> Rule 109(1) states: “Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only.”

<sup>21</sup> Email from Mr. Pestman to Mr. Rosandhaug, 27 October 2011.

IENG Sary (who had been copied in Mr. Pestman's email), followed up with Mr. Cayley.<sup>22</sup>

14. On 1 November 2011, Mr. Rosandhaug responded to Mr. Pestman acknowledging that *ex parte* communications between Judge Cartwright, Mr. Cayley and himself had been ongoing since April 2010.<sup>23</sup>

15. On 2 November 2011, Mr. Ang Udom and Mr. Karnavas, Co-Lawyers for Mr. IENG Sary, replied by letter to Mr. Rosandhaug. They observed that:

[A] cloud of an appearance of impropriety will generally hang over the proceedings whenever a prosecutor and judge in Case 002 are meeting to discuss even administrative matters touching on the ECCC in general.... [I]n light of the *sui generis* nature of this particular national court which is being assisted by the UN, comparisons between what may occur at the [International Criminal Tribunal for the former Yugoslavia ("ICTY")] and what is being done here are inapposite. If the intention is for the UN component of the ECCC to have better coordination with UN headquarters, then why exclude representatives of the Defence and Civil Parties, particularly when you have the International Co-Prosecutor (who is also directly participating in the proceedings in Case 002) and a member of the Trial Chamber (who is sitting on the proceedings in Case 002 – as opposed to the Prosecutor and the President of the Tribunal, such as at the ICTY) meeting and discussing issues which impact the general administration of justice at the ECCC... [S]uch meetings could very well impact on the ongoing case in which both the prosecutor and the trial judge are participating... [W]e find disquieting any contact between members of the OCP and members of the Trial Chamber that would in any way give rise to suspicions of ongoing *ex parte* communications, [and] subscribe to the wise observations of Lord Hewart C.J. in *R v. Sussex Justices, Ex parte McCarthy*: 'Justice must not only be done, but should manifestly and undoubtedly be seen to be done.'... [W]e see no reason why minutes of the meetings which have taken place thus far should not be shared with DSS, the Defence teams and Civil Parties.<sup>24</sup>

16. On 3 November 2011, Mr. Pestman emailed Judge Cartwright informing her that the NUON Chea Defence "look[s] forward to receiving the minutes of these meetings, which

<sup>22</sup> See, e.g., Email from Mr. Karnavas to Mr. Cayley, 30 October 2011: "Hi Andrew! First, congratulations on being short-listed [for the post of Prosecutor at the International Criminal Court.] I truly hope you get the post. Second, as you can see from all that is going around these days re the ECCC, it may be good for you to respond to this message to Knut. The sooner the better! Cheers, Michael."

<sup>23</sup> Email from Mr. Rosandhaug to Mr. Pestman, 1 November 2011. Mr. Rosandhaug explained that the suggestion of regular meetings between Judge Cartwright, Mr. Cayley and Mr. Rosandhaug was made by the Ms. Patricia O'Brien, Under-Secretary General for Legal Affairs and UN Legal Counsel, during her visit to the ECCC in April 2010. According to Mr. Rosandhaug, the "aim was to add focus to communication between the UN component of the ECCC and UN Headquarters," while "keeping their Cambodian counterparts closely informed." He added that such meetings "replicate, in an informal way, the coordination committees that are standard in the other UN and UN-assisted tribunals." They "concern administrative and organisational matters and do not deal in any way with the substance of the cases before the ECCC." *Id.*

<sup>24</sup> Letter from IENG Sary Defence to Mr. Rosandhaug, 2 November 2011.

will allow us to determine whether any issue has been discussed which, in our view, may effect [sic] the substantive rights of our client.” Mr. Pestman noted that the NUON Chea Defence had “seen information suggesting other meetings have taken place between [Judge Cartwright] and the [international] co-prosecutor, without the UN Administrator [Mr. Rosandhaug].” Mr. Pestman sought confirmation of whether this information was correct, and if so, “precisely what issues were discussed at these meetings?”<sup>25</sup>

17. On 4 November 2011, Mr. Cayley emailed Mr. Pestman requesting to be provided with “the basis for the very serious allegation you made against me.” Mr. Cayley claimed that he was “surprised” by Mr. Ang Udom’s and Mr. Karnavas’s letter dated 2 November, asserting that “there is mendacity taking place and I will not tolerate it.” Mr. Cayley added that he would not accept “speculative allegations” made for the purposes of what he described as “defence tactics.” Mr. Cayley concluded his email by requesting Mr. Pestman to “provide to me the address of the Dutch Bar Association. I want to see your rules on professional conduct.”<sup>26</sup> Mr. Pestman replied to Mr. Cayley the same day accommodating his request.<sup>27</sup>

18. Also on 4 November 2011, the NUON Chea Defence wrote to Presiding Trial Chamber Judge Nil Nonn:

In light of the rapidly approaching opening statements in Case 002, we hereby urgently request the Trial Chamber to disclose: (i) a comprehensive list of all meetings that have taken place between Judge Cartwright and any members of the Office of the Co-Prosecutors and/or Mr Rosandhaug; and (ii) the agenda and/or minutes of any such meeting.<sup>28</sup>

19. On 7 November 2011, Mr. Rosandhaug responded to Mr. Ang Udom’s and Mr. Karnavas’s letter dated 2 November 2011. He noted that as the meetings between him,

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<sup>25</sup> Email from Mr. Pestman to Judge Cartwright, 3 November 2011.

<sup>26</sup> Email from Mr. Cayley to Mr. Pestman, 4 November 2011.

<sup>27</sup> Email from Mr. Pestman to Mr. Cayley, 4 November 2011:

Dear Andrew, If you want to file a complaint against me I suggest you contact the Amsterdam Bar. They have a decent website in English explaining what to do and to whom to address your complaint: ‘INFORMATION REGARDING THE COMPLAINT PROCEDURE AGAINST LAWYERS’: <http://www.advocatenorde-amsterdam.nl/item.html&objID=4696>. The Dean of the Amsterdam Bar is Mr. G.J. Kemper; I will copy this e-mail to him so that he knows your complaint is on its way. As you probably know, I am also a member of the Phnom Penh Bar. They have very interesting Code of Conduct. I am sure you will find this helpful as well. The President of the PP Bar is Mr. Chiv Song Hak. He speaks English very well and can be reached on his mobile: [telephone number]. I have a meeting with him tomorrow morning at 10. If there is anything you would like me to convey to him, please let me know before then. Michiel.

<sup>28</sup> Letter from NUON Chea Defence to Judge Nil Nonn, re ‘Request for information related to ex-parte meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug’, 4 November 2011, E137.

Mr. Cayley and Judge Cartwright “are of an informal, ad hoc nature and are held to discuss administrative and operational matters only,” no minutes are taken. The Defence’s request to participate in the meetings was refused.<sup>29</sup>

20. On 7 November 2011, *The Cambodia Daily* reported on the issue. Mr. Cayley was quoted:

[I]n answer to these representations by the Nuon Chea and Ieng Sary teams: Administrative management meetings such as these take place in the ICC, ICTY, and ICTR. They are normal. If they did not take place, these institutions, including the ECCC, would be paralyzed.

In answer to the Karnavas [and Ang Udom] letter [dated 2 November 2011], which suggests that the President and Prosecutor of the ICTY are not involved in casework: this is a total misrepresentation of the truth.... The President and Vice President of the ICTY are judges directly involved in cases (and if Karnavas disputes this I can provide examples to him from 1995 onwards). Unlike Mr. Karnavas I worked in the Office of the Prosecutor of the ICTY for 10 years. I know.<sup>30</sup>

21. On 8 November 2011, *The Cambodia Daily* published a letter to the editor from Mr. Karnavas and Mr. Ang Udom responding to Mr. Cayley’s remarks the previous day:

In Michael G. Karnavas’ ten years’ experience as Defence counsel at the [ICTY], he is unaware of any instance where a prosecutor in a case holds regular meetings with the registrar and one of the judges sitting in the same case. Mr. Cayley is directly involved in Case 002, as is Judge Cartwright. At present, the ECCC Trial Chamber – where Judge Cartwright sits – is only dealing with Case 002.... We have an ethical obligation to look diligently into the matter of ex-parte communications once raised. Mr. Cayley should know this.<sup>31</sup>

22. On 15 November 2011, the NUON Chea Defence filed a Request for Information Regarding *Ex-Parte* Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration.<sup>32</sup> To date, neither Judge

<sup>29</sup> Letter from Mr. Rosandhaug to Mr. Ang Udom and Mr. Karnavas, 7 November 2011.

<sup>30</sup> Julia Wallace, *KRT Defense Alleges Ex Parte Meetings*, CAMBODIA DAILY, 7 November 2011, p. 2.

<sup>31</sup> Ang Udom & Michael G. Karnavas, *Andrew Cayley’s Remarks ‘Defensive and Deflective’*, CAMBODIA DAILY, 8 November 2011, p. 26.

<sup>32</sup> Request for Information Regarding *Ex-Parte* Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, 15 November 2011, E137/1: In its Request, the NUON Chea Defence, *inter alia*, “urge[d] the [Trial] Chamber to direct Judge Cartwright to provide the Defence with the previously-sought information, namely: (a) a list of all meetings that have taken place between Judge Cartwright and any members of the Office of the Co-Prosecutors..., regardless of whether such meetings were also attended by Mr Rosandhaug [sic], and (b) the agenda and/or minutes of any such meetings (even if only informal and/or hand-written notes were taken)... Additionally, the Defence would like to know whether substantive and/or Case-002 related issues were discussed during any meeting between or among Judge Cartwright, Mr Cayley, and/or Mr Rosandhaug. In particular, the Defence would like to know whether Judge Cartwright, Mr. Cayley (or any other member of the OCP) and/or Mr. Rosandhaug have ever discussed any of the following topics: a. continuing political interference by the Cambodian government at the ECCC; b. the

Cartwright nor Mr. Cayley have been forthcoming with further information. On 21 November 2011, the NUON Chea Defence filed its Urgent Application for Disqualification of Judge Cartwright, which alleged that the *ex parte* meetings give rise to an “unacceptable appearance of bias.”<sup>33</sup>

23. On 18 November 2011, the Defence circulated a courtesy copy of the Request for Investigation to the Trial Chamber and the parties. On 24 November 2011, the Request for Investigation was filed with minor amendments which did not assuage, mitigate or otherwise lessen its concerns raised in the courtesy copy. In the Request for Investigation, the Defence requested:

- a. a list of all meetings where Mr. Cayley and Judge Cartwright participated in *ex parte* communications, regardless of whether such 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).<sup>34</sup>

The Defence further requested:

the Trial Chamber to exercise its powers to investigate by: **a.** *summoning* Mr. Cayley, Ms. Patricia O’Brien [Under-Secretary General for Legal Affairs and UN Legal Counsel] and Mr. Knut Rosandhaug, together with any other person (whether connected with the ECCC or otherwise, including but not limited to diplomats and representatives of overseas governments) who has participated in *ex parte* meetings held between Mr. Cayley and Judge Cartwright ... to provide the Requested Information; and **b.** *encouraging* Judge Cartwright to make a statement providing the Requested Information, notwithstanding that this Request is not an application for disqualification.<sup>35</sup>

24. On 24 November 2011, the Defence sent letters to Ms. O’Brien,<sup>36</sup> H. E. Sok An,<sup>37</sup> and President of the JAC Judge Kong Srim.<sup>38</sup> The letter to Ms. O’Brien requested her to

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effect of such interference on Cases 003 and 004; c. the effect of such interference on Case 002; d. the Defence request for an independent investigation into such interference.” *Id.*, paras. 6-7.

<sup>33</sup> Urgent Application for Disqualification of Judge Cartwright, 21 November 2011, E137/2, para. 15.

<sup>34</sup> Request for Investigation, introduction (internal footnotes omitted).

<sup>35</sup> *Id.*

<sup>36</sup> Letter from the IENG Sary Defence to Patricia O’Brien, re: Request for the provision of a statement regarding *ex parte* meetings between ECCC International Trial Chamber Judge Sylvia Cartwright, ECCC International Co-Prosecutor Andrew Cayley and UNAKRT Deputy Director of Administration, Knut Rosandhaug, 24 November 2011.

<sup>37</sup> Letter from the IENG Sary Defence to H. E. Sok An, re: Request for information regarding *ex parte* meetings between ECCC International Trial Chamber Judge Sylvia Cartwright, ECCC International Co-Prosecutor Andrew Cayley and UNAKRT Deputy Director of Administration, Knut Rosandhaug, 24 November 2011.

<sup>38</sup> Letter from the IENG Sary Defence to Judge Kong Srim, re: Request for information regarding *ex parte* meetings between ECCC International Trial Chamber Judge Sylvia Cartwright, ECCC International Co-

provide a statement detailing her knowledge of the *ex parte* meetings. The letter to H. E. Sok An requested whether he had knowledge of the *ex parte* meetings. The letter to Judge Kong Srim requested whether as chair of the JAC, he had authorized, was informed of, and received the results from the *ex parte* meetings.

25. On 24 November 2011, the Co-Prosecutors circulated a courtesy copy of their joint response to the Request for Investigation and to the NUON Chea Defence's Urgent Application for Disqualification of Judge Cartwright ("Co-Prosecutors' Joint Response"). On 1 December 2011, the Co-Prosecutors' Joint Response was filed.<sup>39</sup> The Co-Prosecutors asserted that for the "reason to believe" standard to have been met, "the Chamber must find that 'there exists a material basis or reason that is the foundation of their belief.'"<sup>40</sup> The Co-Prosecutors asserted that the Defence had "fail[ed] to provide a material basis to substantiate the *actus reus*, that is, that the administrative meetings constitute interference with the administration of justice as regards Ieng Sary in Case 002... [and] the Ieng Sary Defence makes *no* argument that any purported interference with the administration of justice was done with the requisite *mens rea*."<sup>41</sup>

26. On 30 November 2011, the Defence requested leave to reply to the Co-Prosecutors' Joint Response because, *inter alia*, the Co-Prosecutors' Joint Response misconstrued the legal basis for the Request for Investigation and failed to address whether Judge Cartwright's and Mr. Cayley's *ex parte* meetings violate applicable codes, rules and guidelines of professional conduct. The Defence asserted that:

For the avoidance of doubt, the Defence seeks leave to reply that the "extremely low threshold" required to give "reason to believe" that an interference with the administration of justice has occurred is established by:

- a. The fact that *ex parte* meetings between Judge Cartwright and Mr. Cayley have occurred on a periodic basis (Request, paras. 4, 9-10);
- b. The fact that Mr. Cayley has in the past (for example, in last week's opening statements) and will continue to appear before Judge Cartwright in Case 002 (Request, para. 25); and

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Prosecutor Andrew Cayley and UNAKRT Deputy Director of Administration, Knut Rosandhaug, 24 November 2011.

<sup>39</sup> Co-Prosecutors' Joint Response to: 1) NUON Chea's Urgent Application for Disqualification of Judge Cartwright, and 2) IENG Sary's Request for Investigation Concerning Ex Parte Communications between the International Co-Prosecutor, Judge Cartwright and Others, 1 December 2011, E137/4.

<sup>40</sup> *Id.*, para. 26.

<sup>41</sup> *Id.*, paras. 28-29.

c. The fact that there is no express legal basis for these *ex parte* meetings (Request, para. 24).<sup>42</sup>

...

[A]ny violation of ... codes of ethics, guidelines and obligations must be construed as knowing and willful.

27. On 1 December 2011, the Defence's request for leave to reply to the Co-Prosecutors' Joint Response was rejected by the Trial Chamber's Senior Legal Officer.<sup>43</sup>

## V. ARGUMENT AND LAW

28. The Constitution, the Establishment Law and the Agreement require that ECCC proceedings be conducted in accordance with international standards of justice, fairness, and due process of law.<sup>44</sup> The Trial Chamber *must* ensure that trials are fair and preserve a balance between the rights of the parties.<sup>45</sup> The Accused have the fundamental right to be tried before an independent and impartial tribunal.<sup>46</sup> *Ex parte* meetings that occurred between Judge Cartwright, Mr. Cayley – a prosecutor in Case 002 – and Mr. Rosandhaug, without legal authorization or the knowledge and consent of the other parties, impact the fairness of the trial and cause an imbalance – or disparate treatment – between the parties. By refusing to investigate these *ex parte* meetings and deliberately mischaracterizing and misconstruing the Request for Investigation as a Rule 34 request for disqualification, the Trial Chamber knowingly and willfully interfered with the administration of justice in Case 002, breaching its obligation to ensure a fair trial.

### A. The Trial Chamber erred in law in its justification of the *ex parte* meetings between Judge Cartwright, International Co-Prosecutor Cayley and others

29. The Trial Chamber declined to investigate by improperly finding – absent any credible evidence or authority – that the *ex parte* meetings between Judge Cartwright, Mr. Cayley,

<sup>42</sup> Letter from the IENG Sary Defence to Trial Chamber Senior Legal Officer, Susan Lamb, Re: IENG Sary's Request for Leave to Reply to Co-Prosecutors' Joint Response to: 1) NUON Chea's Urgent Application for Disqualification of Judge Cartwright; and 2) IENG Sary's Request for Investigation Concerning *Ex Parte* Communications between the International Co-Prosecutor, Judge Cartwright and Others, 30 November 2011.

<sup>43</sup> Email from Susan Lamb to all parties, 1 December 2011.

<sup>44</sup> Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1).

<sup>45</sup> Establishment Law, Art. 33 new; Agreement, Art. 12; Rule 21(1)(a).

<sup>46</sup> International Covenant on Civil and Political Rights ("ICCPR"), Art. 14(1). The rights guaranteed by the ICCPR are guaranteed to all Accused brought before the ECCC. See Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 12; Rule 21. See also *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 177, where it was held that the "fundamental human right to be tried before an independent and impartial tribunal" is considered "an integral component" of the fair trial guarantee.

and Mr. Rosandhaug were justifiable because they were necessary for coordination of the UN component of the ECCC.<sup>47</sup> The ECCC legal framework, as reflected by the Cambodian Code of Ethics for Judges, prohibits *ex parte* communications during case proceedings between a judge and any party in the absence of another party, except where the law permits or with the consent of the other parties.<sup>48</sup> The Trial Chamber erred in failing to recognize that the *ex parte* meetings between Judge Cartwright and Mr. Cayley are prohibited (particularly because both individuals are currently involved in Case 002, there is no legal basis for the meetings and the other parties were unaware of the meetings).

30. *Ex parte* meetings between a judge and a prosecutor who are involved in the same case give, at a minimum, the *appearance* of knowing and willful interference with the administration of justice. While the Defence is not averring that anything inappropriate was discussed during these meetings, the very fact of their occurrence is cause for concern when considering the rationale for prohibiting such meetings; hence the Request for Investigation. The prohibition on *ex parte* meetings reflects the need for “separation between those authorities responsible for prosecuting and those responsible for adjudication”<sup>49</sup> and the principle that judges “shall be independent in the performance of their functions.”<sup>50</sup> This rationale is encompassed in international norms<sup>51</sup> and in the Cambodian Code of Ethics for Judges, prohibiting *ex parte* meetings – except where expressly permitted by law or when the other parties have given their consent.<sup>52</sup>
31. The Trial Chamber held that “[t]he ECCC Code of Judicial Ethics recognizes that it, and not the Cambodian Code of Ethics for Judges..., is the code governing the conduct of international judges of the ECCC.”<sup>53</sup> While the ECCC Code of Judicial Ethics does not explicitly prohibit *ex parte* meetings, it does incorporate “both national and international norms,”<sup>54</sup> which do, in fact, prohibit *ex parte* communications.

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<sup>47</sup> Impugned Decision, para. 21.

<sup>48</sup> Cambodian Code of Ethics for Judges, Art. 9.

<sup>49</sup> Rule 21(1)(a).

<sup>50</sup> Establishment Law, Art. 10 new; Agreement, Art. 3(3). *See also* Constitution, Art. 128 new.

<sup>51</sup> United Nations Basic Principles on the Independence of the Judiciary, Principles 4, 6; Bangalore Principles of Judicial Conduct 2002, Value 2, Application 2.2.

<sup>52</sup> Cambodian Code of Ethics for Judges, Art. 9.

<sup>53</sup> Impugned Decision, para. 18.

<sup>54</sup> ECCC Code of Judicial Ethics, preamble.

32. The national rules of conduct for Judge Cartwright and Mr. Cayley prohibit *ex parte* communications. New Zealand's Guidelines for Judicial Conduct recommend Judge Cartwright to take care to "avoid direct social contact with practitioners who are engaged in current cases before the judge."<sup>55</sup> Judge Cartwright also should disclose "any matter which might give rise to objection ... even if the judge has formed the preliminary view that there is no basis for disqualification."<sup>56</sup> Mr. Cayley is prohibited from:

(a) engag[ing] in conduct whether in pursuit of his profession or otherwise which is: ... (ii) prejudicial to the administration of justice; or (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.<sup>57</sup>

33. According to the Trial Chamber's interpretation of the ECCC Code of Judicial Ethics, while in their national jurisdictions Judge Cartwright and Mr. Cayley would be prohibited from engaging in *ex parte* communication (as Cambodian judges are under Cambodian law), at the ECCC they may freely communicate with each other at their discretion without having to inform the other parties in Case 002. This logic leads to legal absurdity and a perversion of justice. By attempting to justify the *ex parte* meetings through the selective and disparate application of the ECCC Code of Judicial Ethics, the Trial Chamber erred in law.

34. While there is merit in the Trial Chamber's assertion that coordination by the UN component of the ECCC is necessary,<sup>58</sup> such coordination must be done within the ECCC legal framework. Contrary to the Trial Chamber's findings that the Judicial Administration Committee ("JAC") was "not designed to address matters relevant solely to the United Nations component of the ECCC,"<sup>59</sup> and that it is not "vested with exclusive competence in relation to administrative oversight and coordination," guidance can be taken from its statutory role. The Rules explicitly set out the composition of the JAC,<sup>60</sup>

<sup>55</sup> New Zealand's Guidelines for Judicial Conduct, para. 50.

<sup>56</sup> *Id.*, paras. 85-86.

<sup>57</sup> Code of Conduct of the Bar of England & Wales, para. 301(a)(ii)-(iii).

<sup>58</sup> Impugned Decision, para. 20.

<sup>59</sup> *Id.*, para. 21.

<sup>60</sup> Rule 19(1) states: "The Judicial Administration Committee shall be comprised of three national Judges, one of whom shall be the President, and two international Judges, all elected in Plenary Session. A national and an international substitute member shall be elected at the Plenary Session to replace an absent member as needed. The Committee shall also include, in a consultative capacity, the Co-Prosecutors and the Director and Deputy Director of the Office of Administration. Where a member or a substitute member of the Committee notifies the Plenary that he or she cannot, or no longer wishes to, sit on the Committee, a replacement member shall be elected at Plenary Session."

the role of the JAC,<sup>61</sup> the frequency with which the JAC shall meet,<sup>62</sup> and how the JAC will be serviced.<sup>63</sup> Coordination by the UN component – or a “Coordination Council”<sup>64</sup> – can likewise transparently be set up in accordance with the Rules.

35. The Trial Chamber erroneously found that meetings of the UN component “follow[ed] the advice of the United Nations Legal Counsel.”<sup>65</sup> The Trial Chamber’s finding endorses a thesis that a recommendation given by the UN Legal Counsel Ms. O’Brien is above the law. Put differently, on Ms. O’Brien’s word, the ECCC legal framework can be usurped.<sup>66</sup> Nowhere in the ECCC legal framework does it state that the UN Legal Counsel may direct the UN component of the ECCC to act outside its scope.
36. The Trial Chamber found – absent any formal statement by Judge Cartwright or Mr. Cayley<sup>67</sup> – that “the meetings between Judge Cartwright, the international Co-Prosecutor and the Deputy Director of Administration were informally modelled upon these examples from the ICTR, ICTY and the ICC, as adapted to the specific ECCC context.”<sup>68</sup> Judge Cartwright’s and Mr. Cayley’s meetings cannot be compared to the Coordination Councils at the ICTY, International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Court (“ICC”). First, as noted by the Trial Chamber, the rules and regulations of the ICTY, ICTR and ICC provide for Coordination Councils.<sup>69</sup> The ECCC legal framework does not provide for meetings between Judge Cartwright and Mr. Cayley. Second, the President of the ICTY, ICTR and ICC does not sit on a trial bench in

<sup>61</sup> Rule 19(2) states: “The Committee shall advise and guide the Office of Administration concerning all activities relating to the administrative and judicial support provided to, the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges and the Chambers, including the preparation and implementation of the budget.”

<sup>62</sup> Rule 19(3) states: “The Committee shall meet at the initiative of the President. Committee meetings shall be confidential. Remote participation may be organized, as necessary.”

<sup>63</sup> Rule 19(5) states: “The Committee shall be serviced by a secretariat. At the request of the President of the Plenary Session, the Chambers and/or the Office of the Co-Prosecutors and/or the Office of the Co-Investigating Judges shall assign the members of the secretariat, as necessary and appropriate. The Office of the Administration shall provide support staff as needed. In accomplishing its tasks, the Committee may take expert advice at the expense of the ECCC.”

<sup>64</sup> Impugned Decision, para. 19: “These so-called Coordination Councils...”

<sup>65</sup> *Id.*, para. 20.

<sup>66</sup> It is noteworthy that Ms. O’Brien has in the past apparently endorsed the failure of the UN to investigate fair trial concerns at the ECCC relating to Cases 003 and 004 on the grounds that an investigation into allegations of political interference “could really undermine Case 002, [and] the defense might have a field day with that.” Julia Wallace, *Nuon Chea Takes Meddling Charge to Court*, CAMBODIA DAILY, 24 October 2011, p. 1, 30, quoting Ms. O’Brien.

<sup>67</sup> Contrary to the recommendations of the Defence in the Request for Investigation, neither Judge Cartwright nor Mr. Cayley have issued a formal statement. See Request for Investigation, para. 33.

<sup>68</sup> Impugned Decision, para. 20.

<sup>69</sup> ICTR Rule 23bis(B); ICTY Rule 23bis(B); ICC Regulation 3(2).

a case where the prosecutor has and will continue to appear before him or her. At the ECCC, Judge Cartwright is only involved in Case 002. Mr. Cayley has and will continue to appear before her.

37. The Trial Chamber erroneously found that Judge Cartwright and Mr. Cayley had “significant non-judicial and administrative responsibilities” that were necessary to ensure that the international component of the ECCC has the necessary resources and support to fulfill its mandate.<sup>70</sup> These non-judicial and administrative responsibilities do not require *ex parte* meetings between Judge Cartwright and Mr. Cayley. Rule 9(1) states: “The Office of Administration shall support the Chambers, the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges and Plenary Sessions in the performance of their functions and shall be responsible for their administration and servicing.” Administrative responsibilities lie with each organ and the Office of Administration. To fulfill non-judicial and administrative responsibilities, the Rules do not require that the International Co-Prosecutor and Judge Cartwright meet together with the Deputy Director of the Office of Administration on an *ex parte* basis.
38. According to the Trial Chamber, the ECCC is a “model court”<sup>71</sup> that will “encourage and underscore the significance of institutional safeguards of judicial independence and integrity”<sup>72</sup> in Cambodia. It follows – if indeed the ECCC is a model court – that the ECCC should operate in a transparent manner and in accordance with nationally and internationally recognized fair trial standards. Given the prohibition under international and Cambodian law against *ex parte* meetings that occur without legal authority or the consent of other parties, and the appearance of a knowing and willful interference with the administration of justice that arises from such meetings, the Trial Chamber should have investigated the nature of these meetings.
39. The Trial Chamber determined that no further investigation was warranted because, in its view, an email sent to the parties from Mr. Rosandhaug was sufficient to answer the

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<sup>70</sup> Impugned Decision, para. 20.

<sup>71</sup> Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 14.

<sup>72</sup> *Id.*

Defence's concerns.<sup>73</sup> The Trial Chamber's willful refusal to investigate the *ex parte* meetings – thereby permitting Judge Cartwright and Mr. Cayley to continue to meet unreservedly without the knowledge or presence of the other parties in Case 002 – constitutes a knowing and willful interference with the administration of justice. The Trial Chamber, in issuing the Impugned Decision, abdicated its duties under the Constitution, the Establishment Law, the Agreement, and the Rules to ensure a fair and balanced trial.<sup>74</sup>

**B. The Trial Chamber erred in fact or, in the alternative, abused its discretion by mischaracterizing and dismissing the Request for Investigation**

40. The Trial Chamber erroneously found that “[a]s the IENG Sary motion is in substance a motion for disqualification, the Trial Chamber considers this motion to have been improperly based on Internal Rule 35.”<sup>75</sup> The Request for Investigation was a *prima facie* request for investigation. It met the evidentiary threshold of Rule 35 by demonstrating “reason to believe” that a knowing and willful interference with the administration of justice had occurred. The Trial Chamber erred in fact or, in the alternative, abused its discretion in mischaracterizing and misconstruing the Request for Investigation and in subsequently dismissing it. The Trial Chamber, it would appear, did so to circumvent the Rules and avoid carrying out an investigation which, depending on the results, may have given rise to a subsequent Rule 34 application for disqualification.
41. Should the Supreme Court Chamber find that the Trial Chamber was exercising its discretion to consider the Request for Investigation as an application for disqualification, the Defence invites the Supreme Court Chamber to be guided by ICTY jurisprudence on the standard for abuse of discretion. In *Prlić et al.*, the ICTY Appeals Chamber held that an abuse of discretion has occurred where the Impugned Decision is “so unfair or unreasonable ... [in that] the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant

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<sup>73</sup> Impugned Decision, para. 20. See also Trial Transcript, 21 November 2011, E1/13.1, p. 14, where Presiding Judge Nil Nonn states: “The Chamber would like to inform all parties that, so far, the deputy director of the office of Administration already responded to this request.”

<sup>74</sup> Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Arts. 12-13; Rule 21.

<sup>75</sup> Impugned Decision, para. 12. See also *id.*, para. 19: “[T]he Defence motions do not meet the threshold evidentiary requirements contained in Internal Rule 34”; *Id.*, para. 22: “As the basis for judicial disqualification cannot be established by unsupported allegations of impropriety....”

considerations.”<sup>76</sup> In this case, the Trial Chamber abused its discretion by failing to give any weight to the substance of the Request for Investigation, which was a *prima facie* request for investigation of the *ex parte* meetings between Judge Cartwright, Mr. Cayley and others. The Trial Chamber erroneously and unfairly mischaracterized and misconstrued the Request for Investigation, treating it as identical to the Application for Disqualification filed by the NUON Chea Defence team<sup>77</sup> without distinguishing between the two filings.

42. Rule 35 provides *inter alia* that when the Trial Chamber “[has] reason to believe that a person may have committed any of the acts set out in [Rule 35(1)],” it may “conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings.”<sup>78</sup> In the Request for Investigation, the Defence requested a list of all meetings where Mr. Cayley and Judge Cartwright participated in *ex parte* communications and all relevant facts and details concerning these *ex parte* meetings, including but not limited to their agenda and/or minutes.<sup>79</sup> The Request for Investigation specifically stated that “this Request is not an application for disqualification”<sup>80</sup> and, indeed, the Defence did not seek the disqualification of Judge Cartwright. The Trial Chamber utterly failed to distinguish the differences between the Request for Investigation and a Rule 34 application for disqualification.
43. The Trial Chamber erred in mischaracterizing and misconstruing the Request for Investigation as a Rule 34 application for disqualification and, as a consequence, finding that “the Defence motions do not meet the threshold evidentiary requirements contained in Internal Rule 34 [regarding an appearance of bias].”<sup>81</sup> As a result of this error, the Trial Chamber further erred by applying the wrong test (the Rule 34 test for establishing

<sup>76</sup> *Prosecutor v. Prlić et al.*, IT-04-74-AR65.24, Decision on Jadranko Prlić’s Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011, para. 4, citing *Prosecutor v. Popović et al.*, IT-05-88-AR65.10, Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009, paras. 4-5; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.14, Decision on Jadranko Prlić’s Appeal Against the *Décision Relative à la demande de mise en liberté provisoire de l’accusé Prlić*, 9 April 2009, 5 June 2009, paras. 5-6; *Prosecutor v. Popović et al.*, IT-05-88-AR65.7, Decision on Vujadin Popović’s Interlocutory Appeal Against the Decision on Popović’s Motion for Provisional Release, 1 July 2008, para. 6.

<sup>77</sup> NUON Chea Defence Team’s Urgent Application for Disqualification of Judge Cartwright, E137/2, 21 November 2011.

<sup>78</sup> Rule 35(2).

<sup>79</sup> Request for Investigation, introduction (internal footnotes omitted).

<sup>80</sup> *Id.*

<sup>81</sup> Impugned Decision, paras. 12, 19.

an appearance of bias)<sup>82</sup> to determine whether the Request for Investigation met the threshold evidentiary requirements for an investigation.

44. The Trial Chamber's erroneous treatment of the Request for Investigation as an application for disqualification compounds the appearance of a knowing and willful interference with the administration of justice. By dismissing the Defence's valid concerns regarding *ex parte* meetings between a judge and a prosecutor, the Trial Chamber failed to give any weight to the evidence presented in the Request for Investigation. Rather than, at a minimum, encouraging Judge Cartwright to provide a written statement (as other judges have done in the past),<sup>83</sup> the Trial Chamber simply deferred to an email from the Deputy Director of Administration, claiming that it adequately addressed the Defence's concerns.<sup>84</sup> Had the Trial Chamber applied the correct test (the Rule 35 test) to the Request for Investigation, it would have been obliged to exercise its discretion to investigate meaningfully whether Judge Cartwright and Mr. Cayley knowingly and willfully interfered with the administration of justice.

45. Rule 35 requires "reason to believe"<sup>85</sup> that an interference with the administration of justice has occurred. This evidentiary requirement has been held to be an "extremely low threshold."<sup>86</sup> The Request for Investigation demonstrated that: **a.** *ex parte* meetings between Judge Cartwright and Mr. Cayley have occurred on a periodic basis, without the consent of the other parties in Case 002;<sup>87</sup> **b.** Mr. Cayley has in the past and will continue to appear before Judge Cartwright in Case 002,<sup>88</sup> and **c.** there is no express legal basis for

<sup>82</sup> See *id.*, para. 13, citing *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189.

<sup>83</sup> See Request for Investigation, para. 33. See also 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, para. 2, where Judges Downing and Lahuis filed written submissions responding to an application made by the Defence for "appropriate measures," rather than disqualification *per se*.

<sup>84</sup> Impugned Decision, para. 20.

<sup>85</sup> Rule 35(2).

<sup>86</sup> See Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, D314/1/12, para. 37: "The *reason to believe* standard is an extremely low threshold and merely invokes inquiry by the CIJs or a Chamber. The broad nature of this threshold is emphasised by the inclusion of *may* in Internal Rule 35(2). A finding that there is reason to believe does not require or involve a determination as to the merits of an allegation or suspicion of interference. The finding that the reason to believe standard has been met does, however, require the CIJs or Chamber to have concluded that there exists a material basis or *reason* that is the foundation of their *belief*. This material basis or *reason* shall be established based on an examination of the allegation or suspicion, which examination may be subjective in nature."

<sup>87</sup> Request for Investigation, paras. 4, 9, 10, 23.

<sup>88</sup> Request for Investigation, para. 25.

these *ex parte* meetings.<sup>89</sup> Because *ex parte* meetings are prohibited under Cambodian and international law, the Request for Investigation established “reason to believe” that a knowing and willful interference with the administration of justice had occurred.

46. The Trial Chamber erred in failing to conduct an investigation in accordance with Rule 35 to determine whether there were sufficient grounds to initiate proceedings regarding a knowing and willful interference with the administration of justice.<sup>90</sup> By mischaracterizing the Request for Investigation and applying the wrong threshold test, the Trial Chamber either erred in fact or abused its discretion, thus knowingly and willfully interfering with the administration of justice. In so doing, the Trial Chamber has failed to fulfill its constitutional obligation to ensure a fair trial for the Accused.

## VI. CONCLUSION AND RELIEF REQUESTED

47. The Trial Chamber knowingly and willfully interfered with the administration of justice by failing to investigate the *ex parte* meetings between Judge Cartwright, Mr. Cayley and other persons. It did so by mischaracterizing and misconstruing the Request for Investigation, thus shielding Judge Cartwright and Mr. Cayley, and preventing the Defence from ascertaining whether good cause exists for a Rule 34 application for the disqualification of Judge Cartwright. Given the Trial Chamber’s reluctance to ascertain the truth of this matter – as illustrated by Presiding Judge Nil Nonn’s reference to an email from Mr. Rosandhaug as containing sufficient answers to the Defence’s concerns<sup>91</sup> – the Supreme Court Chamber should assume the duty that the Trial Chamber refuses to fulfill and conduct its own investigation into the *ex parte* meetings.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

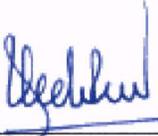
- a. FIND the Appeal admissible;
- b. GRANT a public, oral hearing;
- c. ANNUL the Impugned Decision; and
- d. INVESTIGATE the *ex parte* meetings between the Judge Cartwright, the International Co-Prosecutor and others.

<sup>89</sup> *Id.*, para. 24.

<sup>90</sup> See Rule 35(2)(b).

<sup>91</sup> See Trial Transcript, 21 November 2011, E1/13.1, p. 14.

Respectfully submitted,

  
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ANG Udom



  
\_\_\_\_\_  
Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 5<sup>th</sup> day of **January, 2012**

