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BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' JOINT RESPONSE TO IENG THIRITH, IENG SARY AND NUON CHEA'S APPLICATIONS FOR DISQUALIFICATION OF THE JUDGES

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INTRODUCTION

1. On 1 February 2011, the Ieng Thirith Defence filed its Application ("Ieng Thirith Application") for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony[1] (the "Judges"). Advanced copies of similar applications were notified to the parties in one language by email on behalf of Ieng Sary[2] and Nuon Chea("Ieng Sary Application" and "Nuon Chea Application" respectively)[3]. Noting the Trial Chamber's Memorandum as to Interim Procedure before the Trial Chamber where translation constraints preclude compliance by the Parties with filing deadlines[4] and in the interests of expediting proceedings, this Joint response addresses the Ieng Thirith Application, the Ieng Sary Application and the Nuon Chea Application (together "Applications"). The Applications request that the Judges, constituting the entirety of the Trial Chamber, be disqualified from adjudicating in the forthcoming trial of the Accused. For the reasons stated below, the Co-Prosecutors oppose the Applications.

2. The Defence argue that certain findings of fact and law set out by the Trial Chamber in the judgment in the *Duch* case[5] are such that a reasonable observer, being properly informed, would apprehend bias on the part of the Judges. As a result, they argue, the Judges should be disqualified in accordance with Article 34 of the Law establishing the Extraordinary Chambers. The Co-Prosecutors submit that the threshold for establishing an appearance of bias has not be met and that the Applications should accordingly be dismissed.

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

2 *Case of Ieng Sary,* 002/19-09-2007-ECCC/TC, IENG Sary Defence Motion to Support Ieng Thirith and Nuon Chea's Applications for Disqualification of the Trial Chamber Judges and IENG Sary's Motion to Join Ieng Thirith's Application for the Trial Chamber to be Replaced – for the Purpose of Adjudicating the Applications – By Reserve Judges of the Trial Chamber or Additional Judges Chosen by the Judicial Administration Committee, 17 February 2011. Both applications were forwarded by the Senior Legal Office of the Trial Chamber.

3 *Case of Nuon Chea,* 002/19-09-2007-ECCC/TC, NUON Chea Defence Urgent Application for Disqualification of the Trial Chamber Judges, 8 February 2011

4 Doc. No. E38, ERN 00643388, 8 February 2011.

5 Judgement, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, 26 July 2010, E188, paras. 44, 45, 90, 131 and 509.

THE IMPARTIALITY TEST

3. The Co-Prosecutors submit that judicial impartiality pertains to process and not outcome. This is inherent in the notion of judicial bias, which is defined as "*A judge's bias towards one or more of the parties to a case over which the judge presides*[6]" and has been set out explicitly by the High Court of Australia, which stated that:

> "[...]It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party[7]"

This excerpt has been quoted with approval by, *inter alia*, the Constitutional Court of South Africa[8], the ICTR in *Karemera*[9] and the ICTY in the *Brdjanin and Talic*[10] and *Celebici*[11]. In *Karemera,* the ICTR goes on to develop the principle of impartiality in process further, stating that:

> ...what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a predisposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment[12].

Thus, the *conditio sine qua non* to establish a lack of impartiality is to provide evidence that the Judges have demonstrated an extraneous or improper predisposition against the accused, not genuinely related to the application of the law[13]. The Co-Prosecutors therefore submit that, to the extent that the Ieng Sary Defence argues that the Trial Chamber is unlikely to decide the case differently, their submissions are manifestly ill-founded in law.

IMPARTIALITY AS APPLIED TO INTERNATIONAL CRIMINAL LAW

4. In the present case, the Defence teams do not argue that the Duch judgment demonstrates that Judges have taken into consideration extraneous or improper factors. They argue that the judgement demonstrates that the Judges have already judicially determined certain

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6 Black's Law Dictionary, 8th Ed., 2004, West Publishing, United States, p. 171

7 *Re: JRL; ex parte CJL* (1986) 161 CRL.

8 *South African Rugby Football Union*, Constitutional Court of South Africa, Case CCT 16/98, 4 June 1999, para 46.

9 *Prosecutor v. Karemera et al.* ICTR -98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004 at para. 10.

10 *Prosecutor v. Brđanin and Talić,* ICTY-99-36, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, para. 18.

11 *Prosecutor v. Delalic, Mucic, Hazim and Landzo* ("Celebici-case") IT-96-21-A, Judgment of the Appeals Chamber, 20 February 2001, para.707.

12 *Prosecutor v. Karemara et al.* ICTR-98-44-T, Decision on Motion by Karemara for Disqualification of Trial Judges, 17 May 2004, para.13.

13 See also the note Black's Law Dictionary, supra, p.171.

aspects of the cases against the Ieng Thirith, Ieng Sary and Nuon Chea (together "Accused"). In this respect, the Co-Prosecutors submit that it is a matter of course, particularly in international criminal law, that judges will frequently be required to determine issues in different cases grounded in the same or similar sets of facts. It is a well-established principle that judges are assumed to be able to set aside such prior factors and determine each case on its own merits. This was set out by the ICTY in the *Galić* case, where it was stated that judges':

> "training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict[14]".

This principle has been reiterated by the ICTY in *Celebici*[15] and the ICTR in *Karera*[16], *Nahimana et al.*[17] and *Ntawukulilyayo*[18]. The effect of this presumption is that:

> "...it does not follow that a judge is disqualified from hearing two or more criminal trials arising out the same series of events, where he is exposed to evidence relating to these events in both cases[19]"

Similar rulings were made in *Karadzic*[20], *Ntawukulilyayo*[21] and *Brđanin and Talić*[22].

5. This principle remains good even where the matter considered by judges in the previous trial or judgment is a matter central to the present case. Thus, for example, in the case of *Lindon*[23], where two cases of criminal defamation arose around the same passage of text, the ECtHR ruled that a finding by two judges in the first case that the passage was defamatory was not sufficient to objectively demonstrate a lack of impartiality by the same two judges sitting with other judges in the second case. The question as to whether the applicant had acted in good or bad faith remained open in the second case and had not been prejudiced by the first judgment. The finding in the first case was not determinative of the applicant's guilt in the second case and therefore there was no finding of

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14 *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgment, 30 November 2006, para. 44.
15 *Prosecutor v. Delalic, Mucic, Hazim and Landzo* ("Celebici-case") IT-96-21-A, Judgment of the Appeals Chamber, 20 February 2001, para. 700.
16 *François Karera v. The Prosecutor,* ICTR-07-74-A, Appeal Judgement, 2 February 2009, para. 378.
17 *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 78.
18 *Ntawukulilyayo v. The Prosecutor,* ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011, para. 12, quoting *Karera.*
19 *The Prosecutor v. Kordić and Čerkez,* IT-95-14/2-PT Decision on the Defence Application Requesting Disqualification of Judges Jorda and Riad, 4 May 1998, p.2.
20 *Prosecutor v. Karadzic*, IT-95-05/18-PT, Decision by Chamber Convened by Order of the Vice President, 22 July 2009 Para. 22.
21 *Ntawukulilyayo*, para. 12.
22 *Talić*, para 16.
23 *Lindon Otchakovsky-Laurens and July v. France*, ECHR [GC] , 21279/02 & 26448/02, decision of 22 October 2007, para. 79.

partiality[24]. This principle has been incorporated into international criminal law through a number of cases, including *Brđanin and Talić*[25], which also related to a prior finding of the existence of an "international armed conflict", *Karadizić*[26] and *Ntawukulilyayo*[27]. Although the Ieng Thirith Application incorrectly asserts that the issue of international armed conflict was unchallenged by the Defence in the Duch case, as can be seen from the above cases, such challenge is not essential to ensuring the impartiality of judges in a later case.[28] Therefore, even it is accepted that the *Duch* judgment establishes the '*chapeau* prerequisites' for various crimes, this is not sufficient to establish a lack of impartiality on the part of the Judges.

6. In order for a prior judgment or decision to be capable of creating an appearance of bias in the manner argued by the Defence, it is necessary that it "*...directly or by inference constitute findings on the individual criminal responsibility...*[29]" of the Accused. The principle has been put succinctly by the ECHR, which stated in *Poppe* that:

> The mere fact that a judge has...already tried a co-accused in separate criminal proceedings is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings.[30]

Thus where the matters previously ruled upon do not pre-determine the individual guilt of the accused, either because they do not speak to the whole crime, as in *Lindon*[31], or because the previous determinations do not meet the standard of proof required to convict the Accused, as in *Karadzić*[32], *Ntawukulilyayo*[33] and *Hauschildt*[34], then they are not sufficient to establish a lack of impartiality.

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24 In *Lindon*, the ECtHR noted that the prior finding as to the defamatory nature of the passage would be binding under the principle of *res judicata*. The Co-Prosecutors do not seek to argue that the principle of *res judicata* applies to the present matters; rather, what *Lindon* demonstrates is that, even if the prior findings are binding, they cannot create an appearance of bias if they do not pre-determine the guilt of the Accused.

25 *Talić*, para 16.

26 *Karadzic*, para.23.

27 Ntawukulilyayo, para. 12.

28 See *Duch Trial Transcript*, 21 May 2009 at page 13 where Judge Cartwright states to the prosecutors "In relation to the matter that you have raised, armed conflict, I acknowledge the problem. First, the accused *does not fully accept* the fact of an armed conflict and, therefore, it must be proved. See also the testimony of expert witness Nayan Chanda on 26 May 2009 at pages 39 – 42 where the Defence challenges the existence of an armed conflict prior to the end of 1977.

29 *Karadzić*, para. 22.

30 *Poppe v. the Netherlands*, ECHR No. 32271/04, Judgment of 24 March 200, para. 26.

31 Ibid.

32 *Karadzić* , para. 22.

33 *Ntawukulilyayo*, para. 12.

34 *Hauschildt v. Denmark*, ECHR No.10486/83, Judgment of 24 May 1989.

IMPARTIALITY AND THE PRESUMPTION OF INNOCENCE

7. The Nuon Chea Application attempts to argue that the *Duch* judgment effectively offends against the presumption of innocence owed to him, because it not only establishes the "*chapeau* requirements" for various crimes but also speaks to his personal culpability through findings as to his personal position within the CPK and the DK régime. The Co-Prosecutors reject this submission.

8. First, the passages referred to by the Defence are not judicial determinations as to the truth of matters in respect of Nuon Chea or his role. Thus, for example it is stated that "*According to his testimony*, the Accused received instructions from...Nuon Chea[35]" and "*The Accused indicated that*...he reported to Nuon Chea[36]" (Emphasis added). In these instances, the Trial Chamber is merely repeating the fact of what Duch stated, and is not endorsing the contents of the statement as definitive findings as to the role of Nuon Chea. Where unqualified statements are made, in paragraphs 85 and 95, these fall into the category of "*careful references...for the sole reason of providing a historical background*" as referred to in the *Karadzić* case[37]. The Co-Prosecutors therefore submit that such references do not constitute a pre-determination of the roles of Nuon Chea or indeed any of the other accused in this case.

9. Second, a finding that an accused occupied a certain position within the régime, even if the "*chapeau* requirements" of various crimes are accepted as established, is not sufficient to pre-determine the guilt of the accused. Such a proposition implies organisational or functional guilt which is strictly opposed to the principle of individual criminal responsibility. In order to establish individual criminal responsibility, whether by ordering, superior or command responsibility, or joint criminal enterprise, it will be necessary to examine in detail, *inter alia,* the *mens rea* of the various accused, with regards to their intention[38] or knowledge[39]. There is no discussion, let alone finding, with regard to the *mens rea* of the Accused in the *Duch* judgment and, hence, even considering the findings on aggregate, the Judges cannot be said to have predetermined the guilt of any of the Accused. *Culpa* is addressed only in relation to Duch, and not in relation to the Accused.

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35 *Duch*, para. 90.
36 *Duch*, para. 131.
37 *Karadzić*, Para.22.
38 *Duch*, para. 509.
39 *Duch*, para. 509.

10. Third, all references to the role of the Accused in the *Duch* case are merely ancillary, or obiter, to the key finding: that of the culpability of Duch for the crimes with which he was charged. As such, these statements were not subject to the criminal standard of proof of "beyond reasonable doubt[40]", as is reflected in the language of the passages in question, and are therefore not capable of establishing an appearance of bias. International jurisprudence holds that, even were the culpability of an accused was in question in prior decisions, this cannot establish guilt where the prior decisions required a lower standard of proof[41]. Thus, in the case of *Ntawukulilyayo,* the ICTR found that:

> ...a pronouncement by the Appeals Chamber on the reasonableness of the finding that Kalimanzira was aware that Ntawukulilyayo's promises of safe refuge were false does not constitute a ruling on Ntawukulilyayo's culpability...and his contention that he was found to be a co-perpetrator in the Kalimanzira case is therefore a mischaracterisation[42].

This being the case, there was no appearance of bias. Cases such as *Karadzić*[43] and *Galić*[44] further reinforce this principle. Similarly, in the present case, it is a mischaracterisation for the Defence to argue that the *Duch* judgment has established the guilt of any of the present Accused.

11. The Co-Prosecutors note that it is a rare occasion on which an appearance of bias has been found on the basis of a prior judicial decision, particularly in the field of international criminal law: none of the international criminal cases referred to by the parties demonstrate such an instance. There is clear and consistent precedent to show that a degree of overlap between cases stems from the nature of international criminal law and cannot therefore, other than in exceptional circumstances, form the basis for recusal of a Judge[45]. The two cases cited in which it was held that there was such an appearance of bias originate from the European Court of Human Rights and concern cases in which the prior decision *explicitly* found that the applicant had assisted in a crime[46] and in which the judge had previously been required to determine the guilt of the applicant to a "very high degree of clarity[47]". The present does not involve such exceptional circumstances and,

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40 *Duch*, paras. 44 and 45.
41 *Hauschildt v. Denmark*, ECHR No.10486/83, Judgment of 24 May 1989, para.50.
42 *Ntawukulilyayo*, para. 18.
43 *Karadzić*, paras. 22 and 24.
44 *Galić*, para. 42.
45 See inter *alia, Kordić and Čerkez,* p.3, *Ntawukulilyayo*, para. 12, *Prosecutor v. Krajisnik*, IT-00-39-PT, Decision by a Single Judge on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, para. 15 and Brđanin and Talić, para. 17.
46 *Ferrantelli and Santangelo v. Italy*, ECHR, App Nos. 48/1995 & 554/640, Judgment, 7 August 1996, para. 59.
47 *Hauschildt*, para. 52.

for the reasons argued above, is instead analogous to the case of *Poppe v. Netherlands*, in which the ECtHR found that:

> In both judgments the names of the applicant and others are mentioned in passing, merely to illustrate and clarify the leading role played in the criminal organisation by the persons convicted…Whether the applicant's involvement with C3 and D fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence, was not addressed, determined or assessed…It cannot therefore be said that any fears of bias…which the applicant might have had are objectively justified.[48]

12. The Co-Prosecutors submit that, similarly to *Poppe,* the various findings and passages in relation to which complaint is made by the Accused in this case do not offend against the presumption of innocence owed to them. This being the case, the presumption that the Judges have the "*capacity to put out of their mind evidence other than that presented at trial in rendering a verdict*[49]" must prevail, no appearance of bias is established and the Judges must be allowed the opportunity to undertake a "fresh consideration" of the matters in issue[50].

REQUEST

13. For the reasons stated above, the Co-Prosecutors submit that the Trial Chamber should dismiss the Applications in their entirety, reject the Accused requests for the disqualification of the Judges and the appointment of reserve or additional judges.

Respectfully submitted,

Date	Name	Place	Signature
23 February 2011	YETH Chakriya Co-Prosecutor	Phnom Penh	
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48 *Poppe v. the Netherlands*, para 28.
49 *Galić*, para. 44.
50 *Thomann v. Switzerland*, ECHR, Judgment of 10 June 1996, para. 35.