BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON MOTIONS FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 22 November 2011, the Nuon Chea Defence filed an *Urgent Application for Disqualification of Judge Cartwright* (the "Application"),[1] requesting Judge Cartwright's disqualification, or, in the alternative, her voluntary recusal.[2] The Application annexed, referenced and incorporated portions of a previously circulated courtesy copy of a motion by the Ieng Sary Defence entitled *Ieng Sary's Request for Investigation Concerning* Ex Parte *Communications Between the International Co-Prosecutor, Judge Cartwright and Others.*[3]

2. On 24 November 2011, the Ieng Sary Defence filed a motion entitled *Ieng Sary's Request for Investigation Concerning* Ex Parte *Communications Between the International Co-Prosecutor, Judge Cartwright and Others* (the "Request").[4] The Request relied on essentially the same purported evidence as the Application.

3. On 1 December 2011, the Co-Prosecutors filed a joint response to Nuon Chea's and Ieng Sary's motions.[5] The Co-Prosecutors argued that the Application and the Request should be denied because they failed to adduce sufficient evidence to support their claims.

4. On 2 December 2011, the Trial Chamber, with Reserve Judge Claudia Fenz sitting in the place of Judge Cartwright pursuant to Rule 34(6), entered its *Decision on Motions for Disqualification of Judge Silvia Cartwright* (the "Decision").[6] The Trial Chamber noted that the Request was "in substance a motion for disqualification" and addressed it as such.[7] The Trial Chamber dismissed both the Request and Application, holding that they failed to meet their evidentiary threshold and were devoid of merit.[8]

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1 **E137/2** *Urgent Application for Disqualification of Judge Cartwright*, 21 November 2011 ("Application").
2 **E137/2** Application, *supra* note 1 at para. 1.
3 **E137/2.1** *Ieng Sary's Request for Investigation Concerning* Ex Parte *Communications Between the International Co-Prosecutor, Judge Cartwright and Others,* 22 November 2011.
4 **E137/3** *Ieng Sary's Request for Investigation Concerning* Ex Parte *Communications Between the International Co-Prosecutor, Judge Cartwright and Others*, 24 November 2011 ("Request"). Notified 25 November 2011.
5 **E137/4** *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.
6 **E137/5** *Decision on Motions for Disqualification of Judge Silvia Cartwright,* 2 December 2011. Notified 2 December 2011.
7 **E137/5** Decision, *supra* note 6 at para. 12.
8 **E137/5** Decision, *supra* note 6 at para. 19.

5. On 5 January 2012, the Ieng Sary Defence filed an appeal from the Trial Chamber's decision (the "Appeal").[9] The Appeal claimed that by interpreting the Request as a motion for disqualification under Rule 34 rather than as a motion for an investigation under Rule 35, "the Trial Chamber violated its obligations under the Constitution, the Establishment Law, the Agreement, and the Rules."[10] The Ieng Sary Defence alleged that the Trial Chamber not only had committed error, but that it had committed malfeasance because it had "knowingly and willfully interfered with the administration of justice in Case 002" by "deliberately mischaracterizing and misconstruing the Request for an Investigation as a Rule 34 request for disqualification"[11]. The Ieng Sary Defence further alleged that the unanimous decision of the Trial Chamber was made "seemingly in order to avoid having to carry out an investigation."[12] The Appeal does not claim that the Trial Chamber erred in holding that Judge Cartwright should not be disqualified.

6. The Nuon Chea Defence did not appeal.

7. In this response, the Co-Prosecutors submit that the Supreme Court Chamber should deny the Appeal because it is inadmissible, or, in the alternative, because it fails to carry its evidentiary burden.

II. THE APPEAL IS INADMISSIBLE

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9 **E137/5/1/1** *Ieng Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright*, 5 January 2012. Notified 11 January 2012.

10 **E137/5/1/1** Appeal, *supra* note 9 at para. 4.

11 **E137/5/1/1** Appeal, *supra* note 9 at para. 28. Indeed, throughout its Appeal the Ieng Sary Defence appears to advance a claim that the Trial Chamber *itself* (presumably including Reserve Judge Frenz, but not including Judge Cartwright, who did not participate in the decision), rather than the subject matter of the Request, should be investigated under Rule 35, by accusing the Trial Chamber of "knowingly and willfully interfere[ing] with the administration of justice". *See also*, *ibid.* at para. 39: "The Trial Chamber's willful refusal to investigate the *ex parte* meetings … constitutes a knowing and willful interference with the administration of justice."; *ibid.* at para. 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."; *ibid.* at para. 46, "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."; *ibid.* at para. 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." The Co-Prosecutors decline to respond to this argument as it was not the subject of the initial Request or Decision, and therefore is not properly before the Supreme Court Chamber on appeal. Additionally, the Supreme Court Chamber has recently held that "neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and willful interference with the administration of justice pursuant to Internal Rule 35 (Rev. 8)." **E130/4/3** *Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court*, 13 January 2012, p. 2.

12 **E137/5/1/1** Appeal, *supra* note 9 at para. 4. *See also, ibid.* at para. 40 ("The Trial Chamber, it would appear, did so to circumvent the Rules and avoid carrying out an investigation … .").

8. The Trial Chamber's decision on this matter is not open to immediate appeal. The Ieng Sary Defence purports to make its appeal under Rule 104(1) and Rule 104(4). In doing so, they conflate the Supreme Court Chamber subject matter jurisdiction provisions of Rule 104(1) with the list of matters subject to immediate appeal delineated in Rule 104(4). Rule 104(1) lays out the subject matter jurisdiction of the Supreme Court Chamber, but does not set out an independent basis for immediately appealable decisions. Read correctly, Rule 104(1) states that the Supreme Court Chamber's jurisdiction encompasses "a) an error on a question of law invalidating the judgment or decision", "b) an error of fact which has occasioned a miscarriage of justice," and also, when considering an issue validly subject to immediate appeal, a "discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant", inclusive. What issues are subject to an immediate appeal, however, are exclusively itemized in Rule 104(4).[13] This position was recently confirmed by the Supreme Court Chamber.[14] Where a claim does not fall under one of the categories listed in 104(4), the Rule is clear that "[o]ther decisions may be appealed only at the same time as an appeal against the judgment on the merits."[15]

9. The Ieng Sary Defence further claims that the Trial Chamber decision is immediately appealable under Rule 104(4)(d).[16] Rule 104(4)(d) applies to "decisions on interference with the administration of justice under Rule 35(6)." The Trial Chamber was clear, however, that "the IENG Sary motion [was] in substance a motion for disqualification" and that "[t]he relevant provision is instead Internal Rule 34(2)."[17] As a result, the Trial Chamber's decision was not one made "under Rule 35(6)" as Rule 104(4)(d) requires and is therefore inadmissible. The Co-Prosecutors submit that the Trial Chamber was within its discretion to interpret the submission from Ieng Sary as one made under Rule 34, as set out in Section III below.

III. THE TRIAL CHAMBER'S DECISION WAS WITHIN ITS DISCRETION

10. Even if the Supreme Court Chamber admits the Appeal, it should be denied. The Ieng Sary Defence claims that the Trial Chamber erred by addressing their motion as one for

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13 **E169/1/2** *Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009*, 24 December 2009 at paras. 9-12.
14 **E130/4/3** *Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court,* 13 January 2012, p. 2.
15 Rule 104.
16 **E137/5/1/1** Appeal, *supra* note 9 at para. 7.
17 **E137/5** Decision, *supra* note 6 at para. 12.

disqualification under Rule 34 rather than one for an investigation under Rule 35. On the contrary, the Trial Chamber was well within its discretion to address the motion as argued. Furthermore, the Request fails to carry its burden even if considered under Rule 35.

A. Scope of Review

11. The jurisprudence of the ECCC has held that "the Appeals Chambers of international tribunals have a very limited scope of review when dealing with appeals against discretionary decisions of a first instance jurisdiction"[18], and has adopted the following test from the ICTY:

> [A] Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber [would have held differently from the Trial Chamber], the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.[19]

12. In slightly different wording, the ICTR Appeals Chamber has similarly held that, "[w]hen reviewing a Trial Chamber's exercise of judicial discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber, but whether in reaching its decision the Trial Chamber has reasonably exercised its discretion."[20]

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[18] **D164/4/13** *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive,* 18 November 2009 at para. 26.

[19] **D140/9/5** *Public Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional Expert to Re-examine the Subject Matter of the Expert Report Submitted by Ms Ewa Tabeau and Mr Theay Kheam*, 28 June 2010 at paras. 15-17, quoting *Slobodan Milošević v. Prosecutor*, IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel*, Appeals Chamber, 1 November 2004; **D348/2/7** *Confidential Decision on the Appeal of Co-Lawyers for Civil Parties Against the Order Concerning a Witness of Forced Marriage in S-24 Following Further Submission*, 4 August 2010 at para. 9 (quoting same); **D356/2/9** *Decision on Nuon Chea's Appeal Against the Co-Investigating Judges' Order Rejecting Request for a Second Expert Opinion*, 1 July 2010 at paras. 16-18 (quoting same); *see also Prosecutor v. Tharsisse Muvunyi*, Case No. ICTR-00-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005,* 12 May 2005 at para. 5 (quoting same). *See also Prosecutor v. Hormisgas Nsengimana*, Case No. ICTR-01-69-A, *Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses,* 16 December 2010 at para. 8.

[20] *Prosecutor v. Tharsisse Muvunyi*, Case No. ICTR-00-55A-AR73, *Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005,* 12 May 2005 at para. 5; *see also Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*, No. ICC-01/09-02/11 OA, *Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Dissenting Opinion*

B. The Trial Chamber's Discretion to Decide the Request as Argued

13. A Trial Chamber is within its judicial discretion concerning management of trial proceedings to consider a filing as having been brought under the Rule that is the focus of the motion, even when the moving party claims to bring the submission under a different Rule.[21] Here, however, the Ieng Sary Defence not only focused on Rule 34, but explicitly stated that Rule 34 was the "Applicable Law"[22].

14. The Request was replete with references and analysis based on the test for disqualification under Rule 34(2), which states:

> Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.

The test for apprehension of bias sufficient for disqualification is whether "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[23] The Ieng Sary Request, in its first paragraph, stated: "*Ex parte* communications between a judge and a prosecutor sitting on the same case violate applicable rules of professional conduct and *may give rise to an objective appearance of bias.*"[24]

15. In Section III of the Request, titled "Applicable Law", the Ieng Sary Defence makes clear that it is bringing its request under Rule 34.[25] Section III(B), titled "Recusal and Disqualification of Judges" quotes Rule 34(2) in full, and goes on to quote and cite case law interpreting the disqualification standard.[26] *Nowhere* in the "Applicable Law" section does the Ieng Sary Defence mention or cite to Rule 35. The Ieng Sary Defence goes on to reference the "objective observer" test in paragraph 26, and to argue that the

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of Judge Anita Ušacka, 20 September 2011 at para. 15 (The appellate chamber is "not conducting a *de novo* review and therefore cannot substitute its discretion with the discretion of the Pre-Trial or Trial Chamber.").

21 *See, e.g., Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance,* 14 June 2007 at para. 8.

22 **E137/3** Request, *supra* note 4 at p. 6.

23 **E55/4** *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for disqualifications of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, 23 March 2011, para. 19.

24 **E137/3** Request, *supra* note 4 at p. 1 (emphasis added).

25 **E137/3** Request, *supra* note 4 at pp. 6-9.

26 **E137/3** Request, *supra* note 4 at paras. 17-19.

circumstances meet the test for disqualification under an actual bias or appearance of bias standard in paragraphs 25, 27, 32, 33, and 34.[27]

16. Thus, far from "mischaracterize[ing] and misconstru[ing]"[28] the Request, the Trial Chamber's interpretation of the Request as a claim under Rule 34 is premised on the argument advanced by the Ieng Sary Defence itself, and at the very least the Trial Chamber was well within its discretion to interpret it as such. Furthermore, as explained above, as a permissible interpretation of the Request the Rule 34 decision is not subject to an immediate appeal under Rule 104(4)(d).

C. The Request Would Also Fail as a Rule 35 Submission

17. At the outset, the Co-Prosecutors recall that Rule 35 actions are discretionary, and may be instituted by a Chamber *proprio motu*.[29] Thus, even if the Ieng Sary Defence had made a proper Rule 35 submission and met its evidentiary burden the Trial Chamber would have been within its discretion not to proceed with a Rule 35 investigation.[30] Additionally, the Trial Chamber, faced with sufficient evidence, would be within its discretion to order a Rule 35 investigation even in the absence of any filing in that regard. That the Trial Chamber, faced with the same purported evidence the Ieng Sary Defence relies on in this Appeal, chose not to order an investigation even though it had the authority to do so, further indicates their view that, as they clearly stated, the claims by the Ieng Sary Defence are "devoid of merit"[31].

18. The Ieng Sary Defence failed, however, to meet its evidentiary burden. In order to meet its burden under Rule 35, the Ieng Sary Defence must show a "reason to believe" that an individual "knowingly and wilfully interfere[d] with the administration of justice." To find that the "reason to believe" standard has been met, the Chamber must find that "there

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27 The Ieng Sary Defence proceeds to purport to "incorporate[s] by reference" these paragraphs of the Request, including the "Applicable Law" portion, into its Appeal, thereby repeating its error. **E137/5/1/1** Appeal, *supra* note 9, p. 1.

28 **E137 5/1/1** Appeal, *supra* note 9 at p. 1.

29 Rule 35 has no submission requirement and uses the permissive "may", rather than the imperative "shall".

30 *See Léonidas Nshogoza v. Prosecutor*, Case No. ICTR-07-91-AR77, *Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution,* 7 July 2011 at para. 12 ("The Appeals Chamber recalls that a Trial Chamber is entitled to find a *prima facie* case of contempt and then determine, within the bounds of its discretion, whether or not to initiate further proceedings. Consequently, there is no merit to Nshogoza's contention that, after finding sufficient grounds to proceed, the Trial Chamber's discretion in this case was limited to either ordering an investigation or prosecuting members of the Prosecution." (internal citations omitted)).

31 **E137/5** Decision, *supra* note 6 at para. 19.

exists a material basis or reason that is the foundation of their belief."[32] The material basis, not mere speculation, must support both the alleged material elements, or *actus reus*, *i.e.*, the "interference with the administration of justice", and the alleged mental elements, or *mens rea*, *i.e.*, "willful and knowing". The meaning of the term "administration of justice" in Rule 35 concerns only matters "closely related to the functioning of the judicial proceedings before the Tribunal."[33]

19. The Request does not disclose *any evidentiary basis* in support of the grounds for an investigation. There is no support for the proposition that the meetings between Judge Cartwright, Mr. Cayley and/or Mr. Rosandhaug concerned anything more than administrative and operational matters, which, as further explained under Part III(C)(i) below, are acceptable in the context of an internationalised criminal tribunal. As a result, they fail to provide a material basis to substantiate the material element, that is, that the administrative meetings constitute interference with the administration of justice as regards Ieng Sary in Case 002. The Ieng Sary Defence also makes *no* argument that any purported interference with the administration of justice was done with the requisite mental element,[34] that is, that it was done knowing that discussing administrative matters was an interference with the administration of justice, and wilfully transgressing that precept nonetheless.[35]

20. While the Appeal attempts to conjure an air of reality through references to missives and submissions written by the Ieng Sary and Nuon Chea Defence teams, and various statements in the media, this cannot amount to the "reason to believe" required by Rule 35. Nor can the Ieng Sary Defence's complaint that Co-Prosecutor Andrew Cayley and others did not respond to some instances of Ieng Sary's previous correspondence on this matter satisfy that standard. If that were sufficient, any party or judge who does not respond to any frivolous request could be subject to investigation.

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[32] **D314/1/12** *Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses*, 9 September 2010, para. 37 ("Second Decision").

[33] *Prosecutor v. Milošević*, Cases IT-02-54-Misc5 & IT-02-54-Misc6, *Decision on the Initiation of Contempt Investigations*, 18 July 2011, Para. 11. The ECCC has noted the similarity of Rule 35 to Rule 77 of the ICTY Rules of Procedure and Evidence, and found interpretation of Rule 77 to be instructive. **D314/1/12** Second Decision, *supra* note 30 at paras. 31, 32.

[34] They mention the *mens rea* standard only in quoting a letter they wrote that was not formally filed and the substantive request of which was rejected. **E137/5/1/1** Appeal, *supra* note 9 at para. 26.

[35] *See, generally*, *Prosecutor v. Vojislav Šešelj*, Case IT-03-67-R.77.4, *Public edited version of "Decision on Failure to Remove Confidential Information From Public Website and Order in Lieu of Indictment" issued on 9 May 2011*, 24 May 2011 at para. 27; *Prosecutor v. Milošević*, Case IT-02-54-A-R77.4, *Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings*, 29 August 2005 at paras. 40-43.

21. The evidentiary threshold requirements of Rule 35 are appropriate filtering mechanisms to prevent the misuse of judicial time and scant resources to address manifestly unfounded or unsubstantiated complaints. This is entirely consistent with the model adopted by the Rules of Procedure and Evidence of the International Criminal Court, and its subordinate Regulations, in addressing complaints of misconduct against a judge or prosecutor. These legal texts direct the Presidency to conduct a preliminary assessment and set aside complaints that are "anonymous or manifestly unfounded",[36] with no further consideration necessary. The European Court of Human Rights, Inter-American Commission on Human Rights and Committee against Torture – jurisdictions by nature sensitive to the unequal power relations between complainants and State authorities – confirm that a complaint will be "manifestly ill-founded" or "manifestly groundless" and *therefore inadmissible* if it fails to disclose at least a *prima facie* evidentiary basis or is based upon speculation.[37] The Co-Prosecutors submit that the Chamber should properly apply similar standards in disposing of the Appeal.

i. The Appropriate Nature of the Communications

22. As the Trial Chamber found, certain communications between a Vice-President, Prosecutor and/or Deputy Director of Administration are necessary and appropriate in the context of an internationalised criminal tribunal. Within an internationalised criminal tribunal such as the ECCC, the role of the International Co-Prosecutor (ICP) – a senior United Nations official – is not solely that of a party to proceedings.[38]

23. The ICP has significant non-judicial, administrative responsibilities that extend, *inter alia*, to management, mentoring, knowledge-transfer and capacity-building, budget, staffing, high-level contact with senior UN officials, diplomats, dignitaries and donor

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[36] ICC Rules of Procedure and Evidence, Rule 26(2); ICC Regulations of the Court, Regulations 120-121.

[37] For the ECHR, see: *Gomes v Sweden* (Decision on admissibility, Application no. 34566/04, 7 February 2006) at p. 11 (requiring "substantial grounds to believe" as a threshold for admissibility); For the IACHR, see: *Monsi Lilia Velarde Retamozo v Peru*, Case 12.165, Report No. 85/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 437 (2003) at para. 45; see also *V. v Bolivia*, Case 270-07, Report No. 40/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008) at para 79; *Herrera y Vargas (La Nación)*, Costa Rica, Case No. 12,367, December 3, IACHR, Report No. 128/01, 2001 at para. 50; Report No. 4/04, Petition 12,324, *Rubén Luis Godoy*, Argentina, February 24, 2004 at para. 43 and Report No. 29/07, Petition 712-03, *Elena Tellez Blanco*, Costa Rica, April 26, 2007 at para. 58; for the CAT see: General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22 (11/21/1997. A/53/44, annex IX, CAT General Comment No. 01. (General Comments) at paras. 4-6; 6 *H.I.A. v Sweden*, Communication No. 216/2002, U.N. Doc. CAT/C/30/D/216/2002 (2003) (Decisions of the Committee Against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Thirtieth session - Communication No. 216/2002) at paras. 6.1-6.2.

[38] **E137/5** Decision, *supra* note 6 at para. 20.

States; interaction with other UN agencies in Cambodia and the region and, jointly with the National Co-Prosecutor, ensuring that the Office of the Co-Prosecutors has the necessary resources, logistical and administrative support to be able to fulfill its responsibilities under the law. Neither Co-Prosecutor is functionally subordinated to the judicial, executive or legislative branches of the Cambodian government and both are mandated to act independently and not to seek or accept instructions from any government or any other source.[39]

24. Not only does the ECCC Code of Judicial Ethics not prohibit such meetings[40], but the best practice of other international and internationalised courts and tribunals demonstrates the need for mechanisms to support effective and prudent management of resources and high-level strategic co-ordination between the authorities responsible for adjudication, prosecution and administration. Such co-ordination is both conceptually and practically distinct from the context of "ECCC proceedings", where the Rules expressly "guarantee separation" between prosecution and adjudication.[41] As International Co-Prosecutor Cayley has stated, if such meetings did not take place, "these institutions, including the ECCC, would be paralyzed."[42]

25. For example, from 2001, the ICTY added to its Bureau[43] both a Management Committee[44] – most comparable in structure and function to ECCC's Judicial Administration Committee ("JAC) referred to in the Application – *as well as* a Co-ordination Council,[45] where the President, the Prosecutor and the Registrar coordinate the "activities" of the three organs "in order to achieve the mission of the Tribunal".[46] The work of the Co-ordination Council takes due account of the "responsibilities and independence" of its members.[47] Identical structures operate at the ICTR.[48] The ICC has also adopted the Co-ordination Council model. In each of these tribunals, the Defence plays no part on the Co-ordination Council, and minutes are not made public.[49]

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39 ECCC Law, Art. 19; Agreement, Art. 6(3).
40 Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia, Articles 1 & 2.
41 Rule 21(1)(a).
42 Julia Wallace, KRT Defense Alleges Ex Parte Meetings, Cambodia Daily, 7 November 2011, p.2.
43 ICTY RPE, Rule 23.
44 ICTY RPE, Rule 23*ter*.
45 ICTY RPE, Rule 23*bis*
46 *Ibid.*
47 *Ibid.*
48 ICTR RPE, Rules 23, 23*bis* and 23*ter*.
49 The Ieng Sary Defence's claim that "the President [sic] of the ICTY, ICTR and ICC does not sit on a trial bench in a case where the prosecutor has and will continue to appear before him or her" is patently

26. The hybrid character and appreciably streamlined scale of the ECCC – particularly its diffusion of Registry functions – may not warrant replication of all formal structures found in the *ad hoc* Tribunals and the ICC.[50] But this does not remove the need for co-ordination between Judge Cartwright – as Vice-President of the Plenary and a highly-experienced, senior international judicial official – with the International Co-Prosecutor and/or the Deputy Director of Administration, who also bears significant responsibilities specific to international staff under Article 31 new of the ECCC Law. This is neither sinister nor unlawful. Rather, any matters under discussion in these informal, administrative meetings are concerned with the range of operational issues affecting an internationalised tribunal that do not concern "ECCC proceedings", much less any particular Accused person. Furthermore, there is nothing in the Rules prohibiting administrative meetings, nor anything stating that the JAC is the exclusive mechanism, as the Ieng Sary Defense claims, for doing so. As the Trial Chamber held: "All principals … have significant non-judicial and administrative responsibilities that extend to, amongst other things, management, mentoring, budget, staffing and high-level contact with senior UN officials, diplomats, dignitaries and donor states. These functions are necessary to ensure that the international component of the ECCC has the necessary resources and logistical and administrative support to fulfil its mandate."[51]

27. Therefore, even considered as a Rule 35 submission, the Ieng Sary Defence fail to meet their burden, and the Appeal should be denied.

IV. RELIEF REQUESTED

28. For these reasons, the Co-Prosecutors respectfully request the Supreme Court Chamber to:

A. dismiss the Appeal as inadmissible and manifestly unfounded because:

1) it does not concern an issue subject to immediate appeal under Rule 104(4); and,

2) it fails to present a *prima facie* showing to justify a Rule 35 investigation;

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incorrect. Appeal, *supra* note 9 at para. 36. At all three of these bodies, the Presidents are active judges who sit on panels adjudicating cases in which the Prosecutor is a party.

[50] The Trial Chamber has previously noted: "[T]he ECCC has many features distinct from other internationalized courts and tribunals." **E5/3** *Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests*, 28 January 2011 at para. 14.

[51] **E137/5**, Decision, *supra* note 6 at para. 20.

or

B. deny the Appeal because:

1) the Trial Chamber did not abuse its discretion; and,

2) the Request and Appeal fail to carry their burden to justify a Rule 35 investigation.

Respectfully submitted,

Date	Name	Place	Signature
19 January 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		