

BEFORE THE TRIAL CHAMBER OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG THIRITH DEFENCE APPLICATION FOR DISQUALIFICATION OF JUDGES NIL NONN, SYLVIA CARTWRIGHT, YA SOKHAN, JEAN-MARC LAVERGNE AND THOU MONY

Defence for Ieng Thirith:

Diana ELLIS, QC

Trial Chamber Judges:

NIL Nonn, President
Silvia CARTWRIGHT
THOU Mony
Jean-Marc LAVERGNE
Ya SOKHAN

Civil Party Co-Lead Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

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I INTRODUCTION AND PETITION

1. The defence applies for the Judges of the Trial Chamber, comprising Judge Nil Nonn, Judge Sylvia Cartwright, Judge Thou Mony, Judge Jean-Marc Lavergne and Judge Ya Sokhan to be disqualified from adjudicating in the forthcoming trial of the Accused, and three others. Between 17 February 2009 and 17 September 2009 the aforementioned Judges conducted the trial of Kaing Guek Eav alias Duch (*Duch Case*) in the course of which they decided a number of matters, which will be in issue in the trial of the Accused. The fact that the Trial Chamber has already determined certain points which are in dispute will inevitably objectively give rise to the appearance of bias and might affect the impartiality of the Judges when reconsidering the particular matter in issue.
2. This application is made pursuant to Rule 34(2) of the Internal Rules which provides that:

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.

II ADMISSIBILITY OF THE APPLICATION

3. The third limb of Internal Rule 34 reads that the 'application shall be filed as soon as the party becomes aware of the grounds in question', whilst the fourth limb provides that, to be admissible an application must be submitted 'against a Trial Chamber Judge, concerning matters arising before the trial, at the initial hearing [...]'.
4. These two provisions seem contradictory, and hence, the defence files this application at this point in time when the Trial Chamber has just been seized of the case, and thus in accordance with the third limb of Internal Rule 34, which requires the applicant to file such application 'as soon as the party becomes aware of the grounds in question'. In order to act diligently, the defence submits this is the appropriate time for filing such application. Further, before the start of the Initial Hearing, the Trial Chamber is expected to rule on other motions filed by the defence for the Accused and her co-accused, which

are also affected by the Trial Chamber's alleged bias. The defence submits the underlying application is thus admissible at this stage of the proceedings.

III BACKGROUND

3.1 Finding on Armed Conflict

5. In its judgment on 26 July 2010 in Case 001/18-07-2007/ECCC/TC against Kaing Guek Eav alias Duch (*Duch Judgment*), the Trial Chamber concluded that in the period of 17 April 1975 and 6 January 1979 an international armed conflict existed in Cambodia.¹
6. The existence of an international armed conflict calls into effect the Geneva Conventions of 12 August 1949.²
7. Article 6 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (*ECCC Law*)³ gives the Extraordinary Chambers the power to 'bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions'. This means that 'an accused may be found responsible for grave breaches only when these are perpetrated against persons or property regarded as 'protected' by the Geneva Conventions and within the context of an international armed conflict'.⁴
8. The Pre-Trial Chamber also found that to establish crimes against humanity, a nexus with an armed conflict is required.⁵

¹ Judgment of 26 July 2010, para. 423.

² Article 2 of the Geneva Conventions of 12 August 1949.

³ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁴ Judgment of 26 July 2010, para. 409.

⁵ PTC, Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011, Document No. D427/2/12, p. 6.

9. The existence of an international armed conflict in the period of 17 April 1975 and 6 January 1979 in Cambodia was not disputed in Case 001 against Duch,⁶ nor is it being disputed on appeal by the Co-Lawyers for Duch.⁷
10. The Trial Chamber made a factual finding of the existence of an international armed conflict in the period of 17 April 1975 and 6 January 1979 in Cambodia, which was not challenged by the defence. It is unrealistic to view this issue as a matter upon which the Trial Chamber will in a future trial decide to the contrary even if the Trial Chamber is presented with persuasive arguments to demonstrate that no international armed conflict existed at the relevant time. It is respectfully submitted that the credibility of the Extraordinary Chambers will be damaged if justice is not seen to be done from an objective standpoint.

3.2 Other Findings

11. Besides the issue of armed conflict, there are other matters which will be in issue that the Trial Chamber has previously ruled upon in the *Duch* case. These include but are not limited to:
- The Chamber's findings on jurisdiction over crimes and forms of responsibility;
 - The Court's findings on the structure of the Government in the Democratic Kampuchea era (Section 2.2.1 of the *Duch* Judgment);
 - The dissemination of the periodicals, directives, etc. of the Communist Party of Kampuchea (CPK) (Section 2.2.7 of the *Duch* Judgment);
 - The CPK security structure (Section 2.2.8 of the *Duch* Judgment);
 - Witnesses in the *Duch* Case are expected to be called in Case 002, whom the Chamber has found to give credible testimony in the *Duch* Case, but whose status and evidence may be challenged in Case 002 for instance Dr Craig Etcheson, was accepted as an expert in the *Duch* Case and is cited on numerous occasions

⁶ Judgment of 26 July 2010, para. 63, 64 and 75.

⁷ *Duch* Case, 001/18-07-2007/ECCC/TC, Notice of Appeal by the Co-Lawyers for Duch against the Trial Chamber Judgment of 26 July 2010, 24 August 2010 and *Duch* Case, 001/18-07-2007/ECCC /SC, Appeal Brief by the Co-Lawyers for Duch against the Trial Chamber Judgment of 26 July 2010, 18 November 2010.

throughout the *Duch* Judgment. His expertise will be challenged by the defence in Case 002 if the Co-Prosecutors seek to call him as an expert in the case.⁸

12. In the premises, the defence of the Accused, Madame Ieng Thirith, respectfully requests that Judges Nil Nonn, Sylvia Cartwright, Thou Mony, Jean-Marc Lavergne and Ya Sokhan recuse themselves to ensure that the defence has the opportunity to present arguments on matters previously decided including in respect of the existence of an international armed conflict before a Trial Chamber free of the appearance of bias.

IV APPLICABLE LAW

4.1 Right to a Fair Trial by an Independent and Impartial Tribunal

13. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia held in *Furundzija* that '[t]he fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial'.⁹
14. The fundamental right to a fair trial has been incorporated in Article 31 of the Constitution of the Kingdom of Cambodia which states that '[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights'.¹⁰ As such, Article 13(1) of the Agreement¹¹ sets out the rights of the accused and guarantees that Articles '14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR] shall be respected throughout the trial process'. A similar provision has been adopted in the ECCC Law. According to Article 33 new of the ECCC Law, '[t]he Extraordinary Chambers of the

⁸ See Ieng Thirith Defence Request for Exclusion of the Report of Dr. Craig C. Etcheson, 11 August 2009, Document No. D192.

⁹ *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment, Appeals Chamber, 21 July 2000, para. 177.

¹⁰ 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

¹¹ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.

trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses' and '[t]he Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 [ICCPR]. Article 14(1) of the ICCPR states that '[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

15. In order to safeguard the fundamental right of a fair trial by an independent and impartial tribunal, the Agreement, the ECCC Law and the Code of Judicial Ethics of the ECCC¹² all have provisions regarding the independence and impartiality of the judges of the Extraordinary Chambers.¹³ And, in case the independence or impartiality of the court cannot be guaranteed, Article 34 of the Internal Rules provides a mechanism to restore the independence and impartiality of the court: the recusal by judges themselves or a request for disqualification of the judges by one of the parties.

¹² *Code of Judicial Ethics*, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008.

¹³ Article 3(3) of the Agreement states: 'The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source'. Article 10 new of the ECCC Law provides in part that 'The judges of the Extraordinary Chambers shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law. Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source'. Article 1(1) of the Judicial Code of Ethics provides that 'Judges shall uphold the independence of their office and the authority of the Extraordinary Chambers in the Courts of Cambodia (hereinafter referred to as ECCC) and shall conduct themselves accordingly in carrying out their judicial functions'. And article 2(1) of the Judicial Code of Ethics states that 'Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions'.

4.2 Recusal and Disqualification of Judges

16. Internal Rule 34 provides that:

1. A judge may recuse him/herself in any case in which he or she has, or has had, a personal or financial interest, or concerning which the Judge has, or has had, an association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias. [...] In any other case the judge in question shall notify the Chamber in which he or she is sitting. The Judge in question shall immediately cease to participate in the judicial proceedings.

2. 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.

[...]

4. To be admissible an application must be submitted:

[...]

c) against a Trial Chamber Judge, concerning matters arising before the trial, at the initial hearing; or concerning matters arising during trial or of which the parties were unaware before the trial, before the final judgment in the case; [...]

4.3 The Test for Bias

17. Article 34(1)(2) provide respectively that a judge may recuse himself or that any party may file an application for disqualification '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'.

18. The test to determine whether a judge is actually biased or gives rise to the appearance of bias has been set forth by the Appeals Chamber of the ICTY in *Furundzija*¹⁴ and has been adopted by other international tribunals¹⁵ as well as by the Pre-Trial Chamber in the disqualification requests against Judges Ney Thol¹⁶ and Marcel Lemonde.¹⁷

¹⁴ *Furundzija*, para. 189-190.

¹⁵ *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 23. *Prosecutor v. Issa Hassan Sesay et al*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 51. *Prosecutor v. Edouard Karemera et al*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, para. 8. *Prosecutor v. Athanase Seromba*, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006, para. 7.

¹⁶ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC01), Public Decision on the Co-Lawyer's Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, paras. 20-21.

19. The Appeals Chamber of the ICTY has held in the case of *Furundzija* that:¹⁸
- A. A Judge is not impartial if it is shown that actual bias exists.
 - B. There is an unacceptable appearance of bias if:
 - (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if a Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
 - (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.
20. The reasonable observer in the second limb in determining whether there is an unacceptable appearance of bias, must be 'an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'¹⁹ In more recent cases international tribunals have explained this by using the 'hypothetical fair-minded observer' approach from the *Krajisnik*²⁰ case. The hypothetical fair-minded observer 'is by implication someone from the outside, who, as an observer (and not a party) recognizes and understands the circumstances well enough to tell whether or not the public sense of Justice would be challenged by the presence of a particular Judge on the Bench in the case at end.'²¹ This, according to the International Criminal Tribunal for Rwanda in the case of *Karemera* 'reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".'²²

¹⁷ *Case of Khieu Samphan*, 002/13-10-2009-ECCC/PTC (02), Public Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, para. 24-25.

¹⁸ *Furundzija*, para. 189.

¹⁹ *Furundzija*, para. 190.

²⁰ *Prosecutor v. Momcilo 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 14. PM Judicial Supplement!

²¹ *Sam Hinga Norman*, para. 27.

²² *Karemera*, para. 8. Quoting the ICTY in the case of *Furundzija*, para. 195, quoting Lord Hewart CJ. in the case of *R v. Sussex Justices ex parte McCarthy*, [1924] 1 KB 256 at p. 259. See also *Prosecutor v. Théoneste Bagosora et al*, ICTR-98-41-T, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 7.

21. The Appeals Chamber of the Special Court for Sierra Leone held in the case of *Sesay* that 'where a Trial Chamber finds 'some indicia of bias,' the logical and reasonable conclusion must be that the Judge is disqualified.'²³

V SUBMISSION

5.1 The Appearance of Bias of the Judges of the Trial Chamber

22. On 26 July 2010 the Trial Chamber, composed of Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan, rendered a judgment in the *Duch* Case in which it found Duch guilty of several crimes. Amongst those crimes were grave breaches of the Geneva Conventions of 1949, which included willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body and health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial and unlawful confinement of a civilian.²⁴ Duch could not have been convicted of these grave breaches of the Geneva Conventions of 1949 unless the Trial Chamber held that there was an international armed conflict in Cambodia between 17 April 1975 and 6 January 1979. The existence of an international armed conflict during this period in Cambodia was not been disputed by the defence of KAING Guek Eav, alias Duch during trial; nor is it being disputed in the appeal against the judgment of 26 July 2010.²⁵
23. The conclusion of the existence of an international armed conflict in Cambodia between 17 April 1975 and 7 January 1979 by the Trial Chamber has far-reaching consequences. It means that the Geneva Conventions of 1949 apply, based on Article 2 of the Geneva Conventions. The ECCC has subject matter jurisdiction over grave breaches of the Geneva Conventions of 1949 according to Article 6 of the ECCC Law. By holding that an international armed conflict existed at the time, the Trial Chamber now has made the

²³ *Prosecutor v. Issa Hassan Sesay et al*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decisions on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 13.

²⁴ Judgment of 26 July 2010, para. 677.

²⁵ *Supra*, paras 63 and 75. *Duch* Case, 001/18-07-2007/ECCC /SC, Appeal Brief by the Co-Lawyers for Duch against the Trial Chamber Judgment of 26 July 2010, 18 November 2010.

Geneva Conventions of 1949 applicable in all cases brought before it and can find accused persons on trial guilty of grave breaches of the Geneva Conventions of 1949.

24. A persuasive argument can be made by the defence that no such international armed conflict existed at the relevant time and therefore the Geneva Conventions of 1949 are inapplicable. This will be a live issue in the case of the Accused at trial, as the assertion that an international armed conflict existed will be challenged. It is self-evident that it would prove difficult and embarrassing for the Trial Chamber to decide in Case 002 that there was no international armed conflict and yet to find to the contrary would raise the issue of lack of objectivity and would appear indicative of partiality to hold on to the previously stated decision. The Judges of the Trial Chamber would have an overwhelming interest in making a finding consistent with that accepted by them in the *Duch* Trial as a contrary view would jeopardize their Judgment in respect of certain crimes. To permit such a state of affairs could undermine the credibility of the ECCC and could even put in jeopardy the *raison d'être* of the existence of the ECCC since the Geneva Conventions of 1949 are one of many international conventions that are of such importance to the pursuit of justice, national reconciliation, stability, peace and security by the Government and the people of Cambodia.²⁶
25. In the case of *Sussex Justices; Ex parte McCarthy* Lord Hewart C.J. restated a long-accepted principle of justice as follows:
- A long line of cases shows that it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.²⁷
26. It is submitted that the circumstances, as set out herein, would lead a reasonable observer, properly informed, to reasonably apprehend bias. A so called hypothetical fair-minded observer, someone who is not a party in the particular matter but is well aware of the history of Cambodia, and more specifically of the period of Democratic Kampuchea from 1975 till 1979, and the existence and purpose of the ECCC, will form the opinion that the public sense of justice is challenged when the same judges have to consider the existence

²⁶ See the preamble of the Agreement.

²⁷ *R v Sussex Justices ex parte McCarthy* [1924], 1 KB 256, 9 November 1923.

of an international armed conflict in Cambodia when it has already been determined by them in an earlier trial without hearing argument. If the hypothetical fair-minded observer would objectively and reasonably apprehend bias, the Accused cannot stand before the Judges of the Trial Chamber and have confidence that it will hear and decide the case without being influenced in any way by its previous conclusion regarding the existence of an international armed conflict in the case of *Duch*. The Accused will lack that confidence and thus be deprived of the fundamental right of a fair trial.

27. The defence submits that an apprehension of bias will exist regarding Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan. According to the Appeals Chamber of the ICTY in the case of *Furundzija*²⁸ and the Appeals Chamber of the SCSL in the case of *Sesay*,²⁹ the apprehension of bias is sufficient ground for a judge or judges to recuse themselves or for them to be disqualified. Therefore the defence respectfully requests the disqualification of Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan in order to allow the Accused to have a trial free of any apprehension of bias by the Trial Chamber.

5.2 High Threshold

28. The defence acknowledges that the Judges of the ECCC ‘enjoy a presumption of impartiality’³⁰ and that this ‘presumption is based on their oath of office and the qualifications for their appointment [...], and places a high burden on the party moving for the disqualification to misplace that presumption’.³¹ The reason for an apprehension of bias against the Accused in this case is not based on any interest or association but on a judgment in either the same case or a separate case, like in the case of *Blagojevic*³² and *Karemera*.³³

²⁸ *Furundzija*, para. 189.

²⁹ *Prosecutor v. Issa Hassan Sesay et al*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 51.

³⁰ *Case of Nuon Chea*, para. 15.

³¹ *Case of Nuon Chea*, para. 15.

³² *Prosecutor v. Blagojevic et al*, IT-02-60, Decision on Blagojevic’s Application pursuant to Rule 15(B), 19 March 2003, para 13.

³³ *Karemera*, para. 11.

29. In the case of *Blagojevic* the defence alleged an apprehension of bias against the accused due to refusal of the Trial Chamber of the ICTY to apply the law on remand as directed by the Appeals Chamber of the ICTY. The Bureau of the ICTY held that the refusal to apply the law as directed by the Appeals Chamber did not rise from any apprehension of bias against the accused but did rise 'from disagreement with the Appeals Chamber over a legal issue and inadequate appreciation of the principle that Appeals Chamber decisions are binding on Trial Chambers'.³⁴ This erroneous decision does not suffice to establish an apprehension of bias according to the Bureau.³⁵
30. In the case of *Karemera*, the Bureau of the ICTR held that:
- Allegations of bias based on the content of judicial proceedings have also been considered by the Supreme Court of the United States, where the objective test is also well-established: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion [...]. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.³⁶
- Error, if any, on a point of law is insufficient; 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 of the relevant facts.³⁷
31. In the case of *Sesay*, the Appeals Chamber of the SCSL held that the Trial Chamber erred in law by holding that the 'indicia of bias' it had found was not sufficient to establish an apprehension of bias. However, the Appeals Chamber of the SCSL held that there was no apprehension of bias. The defence had failed to demonstrate that 'a Judge's legal and factual analysis in a case to which they are not a party could be considered to give rise to an appearance of bias. This is even more so when the party in question is neither mentioned nor alluded to by the Judge'.³⁸ The Court stated that 'it is inevitable that some connection can be made between judicial opinions in cases before the Special Court

³⁴ *Blagojevic*, para. 15.

³⁵ *Ibid.*

³⁶ *Karemera*, para. 12.

³⁷ *Karemera*, para. 13.

³⁸ *Prosecutor v. Issa Hassan Sesay et al*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decisions on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 14.

because each case ultimately relates to the same period of conflict. But a judicial opinion that merely has some connection to a case cannot raise a question of bias nor can it raise a substantive claim for disqualification'.³⁹

32. The defence submits that the case of the Accused differs from the above-mentioned cases. Firstly, the existence of an international armed conflict in Cambodia between 17 April 1975 and 6 January 1979 was not disputed during the trial of Duch. Therefore, the Trial Chamber did not receive information from the defence that could have led to a different conclusion. This by no means implies that its judgment was erroneous; it did not hear arguments advanced to support or challenge the contention that an international armed conflict existed. Although it is true that the cases before the ECCC are connected because of their relation to the period of the Democratic Kampuchea, the Judgment of the Trial Chamber in the *Duch* Case cannot be qualified as a judicial opinion to be conclusive of the issue in the trial of the Accused. As previously stated, the conclusion of the existence of an international armed conflict, and the other issues already dealt with by the Trial Chamber in the *Duch* Case, will affect all future cases before the ECCC and thus the Accused.

5.3 Previous Findings of Fact by Judges

33. In *Prosecutor v. Nahimana et al.*, the ICTR Trial Chamber had to deal with a similar issue, where the defence for Nahimana requested to have Judge Pillay and Judge Mose disqualified due to the findings of fact they had made in respect of a co-accused on his plea of guilty at the ICTR.⁴⁰ The ICTR in that case held that 'it is not unusual for a Judge to hear different cases where the same witnesses give evidence which would require her to assess the credibility of such witness independently in each case'.⁴¹ Ordinarily, an objection cannot be soundly based on a Judge's previous judicial decision.⁴²

³⁹ *Ibid.* para, 15.

⁴⁰ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-I, Transcript, 19 September 2000.

⁴¹ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-I, Transcript, 19 September 2000, p. 11-12.

⁴² *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-I, Transcript, 19 September 2000, p. 17.

34. What is different in this case is that it is not just one Judge of the Trial Chamber who was part of a previous case dealing with the same factual issues, but every single Judge of this Chamber who decided on the factual issues mentioned above.

5.4 Conclusion

35. Therefore it is important, and in accordance with international law, that the defence on behalf of the accused has the opportunity to argue its case before a Trial Chamber not constituted of Judges who have previously decided the issues and whose participation would lead to the apprehension of bias. The case file in Case 002 contains many more documents than the limited case file in the *Duch* Case, including information on the existence or absence of an (international) armed conflict.


VI CONCLUSION

36. According to established international law and the ECCC law an accused has the fundamental right to be tried before an independent and impartial tribunal. In order to guarantee that an accused will have a fair trial, the judges themselves are of high moral character and are presumed to be impartial and independent. Where a judge does not appear to be impartial or independent, the Internal Rules provide the mechanism of either recusal by judges themselves or an application for disqualification by any party.
37. The Appeals Chamber of the ICTY has set out a standard to determine whether there is actual bias or an unacceptable appearance of bias. There is an unacceptable appearance of bias if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. This test has been adopted by other international tribunals as well as by the ECCC. If a hypothetical fair-minded observer who is well informed can tell that there is a public sense that justice will be challenged, then there is an apprehension of bias. The presence of any indicia of bias leads to the conclusion that the judge must recuse himself or be disqualified.

38. In Case 001 Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan, determined the existence of an international armed conflict in Cambodia between 17 April 1975 and 6 January 1979. The existence of such an international armed conflict has not been disputed by the defence for Duch, nor is it being disputed on appeal. The same Judges decided on other important factual issues in the *Duch* Case, as stated above, that will be undoubtedly disputed by the Accused in Case 002
39. For the reasons stated in Chapter IV above, the defence submits that there will be an unacceptable appearance of bias against the Accused by Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan. Presenting a plea in which the existence of an international armed conflict and other important factual issues are being disputed will lead a reasonable observer, properly informed, to reasonably apprehend bias. This apprehension of bias flows from it being highly unlikely that, considering the importance of the Geneva Conventions of 1949 and the purpose of the existence of the ECCC, Judges Nil Nonn, Sylvia Cartwright, Thou Mony, Jean-Marc Lavergne and Ya Sokhan will be able to hear and decide this case without being influenced by their previous decision in the case of Duch.

VII RELIEF REQUESTED

40. According to Internal Rule 34(2) the defence respectfully applies for disqualification of Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan of the Trial Chamber based on the appearance of bias since there is an apprehension of bias against the Accused.
41. Accordingly, the defence requests that Judges Nil Nonn, Sylvia Cartwright, Thou Mony Jean-Marc Lavergne and Ya Sokhan will be replaced by reserve judges of the Trial Chamber or additional judges chosen by the Judicial Administration Committee from amongst the ECCC judges as prescribed by Rule 34(6) of the Internal Rules.

Party	Date	Name Lawyers	Place	Signature
Co- International Lawyer for Ieng Thirith	01 February 2011	Diana ELLIS, QC	Phnom Penh	 P.P.