

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 17 February 2011**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC

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**IENG SARY'S MOTION TO SUPPORT IENG THIRITH AND NUON CHEA'S APPLICATIONS FOR DISQUALIFICATION OF THE TRIAL CHAMBER JUDGES**

&amp;

**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**

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**Filed by:****Distribution to:**

**The Co-Lawyers:**  
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**The Trial Chamber Judges:**  
Judge NIL Nonn  
Judge THOU Mony  
Judge YA Sokhan  
Judge Silvia CARTWRIGHT  
Judge Jean-Marc LAVERGNE  
Reserve Judge YOU Ottara  
Reserve Judge Claudia FENZ

**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY

**All Defence Teams**

Mr. IENG Sary, through his Co-Lawyers, (“the Defence”) hereby moves to support the IENG Thirith Defence Application for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony (“IENG Thirith Application”)<sup>1</sup> and NUON Chea’s Urgent Application for Disqualification of the Trial Chamber Judges (“NUON Chea Application”)<sup>2</sup> (together, “the Applications”). The Defence agrees with the Applications in that, at the very least, there is the appearance of bias by the Trial Chamber Judges resulting from the fact that they have decided on a number of matters in Case 001 which will be in issue in Case 002.<sup>3</sup> There is strong merit in the argument that the Trial Chamber Judges will have an overwhelming interest in making findings that are consistent with their findings in Case 001 as a contrary view would jeopardize their Judgement in relation to certain crimes,<sup>4</sup> thereby affecting their impartiality when reconsidering the particular matter at issue.<sup>5</sup> In the interest of justice and to avoid any misperceptions of judicial impropriety, the Applications must be heard and decided upon by a panel of Judges free from any taint from or association with Case 001. Thus, the Defence further moves to join the IENG Thirith Application in calling for the Trial Chamber Judges 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 (“JAC”) from amongst the ECCC Judges, in accordance with Rule 34(6) of the ECCC Internal Rules (“Rules”).<sup>6</sup> The Defence requests a Stay in the proceedings until the Applications have been resolved. A public hearing is requested.

## I. APPLICABLE LAW

### A. Disqualification of a Judge

#### 1. Rule 34(2) 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.

<sup>1</sup> *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.

<sup>2</sup> See email from Andrew IANUZZI to Andrew CAYLEY, Karlijn VAN DER VOORT, Vera MANUELLO, Tanya Rene PETTAY, Neville SORAB, Sheherazade BOUARFA, and Eleonor FERNANDEZ dated 8 February 2011 attaching a courtesy copy of the NUON Chea Application, which to date has not yet been notified.

<sup>3</sup> IENG Thirith Application, para. 1; NUON Chea Application, para. 2.

<sup>4</sup> IENG Thirith Application, para. 24.

<sup>5</sup> IENG Thirith Application, para. 1; NUON Chea Application, para. 33.

<sup>6</sup> IENG Thirith Application, para. 41; NUON Chea Application, paras. 24, 34.



2. To interpret this Rule, the Trial Chamber used the test articulated by the ICTY Appeals Chamber (“ICTY test”):<sup>7</sup>

A Judge is not impartial if it is shown that actual bias exists.

There is an appearance of bias if:

- A Judge is party to the case, or has financial or proprietary interest in the outcome of a case, or if the 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
- The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>8</sup>

3. ECCC jurisprudence states that disqualification applications must seek the disqualification of a particular Judge sitting on a particular case, not a general order for disqualification.<sup>9</sup> Although this part of the test has been omitted from the Applications, this requirement has been met, as the Applications do seek the disqualification of the Trial Chamber Judges from Case 002 due to the appearance of bias that arises specifically in this case.
4. The ECCC Code of Judicial Ethics states that Judges must be impartial in that, “Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.”<sup>10</sup>

#### **B. One Application for the Disqualification of More than One Judge of the Same Chamber is Permissible**

5. Article 564 of the Cambodian Code of Criminal Procedure (“CPC”) states, “If the applicant wishes to challenge several judges of the same chamber, he may file one application.” Although this issue was not covered in the Applications, the CPC does permit the ECCC to deal with the disqualification of all the Trial Chamber Judges as set out in the Applications.

#### **C. Fair Trial Rights**

<sup>7</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, ERN: 00640427-00640435 (“Judge Nil Nonn Disqualification Decision”), para. 6.

<sup>8</sup> *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-A, 21 July 2000, para. 189.

<sup>9</sup> Judge Nil Nonn Disqualification Decision, paras. 9-11.

<sup>10</sup> ECCC Code of Judicial Ethics, as amended 5 September 2008, Art. 2(2). Similarly, the Cambodian Code of Judicial Ethics, Art. 17 states: “Shall a judge have a clear reason that he or she cannot make impartial judgment, that judge shall withdraw himself or herself from the hearing based on procedure code.”



6. Mr. IENG Sary has a right to be tried by an impartial bench. This right is enshrined in the International Covenant on Civil and Political Rights (“ICCPR”)<sup>11</sup> and the Universal Declaration on Human Rights (“UDHR”),<sup>12</sup> which must be respected in accordance with the Cambodian Constitution,<sup>13</sup> the Agreement<sup>14</sup> and the Establishment Law.<sup>15</sup>

## II. ARGUMENTS

### A. Support of the Applications in that there is the Appearance of Bias by the Trial Chamber Judges

7. Case 001 and Case 002 are inextricably interlinked with respect to a host of issues of fact and law.<sup>16</sup> Judgement upon these issues, which are live in Case 002, has already been rendered by the Trial Chamber Judges in Case 001.<sup>17</sup> The Trial Chamber Judges are now in a situation which would lead a reasonable observer, properly informed, to reasonably apprehend bias. The Trial Chamber Judges appear highly likely to be predisposed to support their findings of fact and holdings on law from Case 001, otherwise their Judgement in Case 001 will be discredited. That is not to say that the Trial Chamber will not, subjectively, do its utmost to remain impartial. Objectively, however, it appears that the likelihood of the Trial Chamber reconsidering its findings and holdings is rather remote. As eloquently explained by Lord Hewart C.J., “It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>18</sup>
8. By sitting on the bench in Case 001, the Trial Chamber Judges’ impartiality for Case 002, through no intentional fault of their own, has been conflicted. For example:

<sup>11</sup> ICCPR, Art. 14 states in pertinent part: “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.”

<sup>12</sup> UDHR, Art. 10 states: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

<sup>13</sup> Cambodian Constitution, as amended in 1999, Art. 31 states in pertinent part: “The 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.”

<sup>14</sup> Agreement, Art. 13 states in pertinent part: “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.”

<sup>15</sup> Establishment Law, Art. 33 new states in pertinent part: “The 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 International Covenant on Civil and Political Rights.”

<sup>16</sup> IENG Thirith Application, paras. 5-11; NUON Chea Application, paras. 2-11 (and paras. 9-11 where the principles are equally applicable to Mr. IENG Sary).

<sup>17</sup> IENG Thirith Application, paras. 5-11; NUON Chea Application, paras. 2-11.

<sup>18</sup> *R v Sussex Justices ex parte McCarthy* [1924], 1 KB 256, 9 November 1923.



- a. How will the Trial Chamber Judges ensure that their reasoning is not clouded or does not appear clouded by a desire to render a Judgement in Case 002 consistent with their determinations in Case 001, especially considering that the Judgement in Case 002 will affect the credibility of the Judgement in Case 001?
  - b. How will the Trial Chamber Judges ensure that they make and appear to make a Judgement based only upon the evidence presented before them in Case 002 when they have already decided many of the same issues in Case 001?
  - c. What will the Trial Chamber Judges do if certain evidence is not put before them in Case 002, but was put before them in Case 001, and the Judges wish to rely upon this evidence?
9. In Case 002, the Trial Chamber Judges appear to have already pre-judged that the Democratic Kampuchea period weakened the Cambodian judiciary.<sup>19</sup> Such a finding is in line with the Judgement in Case 001 which found “that during the DK regime, there was no functioning judicial system to provide procedural safeguards for detainees.”<sup>20</sup> One conclusion which a reasonable observer may draw from this is that given the choice between supporting their determinations in Case 001 and looking at the live issues afresh, the Trial Chamber Judges will support their determinations in Case 001. Whether by intention or otherwise, such findings can lead to a reasonable observer, properly informed, to reasonably apprehend bias in Case 002.
10. If the Trial Chamber Judges remain the same in Case 002 as those who were in Case 001, there is a *de facto* reversal of the burden of proof. The Defence would now be required to convince the Trial Chamber Judges that their previous findings and holdings were incorrect and they must confess error and reverse themselves. Any shift in the burden of proof from the OCP to the Defence will violate Mr. IENG Sary’s presumption of innocence.<sup>21</sup>

<sup>19</sup> Judge Nil Nonn Disqualification Decision, para. 9.

<sup>20</sup> *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, ERN: 00572517-00572797, para. 94.

<sup>21</sup> Article 38 of the Cambodian Constitution states: “The accused shall be considered innocent until the court has judged finally on the case.” Article 35 new of the Establishment Law states: “The accused shall be presumed innocent as long as the court has not given its definitive judgment.” Rule 21(1)(d) states in pertinent part: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been



11. The inherently problematic nature of the same Trial Chamber adjudicating on the same alleged Joint Criminal Enterprise in two separate cases was highlighted to the Trial Chamber in Case 001 by the Defence, where the Defence noted:

The extremely limited number of persons tried by the ECCC, the fact that there is only one Pre-Trial Chamber and the interrelationship between the Charged Persons means that any decision taken against one Charged Person would have a clear and unambiguous impact on the others. This impact is accentuated before the Trial Chamber where the same judges presently conducting the *Duch* trial and addressing this issue will later on judge Mr. IENG Sary. It is inconceivable that the Trial Chamber would issue one decision in the *Duch* case on the applicability of JCE at the ECCC and then immediately thereafter reverse itself in the very next case, which, according to the OCP, is part and parcel of the *Duch* case. Therefore, a decision in *Duch* concerning the applicability of JCE before the ECCC, for all intents and purposes, is formally and directly binding on Mr. IENG Sary.<sup>22</sup>

12. Although the Defence's Request in *Duch* related to the legal question of whether Joint Criminal Enterprise is an applicable form of liability at the ECCC, the principles it espouses are equally applicable to the factual questions raised in the Applications. The sole difference is that the appearance of potential partiality that was apparent to the Defence in June 2009 has now crystallized into a circumstance that would lead a reasonable observer, properly informed, to reasonably apprehend bias in Case 002.
13. It is beyond cavil that Judges enjoy a presumption of impartiality and therefore the reasonable apprehension of bias must be firmly established. Whether or not the Trial Chamber Judges actually put into practice their interest in making findings in Case 002 consistent with their findings in Case 001 is inconsequential. The overriding appearance that they have an overwhelming interest to do so would lead a reasonable person to objectively apprehend bias on the part of Trial Chamber Judges.

**B. Joinder of the IENG Thirith Application for the JAC to Convene a Special Chamber to Consider and Decide the Applications**

14. Rule 34(6) provides that for the purposes of a disqualification application, the Judges subject to the application are mandated to recuse themselves. The Trial Chamber Judges

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established." Article 14(2) of the ICCPR states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;" Article 11(1) of the UDHR states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

<sup>22</sup> See *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, IENG Sary's Expedited Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise in the Case of Kaing Guek Eav "Duch", 17 June 2009, D99/3/6, ERN: 00223990-00223997, para. 7.



*must* recuse themselves for the purposes of the Applications. This was the practice of the international Pre-Trial Chamber Judges when the Defence sought appropriate measures against them following comments made by Prime Minister Hun Sen.<sup>23</sup> The Trial Chamber Judges must follow the example of the international Pre-Trial Chamber Judges and recuse themselves from deciding the Applications.

### C. Request a Stay of the Proceedings

15. Rule 34 does not require a Judge who is the subject of a disqualification application to recuse himself of all matters while the application is pending. “However, he or she may decide to step down voluntarily at any point in the following proceedings.”<sup>24</sup> Until this Application has been decided, the Trial Chamber Judges must not participate in any pending matters or conduct any activities in preparation for Case 002, so that these matters will not be tainted, should the Trial Chamber Judges later be disqualified. As the Applications are for the disqualification of all the Trial Chamber Judges and not just one, it will be judicially prudent for the Trial Chamber to Stay the proceedings until the Applications have been resolved.<sup>25</sup>

### III. REQUEST FOR A PUBLIC HEARING

16. A public oral hearing is necessary to decide the Applications. This Application involves Mr. IENG Sary’s fundamental fair trial right to be tried by an independent and impartial tribunal. There are no justifiable reasons why the Applications should not be discussed and debated transparently and in full view of the public. The people of Cambodia, having an inherent interest in the objective impartiality of the ECCC’s judges, are entitled to scrutinize these proceedings.<sup>26</sup> Lack of transparency and accountability at the UN has

<sup>23</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/(PTC 03), 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 the Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, 1 November 2009, 3, ERN: 00398615-00398622, para. 2.

<sup>24</sup> Rule 34(5).

<sup>25</sup> *See Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prlić Defence Motion to Stay the Proceedings, 20 September 2010.

<sup>26</sup> As the Pre-Trial Chamber has previously recognized, “one of the primary bases for holding a public hearing is to allow public scrutiny of the fairness of the proceedings.” *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on KHIEU Samphan’s Request for a Public Hearing, 4 November 2008, A190/11/8, ERN: 00236251-00236254. As noted by the Open Society Justice Initiative, “Absent demonstration of a compelling need for confidentiality in a concrete matter, rules favoring transparency should govern, in order to allow the public to observe the work of the court.” *Political Interference in the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE, June 2010, p. 27 (“OSJI Report”).



