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

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Mr. IENG Sary, through his Co-Lawyers, ("the IENG Sary Defence") hereby replies to the Co-Prosecutors' ("OCP") Joint Response to IENG Thirith,[1] IENG Sary[2] and NUON Chea's[3] Applications for Disqualification of the Judges ("Response").[4] This Reply is made necessary to correct the flawed analysis of the OCP. The OCP errs when it: **a.** asserts judicial impartiality pertains to process and not outcome;[5] **b.** applies the incorrect test for judicial bias;[6] **c.** asserts the IENG Sary Defence argued "that the Trial Chamber is unlikely to decide the case differently;"[7] **d.** asserts the Accused "do not argue that the Duch judgement demonstrates that Judges have taken into consideration extraneous or improper factors;"[8] **e.** analogizes the cases of *Galić,*[9] *Lindon*[10] and *Karadžić*[11] with the present situation; **f.** asserts that in order to establish individual criminal responsibility, whether by ordering, command responsibility, or joint criminal enterprise ("JCE"), it will only be necessary for the Trial Chamber to examine, *inter alia*, the *mens rea* of the Accused following the findings in Case 001;[12] **g.** asserts that because findings relating to the Accused in Case 001 were ancillary to the key finding of Duch's culpability, they were not subject to the criminal standard of proof beyond reasonable doubt;[13] and **h.** asserts that "no appearance of bias is established and the Judges must be allowed the opportunity to undertake a 'fresh consideration' of the matters in issue."[14]

I. REPLY

[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's Motion to Support IENG Thirith and NUON Chea's Applications for Disqualification of the Trial Chamber Judges & IENG Sary's Motion to Join IENG Thirith's Application for the Trial Chamber to be Replaced - for the purposes of Adjudicating the Applications - by Reserve Judges of the Trial Chamber or Additional Judges to be chosen by the Judicial Administration Committee, 17 February 2011, E53, ERN: 00643507-00643514 ("IENG Sary Motion").
[3] *Case of NUON Chea,* 002/19-09-2007-ECCC/TC, Urgent Application for Disqualification of the Trial Chamber Judges, 24 February 2011, E54, ERN: 00641862-00641877 ("NUON Chea Application").
[4] *Case of NUON Chea,* 002/19-09-2007-ECCC/TC, Co-Prosecutors' Joint Response to IENG Thirith, IENG Sary and NUON Chea's Applications for Disqualification of the Judges, 23 February 2011, E55, ERN: 00647348-00647355.
[5] *Id.*, para. 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*, para. 4.
[9] *Id.*
[10] *Id.*, para. 5.
[11] *Id.*, para. 6.
[12] *Id.*
[13] *Id.*, para. 10.
[14] *Id.*, para. 12.

1. In paragraph 2 of the Response, the OCP asserts that the Applicants argue that "the Judges should be disqualified in accordance with Article 34 of the Law establishing the Extraordinary Chambers." The Applications and the Motion all refer to Rule 34 of the Internal Rules ("Rules"), as opposed to Article 34 of the Establishment Law. For the purposes of this Reply, the IENG Sary Defence will treat this as an error and understands the OCP to mean Rule 34. The OCP asserts that the threshold for establishing the appearance of bias has not been met. For the reasons set out *infra*, this is incorrect.

2. In paragraph 3, the OCP asserts that "judicial impartiality pertains to process and not outcome." This assertion is unsupported. A judge who is biased as to the outcome of a case must be disqualified. The OCP only provides the actual bias test when it asserts that "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." The IENG Sary Defence has not relied upon this test, but rather the appearance of bias test, as stated in Rule 34(2) and elaborated upon in ECCC jurisprudence.[15] The findings of fact in Case 001 would be objectively perceived as a predisposition against the Accused. Many of the facts dealt with by the Trial Chamber in Case 001 will be the same facts challenged in Case 002 related to him. The IENG Sary Defence will challenge all the facts presented by the OCP in Case 002. Contrary to the OCP submission, the IENG Sary Defence did not argue "that the Trial Chamber is unlikely to decide the case differently." Rather, IENG Sary Defence argued that objectively the Trial Chamber is unlikely to decide certain factual questions differently.[16] After having rendered judgement on a host of issues and law in Case 001 which are inextricably interlinked with Case 002, 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.

3. In paragraph 4, the OCP asserts that "the Defence teams do not argue that the Duch judgement demonstrates that Judges have taken into consideration extraneous or improper factors. They argue that the judgement demonstrates that the Judges have already

[15] IENG Sary Motion, paras. 1-4.
[16] *Id.*, paras. 7-13.

judicially determined certain aspects of the cases against the [Accused]." There is a logical flow that one must follow the other. If the Judges have already judicially determined certain aspects of the cases against the Accused, prior to the trial of the Accused taking place, the Judges have taken into account, or there is the appearance they have taken into account, extraneous or improper factors. Throughout the Response, the OCP refers to "international criminal law."[17] As a Cambodian court, the ECCC must only apply Cambodian law. The OCP cites the *Galić* case as a case where judges are assumed to be able to set aside prior factors and determine each case on its own merits.[18] The *Galić* case must be differentiated with the present situation. In the *Galić* case, Galić submitted that the impartiality of Judge Orie, the Presiding Judge in his trial, was compromised by Judge Orie's confirmation of an indictment against Ratko Mladić.[19] Galić submitted that the factual allegations of the *Mladić* case overlapped with the factual allegations of his case and he was named in the *Mladić* indictment as a participant in a JCE to commit genocide.[20] The Appeals Chamber in *Galić* found that there was a fundamental difference between the functions of a Judge who confirms an indictment and a Judge who sits at trial: "Because these tasks involve different assessments of the evidence and different standards of review, the confirmation of an indictment does not involve an improper pre-judgement of an accused's guilt."[21] The Appeals Chamber in *Galić* found that "a hypothetical fair-minded observer, properly informed, would recognise that Judge Orie's confirmation of the Mladić Indictment neither represented a pre-judgement of Galić's guilt nor prevented him from assessing the evidence presented at Galić's trial with an open mind."[22] In the present situation, the Trial Chamber Judges did not confirm the Case 001 indictment, but rather sat on the bench and rendered judgement in the trial of Case 001. In the trial in Case 001, the Trial Chamber Judges assessed the evidence which will be in issue during Case 002 using the same standard of review as is necessary during trial in Case 002. In the present situation, a hypothetical fair-minded observer, properly informed, would recognize that the Trial Chamber Judges' judgement rendered in Case 001 represents a pre-judgement of the Accused's guilt and

[17] Response, paras. 4, 5, 11.
[18] *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeals Judgement").
[19] *Id.*, para. 27.
[20] *Id.*, paras. 27, 35.
[21] *Id.*, para. 42.
[22] *Id.*, para. 44.

will prevent them from assessing the evidence presented during Case 002 with an open mind.

4. In paragraph 5, the OCP raises the European Court of Human Rights ("ECtHR") case of *Lindon* where two cases of criminal defamation arose around the same passage of text.[23] It was found that two Judges who sat in the first case did not demonstrate a lack of impartiality in the second. The OCP compares this with the present situation. This comparison is inapt. First, the OCP omitted the finding in *Lindon* where the court noted that even though the two cases "were connected, the facts in the two cases differed and the 'accused' was not the same."[24] Case 001 and Case 002 will rely on the same facts. Second, it is improper to compare a criminal defamation case with a case where the Judges will be adjudicating facts they have ruled on previously in order to establish whether, for example, a JCE existed. In French law, under which *Lindon* came to the ECtHR, there is a low threshold to prove that a statement is defamatory. All that must be shown is that the statement affects the honor or reputation of the claimant or third party.[25] Following which, the burden of proof falls on the defendant to prove to the Judges that the defamatory statement was true or made in good faith.[26] In order to prove good faith, the defendant is required to prove that he or she conducted a serious investigation before making the statement, the statement concerns a matter of public importance, the tone of the statement was measured and objective, and without a trace of personal hostility.[27] So an actual finding that a statement is defamatory in one case would not necessarily have <u>any</u> bearing on a future case based on the same defamatory statement if the court is presented with different defences. The situation in Case 002 is completely different. A finding, for example, that there was an international armed conflict, or that torture occurred at S-21, has a direct impact on Case 002, especially if JCE or common plan liability is applied as a form of liability as set out in the Closing Order.[28] This gives rise to an appearance of bias on the part of the Trial Chamber Judges. The OCP relies on the

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[23] *Lindon Octhakovsky-Laurens v. France*, ECHR, 21279/02 & 26448/02, 22 October 2007.
[24] *Id.*, para. 78.
[25] Taylor Wessing, Defamation and privacy law and procedure in England, Germany and France, Spring 2006, p. 10.
[26] *Id.*
[27] *Id.*, p.10-11.
[28] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 ("Closing Order"), paras. 1524-41.

case of *Brđanin and Talić*[29] as an example where there was a prior finding of the existence of an international armed conflict. The OCP fails to note that the finding of the existence of an international armed conflict in the case of *Brđanin and Talić* was in relation to two different geographical areas.[30] The OCP provides, in footnote 28 of the Response, a quote supporting that the issue of international armed conflict was not unchallenged by the defence in Case 001. This footnote is incorrect as the quote and the transcript reference do not match. Furthermore, the use of the phrase "the accused *does not fully accept* the fact of an armed conflict..." is not unequivocal. The OCP's assertion does not confirm whether the defence in Case 001 did not accept an armed conflict at all, or for example, did not accept when an armed conflict began or did not believe any hostilities met the threshold of an armed conflict. The IENG Sary Defence challenges all aspects of an armed conflict in Case 002.

5. In paragraph 6, the OCP asserts that "for a prior judgment or decision to be capable of creating an appearance of bias... it is necessary that it '*...directly or by inference constitute[s] findings on the individual criminal responsibility...*' of the Accused." The source cited, a *Karadžić* Pre-Trial Chamber Decision, does not state this.[31] The *Karadžić* Pre-Trial Chamber Decision states that prior decisions made by the Human Rights Chamber "do not directly or by inference constitute findings on the individual criminal responsibility of Karadžić himself..., which would require further specific evidence not adduced or investigated by the HRC."[32] The *Karadžić* Pre-Trial Chamber Decision does not state that it is necessary for a previous judgment or decision to directly or by inference constitute findings on the individual criminal responsibility in order to create an appearance of bias. Bearing in mind that S-21 is a crime site,[33] that JCE is included in the Closing Order as a form of liability,[34] and that the OCP – at a minimum – has alleged Duch[35] and the Accused to be part of the JCE,[36] it follows that factual findings in Case

[29] *Prosecutor v. Brđanin and Talić*, IT-99-36-T, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000.
[30] *Id.*, para. 16.
[31] *Prosecutor v. Karadzić*, IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President pursuant to Rule 15(B)(ii), 22 July 2009.
[32] *Id.*, para. 22.
[33] Closing Order, paras. 415-74.
[34] *Id.*, paras. 1524-41.
[35] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Public Information by the Co-Prosecutors' Pursuant to Rule 54 Concerning their Rule 66 Final Submission Regarding Kaing Guek Eav alias "Duch", 18 July 2008, para. 244.

001 may by inference be construed as findings on the individual criminal responsibility of the Accused in Case 002.

6. Paragraphs 7 and 8 of the Response refer solely to the NUON Chea Application. As such, they are not dealt with herein.

7. In paragraph 9, the OCP implies that "the '*chapeau* requirements' of various crimes" may be "accepted as established" in Case 002. They are not. All facts are being contested. The OCP implies that in Case 001, the organizational or functional guilt of the Accused in Case 002 was established, but that this is insufficient to establish the individual criminal responsibility of the Accused. The OCP asserts that "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...." Individual criminal responsibility encompasses more than *mens rea*. The Trial Chamber's factual findings regarding the structure of government in Democratic Kampuchea[37] and S-21[38] in particular are prejudicial to the Accused's alleged liability pursuant to the JCE as set out in the Closing Order.[39]

8. In paragraph 10, the OCP asserts that findings relating to the Accused in Case 001 were ancillary to the key finding of Duch's culpability and "[a]s such, these statements were not subject to the criminal standard of proof of 'beyond reasonable doubt'... and are therefore not capable of establishing an appearance of bias." First, this assertion is unsupported. The OCP does not know that findings relating to the Accused in Case 001 were ancillary. Logically, as the Trial Chamber must be convinced beyond reasonable doubt, the Trial Chamber will not render findings of facts in a judgement if it is not convinced of them beyond reasonable doubt. There is no requirement that the standards of proof be the same before an appearance of bias can be created. Second, by asserting "all references to the role of the Accused in the *Duch* case are merely ancillary...," the OCP appears to accept that the Trial Chamber Judges have made findings in relation to the Accused. The OCP appears to acknowledge that the Judges of the Trial Chamber will

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[36] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, E390, ERN: 00591062-00591992, paras. 1538-46, 1572-75, 1597-1600, 1623-26.
[37] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, ERN: 00572517-00572797 ("Duch Judgement"), paras. 82-110.
[38] *Id.*, paras. 111-278.
[39] Closing Order, paras. 1524-41.

not look at Case 002 afresh. The Judges have already, to some degree, established findings on the Accused. There is an appearance of bias. It appears that the Judges will rely on their findings in *Duch* and will thus take into account extraneous and improper factors in deciding Case 002.[40] The OCP cites *Galić* to support the argument that where 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. As stated *supra*, the Presiding Judge in Galić's trial also confirmed the indictment against Ratko Mladić, which *Galić* submitted created an appearance of bias. The Appeals Chamber in *Galić* found that because the tasks of a Judge who confirms an indictment and a Judge who sits at trial "involve different assessments of the evidence and different standards of review, the confirmation of an indictment does not involve an improper pre-judgement of an accused's guilt."[41] The standard of proof concerning confirmation of an indictment is whether a *prima facie* case exists.[42] This is a lower standard of proof than a conviction beyond reasonable doubt. The situation in *Galić* is not analogous with the present situation. The Trial Chamber Judges face no difference in the standard of proof between Case 001 and Case 002; all findings of facts essential to the prosecutor's case require that the Judges be convinced beyond reasonable doubt.[43] If any *obiter* findings were erroneously made in Case 001 based on a lower standard of proof, the Trial Chamber must provide this information to the parties in Case 002.

9. In paragraph 11, the OCP cites two cases from the ECtHR in which it was held there was an appearance of bias.[44] It differentiates the ECtHR cases from the present situation in that the prior decisions explicitly found that the applicant had assisted in a crime and the judge had to determine the guilt of the applicant to a "very high degree of clarity," which the OCP asserts is not the case in present situation. The ECtHR case of *Ferrantelli* found that "mention was made of the 'co-perpetrators' of the double crime and of 'the precise statement by G.V. that G.G. together with Santangelo has been responsible for physically

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[40] *See e.g.* Duch Judgement, paras. 82-278.
[41] *Id.*, para. 42.
[42] *Id.*, para. 36.
[43] "It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings." *Prosecutor v. Delalić*, IT-96-21-T, Judgement, 16 November 1998, para. 599 (emphasis added).
[44] *Ferrantelli and Santangelo v. Italy*, ECHR, App. Nos. 48/1995 & 554/640, Judgement, 7 August 1996 ("*Ferrantelli*"); *Hauschildt v. Denmark*, ECHR, ECHR No. 10486/83, Judgement, 24 May 1989.

carrying out the murders.'"[45] The present situation is analogous. The modes of liability in Case 002 may include JCE as a form of common plan liability,[46] which could determine the guilt of the Accused in Case 002 to a very high degree of clarity. The Dissenting Judge in *Poppe*, Judge Gyulumyan, also found that an appearance of bias is dependent on the factual degree of culpability found against the applicant:

> I believe that referring to the applicant's carrying out the actual work in a criminal organisation is a specific description, even a qualification, of the involvement of the applicant and of the acts committed by him.[47]

To have JCE as a form of common plan liability in both Case 001 and Case 002,[48] and the Trial Chamber defining the Communist Party of Kampuchea structure,[49] and the roles, descriptions and positions of the Accused in Case 001,[50] results in an appearance of bias.

10. In paragraph 12, the OCP asserts that "no appearance of bias is established and the Judges must be allowed the opportunity to undertake a 'fresh consideration' of the matters in issue." As submitted *supra* and in the IENG Sary Motion, as a result of having rendered a Judgement in Case 001 on many of the same issues that will be re-litigated in Case 002, the Trial Chamber Judges appear to be unable to consider the matters in issue afresh, giving rise to an appearance of bias.

Respectfully submitted,

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Signed in Phnom Penh, Kingdom of Cambodia on this 1st day of **March, 2011**

[45] *Ferrantelli*, para. 59.
[46] Closing Order, paras. 1524-41.
[47] *Poppe v. the Netherlands*, ECHR No 32271/04, Judgement, 24 March 2009, Dissenting Opinion of Judge Gyulumyan.
[48] Closing Order, paras. 1524-41.
[49] Duch Judgement, paras. 82-110.
[50] Duch Judgement, paras. 69, 76; NUON Chea Application, paras. 10-11.