BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 4 November 2011, the Nuon Chea Defence filed a letter to Judge Nil Nonn regarding a *Request for information related to ex-parte meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug.*[1]

2. On 15 November 2011, the Nuon Chea Defence filed a *Request for information regarding ex-parte meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration.*[2]

3. On 18 November 2011, the Ieng Sary Defence circulated by email a courtesy copy of a motion titled *Ieng Sary's Request for Investigation Concerning* Ex Parte *Communications Between the International Co-Prosecutor, Judge Cartwright and Others.*[3] Also on 18 November 2011, the Ieng Sary Defence circulated by email a revised courtesy copy of an "amended version" of the motion, stating that the "amended version contains one adjustment to footnote one."[4] On information and belief, the Trial Chamber ("Chamber") rejected that motion because it was not accompanied by a Khmer translation.[5]

4. On 22 November 2011, the Nuon Chea Defence filed an *Urgent Application for Disqualification of Judge Cartwright* (the "Application").[6] That filing attached and referenced the *first* circulated courtesy copy of the Ieng Sary Defence request for an investigation.[7] The Application requested Judge Cartwright's disqualification, or, in the

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1 **E137** *Request for information related to ex-parte meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug*, 4 November 2011.

2 **E137/1** *Request for information regarding ex-parte meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration*, 15 November 2011. Notified 15 November 2011.

3 Email from Tanya Rene Pettay, *Courtesy copy of IENG Sary's Request for Investigation Concerning Ex Parte Communications Between the International Co-Prosecutor, Judge Cartwright and Others*, 18 November 2011.

4 Email from Michael Karnavas, *Revised Courtesy copy of IENG Sary's Request for Investigation Concerning Ex Parte Communications Between the International Co-Prosecutor,Judge Cartwright and Others*, 18 November 2011.

5 *Ibid.* ("As translation could not be completed on an expedited basis, the Trial Chamber has rejected the filing of the Request as deficient…").

6 **E137/2** *Urgent Application for Disqualification of Judge Cartwright*, 21 November 2011 ("Application"). Notified 22 November 2011.

7 **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 ("Ieng Sary Attachment"). The Prosecution notes that while the Application itself is only ten pages in length, it purports to "adopt[] by reference" portions of the Ieng Sary Attachment, as well as two of its own previous filings, a combined total of approximately nine additional pages. As a result the Nuon Chea Defense circumvents and renders meaningless Practice Direction 5.1 that places a 15 page limit on all such filings. ECCC/01/2007/Rev.7, Filing of Documents before the ECCC.

alternative, her voluntary recusal.[8] The Application itself did not request an investigation, as it only incorporated select portions of the Ieng Sary attachment, which did not include the Ieng Sary request for relief.[9]

5. 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").[10] While bearing resemblance to the two previously circulated courtesy copies of the same title, the document that was ultimately filed had been substantially revised.[11] The filed document requested the Chamber to conduct an investigation, and suggested to the Chamber how that investigation should be conducted. The submission from Ieng Sary was placed on the Case File and notified to the Co-Prosecutors on 25 November 2011.[12]

6. In this response, the Co-Prosecutors address the submissions in the order they were filed, and submit that the Chamber should: (1) deny the Application because it is inadmissible, or, in the alternative, because the Nuon Chea Defence fails to carry its burden; and, (2) deny the Request because the Ieng Sary Defence fails to carry its burden.

II. THE APPLICATION FOR DISQUALIFICATION SHOULD BE DENIED

7. This is the second "Urgent Application" filed by the Nuon Chea Defence calling for the disqualification of Judge Cartwright. The first application, which also requested the

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8 **E137/2** Application, *supra* note 6, para. 1.

9 **E137/2** Application, *supra* note 6 at para. 2. The Application incorporates only paragraphs 3 to 16 of the Ieng Sary Attachment.

10 **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.

11 The Ieng Sary Defence did not provide any notification of these revisions, which included revisions to paragraphs ostensibly incorporated by the Nuon Chea Defence Application. The successfully filed Request added Patricia O'Brien, Knut Rosandhaug "together with any other person (whether connected with the ECCC or otherwise, including but not limited to diplomats and representatives of overseas governments) who has participated in *ex parte* meetings held between Mr. Cayley and Judge Cartwright" to the individuals whom the Ieng Sary Defence suggested should be summoned before the Chamber. **E137/3**, Request, *supra* note 10 at p. 1. Other additions to and deletions from the previously circulated amended version of the Request are spread across the filing, including, *e.g.*, the deletion from paragraph 14 of the acknowledgement that the 1985 United Nations Basic Principles on the Independence of the Judiciary "does not contain a provision which expressly prohibits *ex parte* communication". Indeed, in the six days between the Ieng Sary Defence's initial and second attempt at filing, they seem to have lost some of the passion for their argument. For instance, they removed the underlined words in the following sentence from paragraph 29: "Judge Cartwright's conduct strongly suggests that she is uninhibitedly engaging in matters that are not just beyond her mandate to serve as a judge in the Trial Chamber of the ECCC, but directly impact on the fair and just administration of Case 002". They also deleted the following sentences from paragraphs 30 and 31 respectively, "An international Judge has no more right to engage in *ex parte* communications than a national Judge", "The circumstances under which these *ex parte* meetings were held, if anything, engender a culture of suspicion at best, and impunity at worst."

12 **E137/3** Request, *supra* note 10.

disqualification of all other Trial Chamber Judges, alleged that "the factual findings in the Duch Judgement … objectively give rise to the appearance of bias against Nuon Chea."[13] That application was denied, with the Chamber stating that the Nuon Chea Defence had "adduced no concrete evidence."[14] This Application should similarly be denied.

A. The Application is Inadmissible

8. As acknowledged by the Defence for Nuon Chea,[15] Rule 34 sets out the requirements for admissibility of an application for disqualification. In particular, sub-rules (3), (4) and (5) set out four threshold requirements for admissibility. The Defence for Nuon Chea, as the filing party, is required to (i) "clearly indicate the grounds"; (ii) "provide supporting evidence"; (iii) file the application diligently (*i.e.* "as soon as the party becomes aware of the grounds in question"); and (iv) file the application concerning a Trial Chamber judge to that Chamber prior to final judgment. These requirements are cumulative.

9. The Co-Prosecutors consider that the Application fails to meet threshold admissibility requirements as it does not disclose *any evidentiary basis* in support of the grounds for disqualification asserted by the Defence for Nuon Chea. "All evidence relied on by the applicant is to be provided upon the filing of an application for disqualification."[16] The sole support for the proposition that alleged "informal, *ultra vires*, and *ex parte* meetings"[17] between Judge Cartwright, Mr. Cayley and/or Mr. Rosendhaug concerned anything more than "merely 'administrative and operational matters'" is a footnoted reference to "information" purportedly received by the Defence from a "reliable source" who "currently wishes to remain anonymous."[18] Merely asserting the existence of an anonymous source, the content and veracity of whose statements cannot be assessed by the Trial Chamber, in no way discharges the minimal burden on the filing party to provide "supporting evidence" of a ground for disqualification.

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13 **E54** *Nuon Chea's Urgent Application for the Disqualification of the Trial Chamber Judges*, 24 November 2011, para. 26 ("Prior Application"). Indeed, there is noticeable overlap between the language and structure of the two applications. Compare, for instance, paragraph 26 of the Prior Application, with paragraph 15 of the Application, both averring: "The crux of this application is simple…".

14 **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 ("Decision on Prior Application").

15 **E137/2** Application, *supra* note 6 at para. 13.

16 *Public (Redacted) Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde*, 23 March 2010 at para. 18.

17 **E137/2** Application, *supra* note 6 at para. 15.

18 **E137/2** Application, *ibid.* at note 56.

10. The Co-Prosecutors observe that the Defence appears neither to have disclosed the identity of its purported anonymous source to the Chamber, even on a strictly confidential basis, nor to have provided the Chamber with a written statement from that source, even in redacted form.[19] While the Application attempts to conjure an air of reality through references to factual[20] and legal[21] assertions by the Defence for Ieng Sary, their own submissions[22] and various statements in the media,[23] this cannot amount to the "supporting evidence" required by Rule 34. Nor can the Nuon Chea Defence's complaint that Judge Cartwright did not respond to Nuon Chea's previous filings on this matter satisfy that standard.[24] If that were sufficient, any judge who does not respond to any frivolous filing could be subject to disqualification.

11. The admissibility requirements in Rule 34 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",[25] 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.[26] The Co-Prosecutors submit that the Chamber should properly apply similar standards in disposing of the Application.

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19 See *Public (Redacted) Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde*, 23 March 2010, paras. 17-19 (finding insufficient evidence supporting an application for disqualification where the only information submitted was a sworn statement under the individual's own name).

20 **E137/2** Application, *supra* note 6 at para. 2.

21 **E137/2** Application, *ibid.* at para. 9.

22 **E137/2** Application, *ibid.* at notes 6 and 49.

23 **E137/2** Application, *ibid.* at para. 16 and notes 40 and 60.

24 **E137/2** Application, *ibid,* at para. 17.

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

26 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*

12. For these reasons, the Co-Prosecutors submit that the Chamber should reject the Application as inadmissible under Rule 34(3).

B. Even if the Application is Admissible, the Nuon Chea Defence Fails to Carry its Burden of Proof

i. The Objective Observer Test

13. The Nuon Chea Defence disavows any claim of actual bias[27], but argues that Judge Cartwright should be disqualified due to an "appearance of bias"[28]. To disqualify a judge based on an appearance of bias, the Nuon Chea Defence must demonstrate that "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias" [29] (the "objective observer test").

14. The objective observer test is far from the *de minimis* standard submitted to the Chamber by the Nuon Chea Defence. A "mere feeling or suspicion of bias by the accused is insufficient."[30] The Nuon Chea Defence must show, in the form of "firmly established"[31] evidence, that the impugned judge, applying all of her expertise, would be unable to put a predisposition on an issue relevant to the case to the side and judge the case before her fairly. This test sets a high bar because "while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, so to[o] would disqualifying Judges on the basis of unfounded allegations of bias."[32]

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.

27 **E137/2** Application, *supra* note 6 at para. 15. "It must be stressed at the outset that the Defence is not claiming the existence of any *subjective* (that is to say, actual) bias on the part of Judge Cartwright.".

28 *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 189 ("*Furundžija*").

29 **E55/4**, *Decision on Prior Application*, *supra* note 14 at para. 11; see also **E137/2** Application, *supra* note 6 at para. 15. The test has also been explained as a response to the question, would "a reasonable, objective and informed person … on the correct facts reasonably apprehend that [Judge Cartwright] has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel". *Furundžija*, *supra* note 28 at para. 186, quoting *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Judgement on Recusal Application, 1999 (7) BCLR 725 (CC), 3 June 1999.

30 *Prosecutor v Edouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings*, 20 February 2009, para. 5 ("*Nzirorera's Motion*").

31 *Furundžija, supra* note 28 at para. 197.

32 *Nzirorera's Motion*, *supra* note 30, at para. 6.

15. The "reasonable observer" is "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 appraised also of the fact that impartiality is one of the duties that Judges swear to uphold."[33] This Chamber has explained that "the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment."[34] The Nuon Chea Defence must thus not only adduce sufficient evidence to carry the burden normally applicable to a moving party, but must also produce sufficient evidence to "displace[e] that presumption, which imposes a high threshold."[35]

16. The presumption of impartiality that must be applied by the objective observer, in addition to establishing an extra hurdle for any party claiming disqualification to surmount, also requires the objective observer to presume that even in situations where a party can demonstrate some predisposition by the judge on an issue relevant to the case, "that the Judges of the International Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions.'"[36] Judge Cartwright is a "highly qualified and experienced jurist[]," thus the reasonable observer apprised of all the relevant circumstances would not "lightly assume" that she has engaged in improper conduct in violation of her judicial ethics and in contravention of her professional obligations.[37]

17. Furthermore, and in particular, the reasonable observer is familiar with the structure and operations of international tribunals, and the requirements that those unique circumstances place on judges. Thus, for example, where "[t]he nature of the jurisdiction exercised by specialized international criminal tribunals is such that multiple trials are likely to arise out of a common set of facts … the reasonable observer would expect that a judge at such a tribunal might be called upon to make findings in one case that bear upon the background and context of a different case, and would not, for that reason, doubt the

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33 **E55/4**, *Decision on Prior Application, supra* note 14 at para. 12, quoting *Furundžija*, *supra* note 26 at para. 190.

34 **E55/4**, *Decision on Prior Application*, *supra* note 14 at para. 12.

35 **E55/4**, *Decision on Prior Application*, *supra* note 14 at para. 12.

36 *Furundžija*, *supra* note 28 at para. 197. The principle of due regard for a Judge's ability to put aside personal considerations in judging a particular case is well-established. For example, the ICTY Appeals Chamber held that even in a case where it could be "established" that a judge sitting on a case "expressly shared the goals and objectives" of an organization that advocated against certain crimes allegedly committed by the accused in the case, the Judge would be able to put aside that inclination in the particular case before her and impartially decide it. *Ibid.* at para. 200.

37 **E55/4** *Decision on Prior Application*, *supra* note 14 at para. 17.

impartiality of the court."[38] Similarly, as further explained below, the reasonable observer would be aware that in international tribunals judges and judges in civil law courts also have administrative functions that bring them in contact with members of the prosecution, and would not, for that reason, doubt the impartiality of the judge.

18. The Appeals Chamber of the ICTY has warned of the perils of countenancing too readily undeserving applications for disqualification:

> *Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.*[39]

ii. The Appropriate Nature of the Communications

19. As discussed above in relation to the admissibility of the Application, the Nuon Chea Defence has failed to provide any evidence that anything more than administrative matters were discussed at any meetings. 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.

20. The ICP has significant non-judicial, administrative responsibilities that extend, *inter alia*, to management, mentoring, budget, staffing, high-level contact with senior UN officials, diplomats, dignitaries and donor 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 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.[40]

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38 **E55/4** *Decision on Prior Application*, *supra* note 14 at para. 20.

39 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, *Judgment*, 20 February 2001, para 707 (citations omitted).

40 ECCC Law, Art. 19; Agreement, Art. 6(3).

21. The best practice of other international and internationalised courts and tribunals demonstrates the need for mechanisms to support effective administrative, 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]

22. 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.

23. 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.[49] 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

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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 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, para. 14.

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"[50], as the Defence claims, for doing so.

24. Not only the International Tribunal system, but also the civil law system requires certain communications between a judge and prosecutor. The Co-Prosecutors have a "special status as judicial officers, by virtue of Cambodian Law".[51] As such, they are entitled to attend and vote on Rules concerning administration.[52] This is a reflection of the civil law tradition, where prosecutors are members of the judiciary. The French legal system, for instance, positively *mandates* prosecutors to communicate regularly with judges on matters concerning the good administration of justice, as diverse and wide-ranging as the effectiveness of penal sanctions;[53] the criminal responsibility of minors;[54] and judicial working hours.[55] Such communications would not, as a matter of course, include representatives of the Defence. This is also entirely consistent with the Principle 20 of the international *Guidelines on the Role of Prosecutors:*

> *In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.* [56]

iii. Conclusion

25. The Nuon Chea Defence has not brought sufficient evidence to carry their burden to show that an objective, reasonable, informed person would reasonably apprehend bias by Judge Cartwright in this situation. As explained above in relation to the admissibility of the Application, the Nuon Chea Defence has produced no evidence to indicate bias, let alone

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50 **E137/2**, Application, *supra* note 6 at para. 10.
51 Rule 18(3)(a).
52 Rule 18(3)(a).
53 «Circulaire relative à l'effectivité de la réponse pénale CRIM 2002-08 E3/10-04-2002 NOR : JUSD0230067C Exécution des peines- Politique pénale » Bulletin Officiel du Ministère de la Justice n° 86 (1er avril-30 juin 2002), Circulaires de la direction des affaires criminelles et des grâces, Signalisation des circulaires du 1er avril au 30 juin 2002.
54 «Politique pénale en matière de délinquance des mineurs, CRIM 2002-17 E1/13-12-2002 NOR : JUSD0230200C, Délinquance- Mineur- Politique pénale » Bulletin Officiel du Ministère de la Justice n° 88 (1er octobre - 31 décembre 2002), Circulaires de la direction des affaires criminelles et des grâces Signalisation des circulaires du 1er octobre au 31 décembre 2002.
55 «Circulaire ARTT pour les magistrats des juridictions, de l'ENM et de l'ENG, SJ 2001-11 DSJ/12-12- 2001 NOR : JUSB0110566C, ARTT - Temps de travail » Bulletin Officiel du Ministère de la Justice n° 85 (1er janvier - 31 mars 2002), Circulaires de la direction des services judiciaires, Signalisation des circulaires du 1er janvier au 31 mars 2002.
56 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

to satisfy its weighty burden, especially in light of the common and accepted practice of administrative meetings in both international tribunals and civil courts.[57]

III. THE REQUEST FOR AN INVESTIGATION SHOULD BE DENIED

26. The Ieng Sary Defence requests the Chamber to initiate an investigation under Rule 35, relying largely on the same allegations as the Nuon Chea Defence, and suggests how that investigation should be conducted.

27. 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 exists a material basis or reason that is the foundation of their belief."[58] 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."[59]

28. The Ieng Sary Defence has utterly failed to demonstrate a material basis for its allegations. Their failure is twofold. First, they fail to provide a material basis to substantiate the *actus reus*, that is, that the administrative meetings constitute interference with the administration of justice as regards Ieng Sary in Case 002. The Ieng Sary Defence adduces no more evidence than the Nuon Chea Defence, and at most show that these were administrative meetings that are perfectly acceptable in the international and civil law context.[60] In fact, the International Co-Counsel for the Ieng Sary Defence, Mr. Karnavas, submitted to the Chamber that in relation to these meetings, "[w]e're not suggesting that anything inappropriate occurred…"

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57 Further undercutting the reasonableness of the Nuon Chea request for disqualification is the fact that the Defence for Ieng Sary, Nuon Chea's co-accused, relying on the same facts nevertheless felt compelled to explain that their request "is not an application for disqualification." **E137/3** Request, *supra* note 10 at p. 1.

58 **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").

59 *The 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 58 at paras. 31, 32.

60 T. 21 November 2011, page 13, line 9.

29. Second, the Ieng Sary Defence makes *no* argument that any purported interference with the administration of justice was done with the requisite *mens rea*,[61] 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.[62] As a result, the Ieng Sary Defence has not carried its burden to demonstrate a material basis for its Request, and it should be dismissed.

IV. RELIEF REQUESTED

30. For these reasons, the Co-Prosecutors respectfully request the Trial Chamber to dismiss the Nuon Chea Application and the Ieng Sary Request as inadmissible, manifestly unfounded, dilatory and/or not in the interests of justice.

Respectfully submitted,

Date	Name	Place	Signature
1 December 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

[61] They mention the *mens rea* standard only once, in repeating the language of Rule 35. See **E137/3** Request, *supra* note 10, at para. 1.

[62] See, generally, *The Prosecutor v. 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, para. 27; *The Prosecutor v. Milošević*, Case IT-02-54-A-R77.4, *Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings*, 29 August 2005, paras. 40-43.