

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S REQUEST FOR APPROPRIATE MEASURES TO BE TAKEN CONCERNING CERTAIN STATEMENTS BY PRIME MINISTER HUN SEN WHICH CHALLENGE THE INDEPENDENCE OF PRE-TRIAL CHAMBER JUDGES KATINKA LAHUIS AND ROWAN DOWNING

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Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

Co-Prosecutors:

CHEA Leang
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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 34 of the ECCC Internal Rules (“Rules”), this Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge the Independence of Pre-Trial Chamber Judges Katinka LAHUIS and Rowan DOWNING. This Request is submitted pursuant to Rule 34 because it is this Rule which sets out the standard by which bias (lack of independence) on the part of a judge must be determined.¹ Mr. IENG Sary has several motions currently pending before the Pre-Trial Chamber and any decision taken on these motions must be free from any appearance of bias. This Request is necessary because the Prime Minister of the Kingdom of Cambodia, Samdech Akka Moha Sena Padei Techo Hun Sen, has recently called into question, in a very public manner, the independence of these two international Pre-Trial Chamber Judges. These public expressions by the highly respected Prime Minister, who enjoys wide support and admiration by Cambodians throughout the country, gives rise, for all intents and purposes, to an objective appearance of bias (lack of judicial independence) on the part of these Judges. Bias, or even the objective appearance of bias, casts a shadow of unreliability and prejudice over any judicial proceedings, profoundly affecting the fundamental right of any Charged Person or Accused to be tried by an independent and impartial tribunal. It is respectfully submitted that in fairness to Mr. IENG Sary and the other Charged Persons and in the interests of justice, the Pre-Trial Chamber use its inherent discretionary powers in taking all necessary and reasonable measures to clarify and/or verify the alleged conduct of Judges Katinka LAHUIS and Rowan DOWNING. It is not for the Defence to question the statements made by Prime Minister Hun Sen. Justice must be seen to be done. The Defence has an obligation, due to its duty of due diligence, to request that measures be taken and their results be made known publicly so that there is a clear record; findings must be made to ensure that all ongoing proceedings are not stained with the tar brush of *bias* or the *appearance of bias*. A public hearing is requested to transparently dispense with this matter, which, unquestionably, is of paramount significance to Mr. IENG Sary’s right to a fair trial, the integrity of the ECCC and the people of Cambodia.

¹ See *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public Decision on the Co-Lawyers’ 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, C11/29, ERN 00160734-00160742, para. 12, which states that “[t]he test for bias to be applied by the Pre-Trial Chamber is provided in Internal Rule 34.2...”

I. BACKGROUND

1. On 21 June 1997, Cambodia requested the United Nations' assistance in organizing a process for the Khmer Rouge Trials.² "The government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice."³
2. On 29 April 2005 the 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 ("Agreement") entered into force.⁴ This Agreement provided for all decision-making to be carried out by means of a super-majority system (a simple majority plus one).⁵ "The intention was that this would mean that no decision could be taken without the agreement of at least one international judge. This unusual provision was intended to be a compromise between the UN's strong preference for a majority of international judges, and the Cambodian insistence on a majority of national judges."⁶
3. On 8 March 2006 UN Secretary General Kofi Annan submitted a list of international candidates for judicial positions in the ECCC to Cambodian Prime Minister Hun Sen. This list included Katinka LAHUIS of the Kingdom of the Netherlands and Rowan DOWNING of Australia.⁷

² See Chronology of Establishment of ECCC, available on the ECCC website:
<http://www.eccc.gov.kh/english/backgroundECCC.aspx>.

³ Introduction to the ECCC, available on the ECCC website: http://www.eccc.gov.kh/english/about_eccc.aspx.

⁴ See Chronology of Establishment of ECCC, available on the ECCC website at:
<http://www.eccc.gov.kh/english/backgroundECCC.aspx>.

⁵ See Agreement, Art. 4.

⁶ Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodia Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 285, 286-87 (2006).

⁷ See ECCC Highlights, available on the ECCC website:

<http://www.eccc.gov.kh/english/news.list.aspx?attribute=&selector=&page=30>.

4. On 4 May 2006 the Cambodian Supreme Council of the Magistracy selected the international judges and prosecutors who would serve the ECCC from this list, including Katinka LAHUIS and Rowan DOWNING.⁸
5. On 7 May 2006 by Royal Decree NS/RKT/0506/214, King Norodom Sihamoni appointed these national and international judges, including Katinka LAHUIS and Rowan DOWNING, to serve the ECCC,⁹ and on 3 July 2006 Katinka LAHUIS and Rowan DOWNING were sworn in as judges of the ECCC.¹⁰
6. On 1 December 2008 the international Co-Prosecutor filed a Statement of Disagreement concerning the appropriateness of opening new judicial investigations against additional suspects.¹¹ He was in favor of opening additional investigations, because he believed that crimes within the jurisdiction of the ECCC were committed and should be investigated in order to lead to a more comprehensive accounting of the crimes allegedly committed under the Democratic Kampuchea regime.¹² He did not believe that opening new investigations would endanger Cambodia's peace and stability.¹³ The national Co-Prosecutor disagreed, arguing that "these investigations should not proceed on account of (1) Cambodia's past instability and the continued need for national reconciliation, (2) the spirit of the agreement between the United Nations and the Government of Cambodia ('Agreement') and the spirit of the law that established this Court ('ECCC Law'), and (3) the limited duration and budget of this Court."¹⁴
7. On 18 August 2009, the Pre-Trial Chamber issued its Considerations Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71.¹⁵ It noted that "the affirmative vote of at least four judges of the Pre-Trial Chamber is required to reach a decision to block the execution of a decision which is the subject of a

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Statement of the Co-Prosecutors, 5 January 2009, available in the press release section of the ECCC website: http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Case of Kaing Guek Eav alias "Duch"*, 001/18-11-2008-ECCC/PTC, Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009.

disagreement between the Co-Prosecutors. If this super-majority is not reached, the default decision is that the Introductory Submission will be forwarded to the Co-Judges for judicial investigation.”¹⁶ The Pre-Trial Chamber then stated that “[a]fter extensive deliberations, the Pre-Trial Chamber has not reached a super-majority of votes on a decision concerning this Disagreement.”¹⁷ Judges PRAK Kimsan, NEY Thol and HUOT Vuthy appended their joint opinion expressing agreement with the national Co-Prosecutor that the investigation should not go forward.¹⁸ Judges Katinka LAHUIS and Rowan DOWNING appended their joint opinion expressing agreement with the international Co-Prosecutor that the investigation should proceed.¹⁹

8. On 9 September 2009, in response to the decision made by the two international Pre-Trial Chamber Judges, which allowed the investigation to continue (as a super-majority was not reached), Prime Minister Hun Sen stated in an address given in Takeo Province that “***I know that some foreign judges and prosecutors have received orders from their governments to create problems here... There is no doubt that they received advice from their government to do so.***”²⁰

9. Prime Minister Hun Sen went on to state:

Some foreign judges, prosecutors and lawyers, have received orders from their governments to act here, but we, the government, are lacking communication with this court, but we passed the law.... In the past we have three judges, failing a support from one more judge, as they (two of them) cooperated among them and were instructed by foreign governments. No doubt, if one side wants to go to the South, the foreign side also wants to go to the South too. Therefore, they can go or they can not go, depending on if they have gathered enough support to break though the deadlock. They think they can gather enough support, because we have three judges. Cambodian judges and foreign judges are confronting each other. In the Pre-trial Chamber, there are only two foreign judges, but we have three Cambodian judges. How could you gather enough support as you are in dispute. It is their tactic, but we are clearly aware about it. We knew that they want to destroy because Cambodia has peace, they are not quite happy

¹⁶ *Id.*, para. 17.

¹⁷ *Id.*, para. 44.

¹⁸ *Id.*, Opinion of Judges: PRAK Kimsan, NEY Thol and HUOT Vuthy.

¹⁹ *Id.*, Opinion of Judges LAHUIS and DOWNING.

²⁰ Sopheng Cheang, *Cambodia PM Accuses Other Countries of Stirring Unrest*, ASSOCIATED PRESS, 10 September 2009 (emphasis added).

with us. If Cambodia has war, they are happy because then we'll be easy to control.²¹

10. Neither the United Nations nor Judges Katinka LAHUIS and Rowan DOWNING have issued any public statements confirming or denying the Prime Minister's statements.²²

II. APPLICABLE LAW

a. The Right to a Fair Trial by an Independent and Impartial Tribunal

11. According to Article 31 of the Cambodian Constitution, "[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."²³ In accordance with this, Article 13(1) of the Agreement states that "[t]he 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. Such rights shall, in particular, include the right: to a fair and public hearing..."²⁴ Article 33 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the

²¹ Taken from an unofficial translation of the speech delivered by Prime Minister Hun Sen on 9 September 2009.

²² The ECCC spokesperson, Lars Olsen, stated that Prime Minister Hun Sen's comments were being verified before a comment could be issued. Sopheng Cheang, *Cambodia PM Accuses Other Countries of Stirring Unrest*, ASSOCIATED PRESS, 10 September 2009. The UNAKRT coordinator, Knut Rosandhaug, stated that the court would not be influenced by the executive branch. Cheang Sopha & R Corey-Boulet, *ECCC Ruling Risks Unrest*, PHNOM PENH POST, 8 September 2009. A careful reading of each of these statements reveals that neither the United Nations nor the judges in question responded specifically and concretely to Prime Minister Hun Sen's assertions.

²³ 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

²⁴ Emphasis added. Article 14(1) of the International Convention on Civil and Political Rights provides in relevant 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." The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognized in other major human rights treaties. The 1948 Universal Declaration of Human Rights provides in Art. 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him." Art. 6(1) of the 1950 European Convention on Human Rights provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 8(1) of the 1969 American Convention on Human Rights provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." Art. 7(1)(d) of the 1981 African Charter on Human and Peoples' Rights provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal."

Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“Establishment Law”) contains a substantially similar provision.²⁵

12. The right to a fair trial includes the right to be tried before a competent, independent and impartial tribunal. According to Article 14(1) of the International Covenant on Civil and Political Rights, “[i]n 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.”²⁶
13. The requirement of an independent and impartial tribunal necessarily means that the judges who make up the Tribunal must be independent and impartial. Article 128 of the Cambodian Constitution ensures this by stating that “[t]he Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”²⁷ The Agreement and Establishment law confirm this. Both state that judges “shall be independent in the performance of their functions and shall not seek any instructions from any government or any other source.”²⁸
14. This duty of impartiality is further set out in Article 2 of the ECCC Code of Judicial Ethics, which requires without exception that:
 1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.

²⁵ Article 33 new *inter alia* states that: “The Extraordinary Chambers of the 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. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level. 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.”

²⁶ Emphasis added.

²⁷ 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

²⁸ Agreement, Art. 3(3); Establishment Law, Art. 10 new (emphasis added).

2. 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.²⁹

b. Test of *Bias* or *Appearance of Bias*

15. In a previous decision the Pre-Trial Chamber stated that “[t]he test for bias to be applied by the Pre-Trial Chamber is provided in Internal Rule 34.2 ... which refers to actual or perceived bias.”³⁰ The Pre-Trial Chamber then followed the test for bias set out by the ICTY Appeals Chamber in the *Furundžija* case.³¹ In that case, the Appeals Chamber found that “there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.”³² It then stated the following principles:

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 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

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³³

16. In relation to the reasonable observer prong of the second principle, the Appeals Chamber then adopted “the approach that the ‘reasonable person 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.’”³⁴

²⁹ Adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, amended on 5 September 2008. *See also* Article 4 of the ICC Code of Judicial Ethics, adopted and entered into force on 9 March 2005, which describes the judges’ duty of impartiality in exactly the same terms.

³⁰ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public Decision on the Co-Lawyers’ 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, C11/29, ERN 00160734-00160742, para. 12.

³¹ *Id.*, para. 20.

³² *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189 [hereinafter *Furundžija*].

³³ *Id.*

³⁴ *Id.*, para. 190, quoting *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997.

17. The Special Court for Sierra Leone has employed the same test. Concerning the reasonable observer prong, its Appeals Chamber noted that “[i]n relation to the objective test, this requires that the Judge is not only impartial, but also appears to be impartial. Furthermore, the threshold for an appearance of bias does not require proof of actual bias.”³⁵

c. Duty of Due Diligence

18. Defence counsel are required to act with due diligence to safeguard their clients interests. *Black’s Law Dictionary* defines due diligence as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.”³⁶ The ICTY has stated that the purpose of according the accused certain rights under the ICTY Statute “was that the accused should exercise due diligence in utilizing them.”³⁷ In the context of an application to reopen a case, an ICTY Appeals Chamber has stated that the primary consideration of a Chamber in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it could not have been found with the exercise of due diligence, the Chamber may exercise its discretion as to whether to admit the evidence.³⁸

III. REQUEST FOR APPROPRIATE MEASURES

19. The appearance of justice being done is as important as justice actually being done; it is not an incidental by-product of judicial proceedings. As stated in a Special Court for Sierra Leone Appeal Decision, “As Lord Hewart C.J. said in *R v. Sussex Justices, Ex parte McCarthy*: ‘Justice must not only be done, but should manifestly and undoubtedly be seen to be done.’ On this sacred and overriding principle [the Special

³⁵ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 9.

³⁶ BLACK’S LAW DICTIONARY 468 (7th ed. 1999).

³⁷ JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 306 (Transnational Publishers Inc., 2002), discussing *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998.

³⁸ *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 283.

Court for Sierra Leone Appeals Chamber] accept[ed] the submission that Judges must be above suspicion of bias and the presumption of innocence must be respected until guilt is proved.”³⁹

20. The appearance of justice, as it seems, must be given equal weight to that of actual justice. This is especially true at the ECCC.⁴⁰ One of the main reasons this special court within the Cambodian judicial system was established with international assistance was in order to ensure that the judicial proceedings related to the subject matter jurisdiction of the ECCC would fully meet international standards and principles of justice. This can only be done by setting a proper example and refusing to allow the appearance of bias to affect the integrity of the proceedings. According to the ECCC website:

The government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice. An agreement with the UN was ultimately reached in June 2003 detailing how the international community will assist and participate in the Extraordinary Chambers. This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.⁴¹

21. Because of the importance of justice being seen to be done, national⁴² and

³⁹ *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 16.

⁴⁰ See Adam Saltsman & Mouly Vichhra, *Results from Outreach about the Extraordinary Chambers: Lessons Learned during Rural Dialogues*, Briefing Paper No. 1, INT’L CENTER FOR CONCILIATION, 9 July 2007, available at: http://www.centerforconciliation.org/Adam_outreach_report072007.html. “In many ways, the public’s interpretation of the Extraordinary Chambers is equally as important as the legal process itself in effecting a favorable outcome from the ECCC.” (Emphasis added).

⁴¹ Available at: http://www.eccc.gov.kh/english/about_eccc.aspx. (Emphasis added).

⁴² The *Talić* Pre-Trial Chamber at the ICTY notes that in Italy, for example, a judge will be disqualified in circumstances which would lead a reasonable person to doubt his impartiality due to personal interest or other reasons. *Prosecutor v. Talić*, IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 13, *citing* Codice di Procedura Penale, Article 36. In the United States, “[t]he impartiality provision of the general disqualification statute provides that a judge is disqualified in any proceeding in which his or her impartiality might reasonably be questioned.” 32 Am Jur 2d Federal Courts § 61.

international⁴³ courts have regularly held that judges must recuse themselves or be disqualified if they possess actual bias or if there exists even the objective appearance of bias. This is indeed what Rule 34 provides and what the Pre-Trial Chamber has previously held.⁴⁴ The Pre-Trial Chamber, quoting *Furundžija*, has stated that the objective appearance of bias means that “[t]he circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”⁴⁵

22. “Reasonable” is defined by *Black’s Law Dictionary* as “[f]air, proper, or moderate under the circumstances.”⁴⁶ “Reasonable person” has been described as “a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others’ interests. This definition has its origins in tort law and has been extended to a variety of other legal contexts including criminal law, contract law, and administrative law.”⁴⁷ The Pre-Trial Chamber, quoting *Furundžija*, stated that a reasonable observer for the purposes of the Rule 34 test is “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of

⁴³ “Judges with a conflict of interest or other bias can be disqualified from sitting on a trial or appeal in a specific case. ... The Appeals Chamber has previously enunciated the following standards to be used in interpreting the ‘impartiality requirement’ of the Statute and the Rules:

- (i) A Judge is not impartial if it is shown that actual bias exists.
- (ii) There is an unacceptable appearance of bias if: [...] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

As the Appeals Chamber in *Furundžija* explained, the ‘reasonable observer’ contemplated by the appearance-of-bias test ‘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’. The pertinent factor is ‘whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that the judge in question might not bring an impartial and unprejudiced mind to the issues arising in the case.’ *Prosecutor v. Milošević*, IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, paras. 17-19.

⁴⁴ “The test for bias to be applied by the Pre-Trial Chamber is provided in Internal Rule 34.2 ... which refers to actual or perceived bias.” *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public Decision on the Co-Lawyers’ 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, C11/29, ERN 00160734-00160742, para. 12. “The jurisprudence of the international tribunals is consistent in the test for bias applied here.” *Id.*, para. 20.

⁴⁵ *Id.*, para. 20 (emphasis added).

⁴⁶ BLACK’S LAW DICTIONARY 1272 (7th ed. 1999).

⁴⁷ Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 97 (2008) [hereinafter *To Recuse or to Refuse*] (internal quotations and citations omitted).

the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”⁴⁸

23. The “reasonable person” should not mean “the reasonable judge.” This is because in general:

‘the reasonable person often turns out to bear a rather suspicious similarity to the judge.’ Accepting the fact that the reasonable person standard often serves as a proxy for the judge’s own views, this standard is particularly inappropriate for judicial disqualification determinations because of self-judging. When a judge determines a motion to recuse based on his own subjective views about what is reasonable, the supposed objectivity of the reasonable person standard has completely collapsed into subjectivity.⁴⁹

Thus, the reasonable person means the average person under the circumstances.⁵⁰ In the United States case, *Sentis Group, Inc. v. Shell Oil Co.*, the Court stated that in accordance with the appearance of bias standard used in the contexts of recusal and disqualification of judges, “recusal or reassignment is appropriate where ‘impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.’”⁵¹

24. Considering that the ECCC is a domestic Cambodian court established within the domestic court system,⁵² the reasonable person in this situation must be considered to be the average Cambodian.⁵³ Prime Minister Hun Sen is widely respected by the

⁴⁸ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public Decision on the Co-Lawyers’ 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, C11/29, ERN 00160734-00160742, para. 21, quoting *Furundžija*, para. 190. See also *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997, per L-Heureux-Dubé and McLachlin JJ. “The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail. The person postulated is not a very sensitive or scrupulous person, but rather a right-minded person familiar with the circumstances of the case. The reasonable person’s knowledge and understanding of the judicial process and the nature of judging, as well as the community in which the alleged crime occurred must be considered.”

⁴⁹ *To Recuse or to Refuse*, *supra* note 51, at 99-100.

⁵⁰ “How a reasonable person would have acted is viewed not in isolation, but in the context of relevant circumstances.” *Rampersad v. McNulty*, 875 N.E.2d 548 (Mass. App. Ct. 2007).

⁵¹ *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 907 (8th Cir. 2009), citing *In re Kan. Pub. Employees Ret. Sys.*, 85 F.3d at 1358-59 (emphasis added.)

⁵² This has been confirmed by the Pre-Trial Chamber in its first decision. The Chamber held that “for all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure.” *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias “Duch”, 3 December 2007, C5/45, ERN 00154284-00154302, para. 19. (Emphasis added).

⁵³ The reasonable person is considered to be a member of the community. See *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997, per L-Heureux-Dubé and McLachlin JJ. “The reasonable person ... as a member of the Canadian community, is supportive of the principles of equality.”

average Cambodian.⁵⁴ Consequently, when Prime Minister Hun Sen recently called into question the independence of the international Judges of the Pre-Trial Chamber⁵⁵ at the ECCC – based on their decision causing the opening of Case 003 – in a public, televised speech to the people of Cambodia, this would lead the average Cambodian – the “reasonable person” – to reasonably apprehend bias⁵⁶ on the part of these Judges. The fact that the United Nations has failed either to deny the veracity of the Prime Minister’s comments or to request clarification from the Prime Minister can only serve to compound the appearance of bias. Indeed, Prime Minister Hun Sen’s comments deserve to be taken seriously, especially since, as the Prime Minister of the host country, his contribution to the establishment of the ECCC with both Cambodian and international judges has been instrumental.

25. Accordingly, the average Cambodian is likely to believe that the separate opinion⁵⁷ taken by Judges Katinka LAHUIS and Rowan DOWNING in insisting for investigations in Case 003 was politically motivated: they were acting upon instructions from their respective governments. Further, the average Cambodian would believe that if Judges Katinka LAHUIS and Rowan DOWNING accepted instructions with respect to Case 003, then they may also have accepted (or will accept) instructions in relation to Case 002. Hence, Mr. IENG Sary’s concerns and the overriding need for immediate and transparent judicial action on this matter.

26. The judicial integrity of Judges Katinka LAHUIS and Rowan DOWNING, in the eyes of the Cambodians (the relevant “reasonable persons”) is now questionable. Any

⁵⁴ See Ker Munthit, *Cambodia’s Ruling party Claims Landslide Election Victory*, The Irrawaddy, 28 July 2008, available at: http://www.irrawaddy.org/article.php?art_id=13588. See also Daniel Ten Kate, *Hun Sen Will Expand Majority, Power in Cambodia Election*, Bloomberg.com, 25 July 2008, available at: <http://www.bloomberg.com/apps/news?pid=20601087&sid=aXJvwC96p5SU&refer=home>. “The second-smallest economy among 10 Southeast Asian countries has averaged 10.6 percent growth during the past five years. Money has poured into Cambodia, as an overheating economy in Vietnam and political turmoil in Thailand triggered stock declines in those countries. The economic expansion has increased the popularity of Hun Sen’s Cambodian People’s Party.”

⁵⁵ Put in context, Prime Minister Hun Sen’s remarks relate to those international judges involved in the decision concerning the opening of Case 003. As such, it is beyond cavil that Prime Minister Hun Sen’s reference was to Judges Katinka LAHUIS and Rowan DOWNING.

⁵⁶ According to para. 189 of *Furundžija*, “[t]here is an unacceptable appearance of bias if: ... the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.” (Emphasis added.)

⁵⁷ *Case of Kaing Guek Eav alias “Duch”*, 001/18-11-2008-ECCC/PTC, Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Opinion of Judges LAHUIS and DOWNING, 18 August 2009.

decisions in which these Judges participate will bear the stain of bias. Perhaps a salient example will suffice to more fully expose the current existence of perceived bias as argued herein. What if the US President Barack Obama or German Chancellor Angela Merkel made statements in their respective countries that certain American or German judges were not acting independently, i.e., that they were taking and acting upon instructions from outside sources in rendering decisions? This would, unquestionably, lead the average citizen (the relevant “reasonable person”) in those countries to believe that those judges must be disqualified because of an appearance of bias. Clearly, it must follow, that the average citizen (the relevant “reasonable person”) in Cambodia is no different. Thus, the people of Cambodia should not be treated differently: immune to forming perceptions based on information received from sources they trust, respect and believe.

27. If the international personnel at the ECCC are to lend it credibility and claim that they are helping it to achieve “international standards of justice,” they must absolutely adhere to the highest standards themselves.⁵⁸ They should be role models by strictly following the letter of the law. The law concerning the disqualification of judges is clear. Judges cannot possess actual bias or even the objective appearance of bias.⁵⁹ In this instance, the objective appearance of bias, regrettably, seems to exist.
28. The objective appearance of bias resulting from Prime Minister Hun Sen’s public statements about the international Judges currently sitting on the Pre-Trial Chamber violates Mr. IENG Sary’s fundamental right to be tried by an independent and impartial tribunal. This right is guaranteed to him by Cambodia’s Constitution, the various international human rights treaties to which Cambodia is a party, the Agreement, the Establishment Law and the Rules. As such, in the interests of justice, the Defence is left with no option but to request that measures be taken to address the

⁵⁸ In the course of negotiations between the UN and Cambodia concerning the establishment of the ECCC and its structure and international character, UN Legal Counsel, Hans Corell, stated that “During the negotiations the United Nations maintained that international standards of justice must be met for the United Nations to participate in the Extraordinary Chambers.” He stated that the UN had to pull out of the negotiations at one point because it concluded that “the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment...” Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders, Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, available at: <http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm> (emphasis added).

⁵⁹ Rule 34(2). *See also Furundžija*, para. 189.

situation that has arisen as a result of Prime Minister Hun Sen's statements, and to request a public hearing to ensure that justice is seen to be done.

29. The Defence has an obligation to raise this Request with the Pre-Trial Chamber based on its duty of due diligence. This duty obliges the Defence to act diligently to protect Mr. IENG Sary's rights and interests, and thus do its part to ensure that his trial is fair. Discussing the requirement of due diligence with respect to another fundamental fair trial right, the right to adequate time and facilities for the preparation of a defence, one scholar noted that "[w]ith regard to both time and facilities, a certain degree of diligence on the part of the defence is expected and indeed required. The defence can only complain of a violation of their rights if they did everything required by the domestic law to obtain the respective (extension of) time or facility."⁶⁰ This requirement of due diligence must apply equally when the Defence seeks to protect any fundamental right, such as the right currently at issue to be tried by an independent and impartial tribunal.

IV. REQUEST FOR A PUBLIC HEARING

30. A public hearing is necessary because this Request involves Mr. IENG Sary's fundamental fair trial right to be tried by an independent and impartial tribunal. It is in the interests of justice to hold a public hearing of this matter, due to the importance of the issues involved and the need for transparency and public scrutiny. The Pre-Trial Chamber has previously stated that it "recognises that one of the primary bases for holding a public hearing is to allow public scrutiny of the fairness of the proceedings."⁶¹
31. There are no justifiable reasons why the matters concerning this Request could not be dealt with in public. The issue here is the perception of bias the people of Cambodia may now harbor towards Judges Katinka LAHUIS and Rowan DOWNING based on the public statements made by Prime Minister Hun Sen. The people of Cambodia have an inherent interest in the objective impartiality of the ECCC's judges. Hence

⁶⁰ STEPHAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 214 (Oxford University Press, 2005) (emphasis added).

⁶¹ *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/I/8, ERN 00236251-00236254.

they have an unqualified right to scrutinize these proceedings; a matter that can only be transparently accomplished through a public hearing.

V. CONCLUSION AND RELIEF REQUESTED

32. Prime Minister Hun Sen has stated that the international Judges at the ECCC take orders from their governments, rather than acting independently, as they are required to do. The statements made by Prime Minister Hun Sen would lead a reasonable Cambodian to reasonably conclude that the international Judges currently serving in the Pre-Trial Chamber are neither independent nor impartial. Measures must be taken to address this perception. A public hearing is necessary for the sake of unhindered transparency, in order to allow the people of Cambodia to scrutinize this issue and in order to protect the integrity and fairness of the proceedings in Case 002.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- a. DECIDE this Request on an expedited basis, before ruling on any other pending decisions;
- b. USE its inherent discretionary powers in taking all necessary and reasonable measures to clarify and/or verify the alleged conduct of Judges Katinka LAHUIS and Rowan DOWNING; and
- c. GRANT the Defence a PUBLIC oral hearing on this matter.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 20th day of October, 2009