BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S RULE 34 APPLICATION FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT OR, IN THE ALTERNATIVE, REQUEST FOR INSTRUCTION AND ORDER TO CEASE AND DESIST FROM *EX PARTE* COMMUNICATIONS

&

REQUEST FOR DISCLOSURE OF *EX PARTE* COMMUNICATIONS

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Judge NIL Nonn
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Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge THOU Mony
Reserve Judge Claudia FENZ

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY QC

All Defence Teams

All Civil Parties

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby applies for the disqualification of Judge Silvia Cartwright pursuant to Rule 34. This Application is made necessary because *ex parte* communications between Judge Cartwright and Andrew Cayley QC, the International Co-Prosecutor, are continuing. The Supreme Court Chamber has recently stated that *ex parte* meetings between a prosecutor and a trial judge "may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge," and may give rise to applications for a judge's disqualification.[1] Disregarding the Supreme Court Chamber, Judge Cartwright has continued to communicate *ex parte* with International Co-Prosecutor Cayley regarding her reaction to the SCC Decision. For Judge Cartwright to offer International Co-Prosecutor Cayley asymmetrical access to her proposed reaction to appellate jurisprudence in Case 002 shows that she is biased in favor of the OCP, or at a minimum gives rise to an appearance of bias. Alternatively, should the evidentiary threshold for disqualification not be met, the Defence requests the Trial Chamber to instruct Judge Cartwright and order International Co-Prosecutor Cayley to cease and desist from continuing their *ex parte* communications. Pursuant to its due diligence obligation,[2] the Defence further requests the Trial Chamber to order disclosure of all *ex parte* communications between Judge Cartwright and the International Co-Prosecutor since 24 November 2011 to determine whether any additional submissions are necessary. Lastly, the Defence submits that pursuant to Rule 34(6) and in the interests of justice, Judge Cartwright must recuse herself from deciding this Application.

I. BACKGROUND

1. On 17 April 2012, the Supreme Court Chamber issued the SCC Decision. Paragraph 24 states:

> [A]bsent any institutional basis either in the ECCC founding documents or the Internal Rules [*ex parte*] meetings could be perceived as being related to a case or cases in which the attending judge has a concern. As such they may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge. Therefore, in order to avoid such appearances and giving rise to disqualification motions it would seem advisable to reconsider the make-up of any meetings that trial judges wish to have with the prosecutors by allowing the participation of the

[1] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3 ("SCC Decision"), para. 24.
[2] Defence counsel are required to act with due diligence to safeguard their clients' interests. *See, e.g.*, Decision on Disqualification of Judge Silvia Cartwright, 9 March 2012, E171/2, para. 12; Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5 ("Nil Nonn Disqualification Decision"), para. 2.

> Defence Support Section [("DSS")] or members of the defence teams, as appropriate.[3]

The SCC Decision represented the culmination of six months of litigation stretching back to the discovery by Mr. Michiel Pestman, International Co-Lawyer for Mr. NUON Chea, that Judge Cartwright, International Co-Prosecutor Cayley and Mr. Knut Rosandhaug, Deputy Director of Administration, were meeting on a regular basis to talk about Court related issues.[4]

2. On 19 April 2012, it came to light that Judge Cartwright was continuing to communicate *ex parte* with International Co-Prosecutor Cayley on matters related to this litigation. This was revealed when Judge Cartwright unintentionally sent an email to the Case File Notification distribution list, i.e. to all ECCC staff notified when documents are added to the Case 002 Case File. Judge Cartwright's email stated:

> Of course I was only trying to see the lighter side.
> As you know Andrew, I am seriously considering my own position. I shall not make a hasty ydecision [sic]
> Silvia

3. The same day the Defence emailed Ms. Susan Lamb, the Trial Chamber's Senior Legal Officer:

> This morning we were copied (perhaps erroneously) in an email from Judge Silvia Cartwright which was intended for recipient "Andrew["] …
>
> For all the obvious reasons, we would most appreciate some clarification as to who Andrew may be. If the intended recipient were Andrew Cayley, the International Co-Prosecutor, this email would indeed cause concern, especially in light of the Supreme Court Chamber's recent decision pointing out the need to avoid 'the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge.' We apologize for this inconvenience, but in light of our due diligence obligations we feel obliged to explore this matter.

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[3] SCC Decision, para. 24.

[4] *See* Request for Information Regarding *Ex-Parte* Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, 15 November 2011, E137/1; Urgent Application for Disqualification of Judge Cartwright, 21 November 2011, E137/2, para. 15; IENG Sary's Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3 ("Request for Investigation"); 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, 1 December 2011, E137/4; Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5 ("Trial Chamber Decision"); IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 5 January 2012, E137/5/1/1; Co-Prosecutors' Response to Ieng Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 19 January 2012, E137/5/1/2; SCC Decision.

4. On Friday 20 April 2012, Ms. Lamb responded to the Defence, *ex parte*:

> I have been asked to convey the below information to you in response to below email message to me of 19 April 2012:
>
> 'The emailed message sent yesterday to a number of recipients was intended for the Deputy Director of Administration and Andrew Cayley, International Co-Prosecutor.
>
> The message was part of a brief discussion among Judge Cartwright, Mr Cayley and Mr Rosandhaug concerning the appropriate reaction to the recent SCC decision in which an appeal against a refusal to recuse Judge Cartwright had been dismissed. The management meetings which were the subject of the recusal motion were originally convened at the request of the Office of Legal Affairs, but in light of the SCC comments, a decision has been made to discontinue them.
>
> Future management issues should be addressed directly to the Administration.'

5. The same day, the Defence forwarded Ms. Lamb's email to the other parties. The Defence noted that as it was the only party who had received Ms. Lamb's email, it considered that all parties should have been copied for transparency purposes.

II. PRELIMINARY MATTER: TIMELINESS OF APPLICATION

6. Rule 34(3) requires that an application for disqualification must be filed as soon as the party becomes aware of the grounds in question. The SCC Decision contemplates disqualification applications in the event of continuing *ex parte* communications between Judge Cartwright and International Co-Prosecutor Cayley.[5] As reflected in the Background, the Defence has acted with all deliberate speed. The Defence contacted Ms. Lamb as soon as it received Judge Cartwright's email, and this Application was sent for Khmer translation within two business days of the Defence learning of the grounds in question. The Application is timely filed.

III. APPLICATION FOR DISQUALIFICATION

7. Judge Cartwright's email of 19 April 2012 is an *ex parte* communication with International Co-Prosecutor Cayley relating to the substance of proceedings in Case 002. Judge Cartwright is sharing information with International Co-Prosecutor Cayley – who has appeared and will appear again before the Trial Chamber in Case 002 – regarding her reaction to Supreme Court Chamber jurisprudence in the case. Judge Cartwright's email

[5] SCC Decision, para. 24.

shows an *ex parte* dialogue regarding the strategic and tactical modalities of how to proceed from the SCC Decision.[6] The nature of Judge Cartwright's association with International Co-Prosecutor Cayley shows actual bias or, at a minimum, the appearance of bias.

8. On 17 April 2012, the Supreme Court Chamber had warned Judge Cartwright that continuing *ex parte* communications with International Co-Prosecutor Cayley may give rise to future disqualification applications. Indeed, the Supreme Court Chamber expressed concerns that *ex parte* communications can engender "the appearance of asymmetrical access,"[7] issuing its guidance after six months of litigation and briefing regarding the legal implications of *ex parte* communications between the same trial judge and prosecutor.

9. The Supreme Court Chamber's warning echoes the Trial Chamber's own observation that where communication between a prosecutor and a judge is unrelated to the substance of proceedings in any case, *ex parte* communications have been held not to demonstrate bias or an appearance of bias.[8] It follows that where *ex parte* communications *are* related to the substance of proceedings, this *could* demonstrate bias or the appearance of bias.

10. Based on the facts, the Trial Chamber can draw certain concrete conclusions:

    (1) Judge Cartwright has permitted a situation to crystallize where the OCP enjoys a degree of access such that a trial judge will communicate with the OCP regarding the appropriate reaction to Supreme Court Chamber jurisprudence in Case 002 without sharing this information with the other parties;

[6] Judge Cartwright appears to reference this dialogue in her email by suggesting that International Co-Prosecutor Cayley already knows that she is seriously considering her position. *See also* Ms. Lamb's email to the Defence of 20 April 2012, acknowledging that the "message was part of a brief discussion among Judge Cartwright, Mr Cayley and Mr Rosandhaug concerning the appropriate reaction to the recent SCC decision in which an appeal against a refusal to recuse Judge Cartwright had been dismissed." For the avoidance of doubt, the Appeal was against a refusal to investigate Judge Cartwright's conduct, not an Application for disqualification. *See* SCC Decision, paras. 12, 16.
[7] SCC Decision, para. 24.
[8] Trial Chamber Decision, para. 16.

(2) Judge Cartwright has disregarded guidance issued by the Supreme Court Chamber and the Trial Chamber regarding the legal effect of *ex parte* communications;

(3) On 19 April 2012, Judge Cartwright knew that *ex parte* communications with a prosecutor could give rise to applications for her disqualification; and

(4) On 19 April 2012, Judge Cartwright knew that *ex parte* communications that relate to the substance of proceedings in Case 002 could demonstrate bias or the appearance of bias.

11. Article 33 new of the Establishment Law permits the Trial Chamber to seek guidance from procedural rules established at the international level where there is uncertainty regarding existing procedures' interpretation or application. Should such uncertainty exist regarding the application of Rule 34 in this matter, the Trial Chamber may consider that the ICTR Appeals Chamber in *Karemera* found a prosecutor's cohabiting relationship with a trial judge, taken with the judge's failure to disclose the nature of this relationship until Defence counsel expressly raised the matter, to be relevant considerations when determining whether there was an appearance of bias.[9] Judge Cartwright's relationship with International Co-Prosecutor Cayley has developed such that they shared information *ex parte* regarding Case 002 jurisprudence. Taken with Judge Cartwright's failure to disclose the nature of her participation in her *ex parte* meetings with International Co-Prosecutor Cayley prior to the Defence raising the issue, procedural rules established at the international level suggest that Judge Cartwright's conduct gives rise, at a minimum, to the appearance of bias.

12. Although, to the best of the Defence's knowledge, no Defence teams have attempted to communicate *ex parte* with members of the Trial Chamber regarding Case 002 proceedings, the Trial Chamber has admonished the Defence for transparently contacting Trial Chamber Judges regarding administrative matters. For example, when Ms. Lamb provided scheduling information regarding the start date of the trial *ex parte* to certain parties, the Defence sent an email in protest and copied the Trial Chamber. Taking

[9] *See Prosecutor v. Karemera*, ICTR-98-44-AR 15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 67.

exception to the Defence's action of copying the Judges (which was done to apprise the Trial Chamber of the inappropriate nature of Ms. Lamb's *ex parte* communications), Judge Cartwright requested Ms. Lamb:

> to advise Mr. Karnavas that the judges are concerned that he continues to include them in his communications, justifying this by saying that this is important. It is inappropriate for him to use this of [sic] direct communication when it is clear that you have been asked to communicate informally with parties by the [Trial Chamber] itself.[10]

13. Similarly, when the NUON Chea Defence wrote to Presiding Judge Nil Nonn regarding the lack of interpretation and translation services provided at informal trial management meetings, it was advised by Mr. Rosandhaug not to communicate directly with judges "individually or jointly," and that "no personal communication [with judges] is permitted."[11]

14. Judge Cartwright does not permit the Defence to communicate with her directly *inter partes*, nor would she countenance *ex parte* communications between the Defence and the Trial Chamber. Nonetheless, she has no qualms with International Co-Prosecutor Cayley contacting her privately – and responding in kind – to share thoughts which are related to Case 002 and may impact the parties. The disparity of treatment is plain.

15. There are sufficient grounds for disqualification based on the known facts.[12] The Supreme Court Chamber has stated that "asymmetrical access enjoyed by the prosecutor to the trial judge" may give rise to applications for disqualification.[13] The Trial Chamber has suggested that communication between a prosecutor and a trial judge related to the substance of proceedings in a case could demonstrate bias or the appearance of bias,[14] thereby satisfying the test for a judge's disqualification.[15] Judge Cartwright's email of 19

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[10] *See* Email from Judge Cartwright to Michael G. Karnavas, 17 October 2011.
[11] Email from Knut Rosandhaug to Andrew Ianuzzi, 18 November 2011: "With reference to the below correspondence addressed directly to the Judges, I am requested to and hereby re-iterate my e-mail of 2 November 2011 to your Co-lawyer where I remind him '...not [to] communicate directly with [Judges] individually or jointly...' and of the '...procedure for filing requests or applications concerning the proceedings and no personal communication is permitted.'"
[12] A party seeking a judge's disqualification must "clearly indicate the grounds and shall provide supporting evidence" in his application. Decision on Application to Disqualify Judge Silvia Cartwright, 9 March 2012, E171/2, para. 13.
[13] SCC Decision, para. 24.
[14] *See* Trial Chamber Decision, para. 16.
[15] Rule 34(2) states: "Any party may file an application for disqualification of a judge in a case in which the judge has a personal or financial interest which objectively might affect his or her impartiality, or objectively

April 2012 evidences her disparate treatment of, and bias towards, the OCP *vis-à-vis* the other parties in relation to the substance of proceedings in this case.[16]

16. To have avoided bias or the appearance of bias, Judge Cartwright should have ensured that any email communications she had with International Co-Prosecutor Cayley regarding the SCC Decision were copied to a representative of DSS or the defence teams. Judge Cartwright was on notice from the Supreme Court Chamber that this would avoid generating the appearance of asymmetrical relations that could give rise to applications for her disqualification. Instead, she continued to communicate *ex parte* with International Co-Prosecutor Cayley.

IV. REQUEST FOR ALTERNATIVE RELIEF

17. Should the Trial Chamber consider that the evidentiary threshold for disqualification pursuant to Rule 34 is not met, the Defence requests the Trial Chamber to issue a decision *instructing* Judge Cartwright and *ordering* International Co-Prosecutor Cayley to cease and desist from continuing their *ex parte* communications and for all future ECCC-related communications between them to be copied to a member of DSS or the defence teams, as appropriate.

18. It would appear that International Co-Prosecutor Cayley initiated his email exchange with Judge Cartwright to obtain Judge Cartwright's view on how she would proceed in dealing with Case 002 jurisprudence, i.e. the SCC Decision. These communications suggest disregard for the Supreme Court Chamber and the ethical principles which should have bound and guided International Co-Prosecutor Cayley and Judge Cartwright throughout

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give rise to the appearance of bias." Interpreting this Rule, the jurisprudence of the ECCC has adopted the test articulated by the ICTY Appeals Chamber and has held: "A judge is not impartial if it is shown that actual bias exists. There is an appearance of bias if: • 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 • The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." Nil Nonn Disqualification Decision, para. 6. *See also* 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, paras. 20-21 (equating a "reasonable observer" with 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").

[16] An application that is speculative or based on a "mere feeling or suspicion of bias" is insufficient. Decision on Application to Disqualify Judge Silvia Cartwright, 9 March 2012, E171/2, para. 13.

their careers.[17] Even assuming *arguendo* that these ethical principles do not *bind* them in Cambodia, and accepting that the Supreme Court Chamber was referring to *meetings* rather than *email communications* specifically, these communications regrettably show reckless disregard for the spirit if not the letter of these principles, as well as for the SCC Decision. They are unbecoming to say the least.

19. Although the SCC Decision demonstrated the inappropriate nature of *ex parte* communications between a trial judge and a prosecutor, this guidance did nothing to hinder Judge Cartwright and International Co-Prosecutor Cayley before the Defence intervened. It was only by chance that the Defence learned that these communications were ongoing. Had Judge Cartwright not mistakenly sent her email to the Case File Notification distribution list, presumably her *ex parte* dialogue with International Co-Prosecutor Cayley would have continued. Short of Judge Cartwright's disqualification, alternative relief would be for the Trial Chamber to issue a decision instructing Judge Cartwright and ordering International Co-Prosecutor Cayley to cease and desist from *ex parte* communications, carrying the threat of sanctions pursuant to Rule 35 in the event of breach.[18]

V. REQUEST FOR DISCLOSURE

20. Irrespective of whether the Trial Chamber grants the Defence's application for Judge Cartwright's disqualification, or decides to instruct Judge Cartwright and order International Co-Prosecutor Cayley to cease and desist from *ex parte* communications, the Defence requests disclosure of Judge Cartwright's *ex parte* communications with International Co-Prosecutor Cayley since 24 November 2011, the date of the Request for Investigative Action.

21. The Supreme Court Chamber has confirmed that *ex parte* meetings between Judge Cartwright and International Co-Prosecutor Cayley are inappropriate. It appears that the decision to discontinue Judge Cartwright's, International Co-Prosecutor Cayley's and Mr. Rosandhaug's "administrative" meetings was taken *after* Judge Cartwright's email came to light. To discontinue these meetings in these circumstances, rather than permit DSS or

[17] *See* Request for Investigative Action, paras. 13-15, 20-21.
[18] A judge is at least in principle within the jurisdiction of Rule 35, provided that her alleged conduct rises to the level of an interference with the administration of justice within the meaning of that Rule. SCC Decision, para. 14.

defence team participation in them, gives rise to further concerns regarding their appropriateness. The Defence is also on notice that Judge Cartwright and International Co-Prosecutor Cayley have shared strategic or tactical modalities regarding how to proceed henceforth from the SCC Decision. Judge Cartwright has disclosed information regarding her *ex parte* meetings with International Co-Prosecutor Cayley and Mr. Rosandhaug to the New Zealand press,[19] indicating a willingness to respond to the media but not to the parties on this issue. The Defence retains serious and legitimate concerns regarding how these meetings and communications may have negatively impacted upon Mr. IENG Sary's enjoyment of his right to a fair trial.

22. Full and specific disclosure of Judge Cartwright's *ex parte* communications with International Co-Prosecutor Cayley since 24 November 2011 is required to determine whether additional submissions may be necessary. Full disclosure will promote transparency and uniformity of process, fostering confidence in the ECCC as a model court.

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

a. DISQUALIFY Judge Cartwright pursuant to Rule 34(2); or, in the alternative
b. INSTRUCT Judge Cartwright and ORDER International Co-Prosecutor Cayley to cease and desist from continuing *ex parte* communications and meetings forthwith, and to copy a representative from DSS or the defence teams, as appropriate, on all future ECCC-related communications between them; and, in any event
c. INSTRUCT Judge Cartwright and ORDER International Co-Prosecutor Cayley in the interests of justice to disclose all *ex parte* communications between them since 24 November 2011, including all correspondence, and in relation to *ex parte* meetings, the number of meetings held, their dates, their agenda, and any actions taken at and pursuant to such meetings.

[19] *See* Julia Wallace, *Email From Judge to Prosecutor Sparks New Debate at KRT*, CAMBODIA DAILY, 23 April 2012, p. 21: "In February [2012, Judge Cartwright] gave an interview to a New Zealand-based media outlet in which she defended the meetings, which she said the UN had asked her to participate in. 'I resisted for some time, but realized it was essential, so we meet to discuss such crucial issues such as the budget for the court, staff issues, problems with IT, these sorts of things,' Judge Cartwright told the website Scoop.co.nz."

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **27th** day of **April, 2012**