



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Judge Silvia CARTWRIGHT
Judge THOU Mony
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON IENG SARY'S APPLICATION TO DISQUALIFY JUDGE NIL NONN AND RELATED REQUESTS

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I. INTRODUCTION

1. On 14 January 2011, the Ieng Sary Defence filed an Application to disqualify Judge Nil Nonn and an accompanying Request for Investigative Action pursuant to Rules 34, 41 and 93 of the Internal Rules.¹ The Application seeks the disqualification of Trial Chamber President Nil Nonn pursuant to Internal Rule 34, on the basis of alleged misconduct during his tenure as the President of the Provincial Court in Battambang, prior to the establishment of the ECCC. The Application alleges that in 2002, President Nil Nonn admitted to a documentary filmmaker that he had “accepted cash gratuities from grateful litigants”². As efforts by the Ieng Sary Defence to obtain this video footage have been unsuccessful, the Request seeks orders from the Chamber compelling the disclosure of, amongst other things, the video footage of this interview. In addition, the Ieng Sary Defence requests immediate resolution of this Application following a public oral hearing, and the recusal of Judge Nil Nonn from all matters related to Case 002 pending a decision on the Application.³

II. DELIBERATIONS

a. Timeliness of the Application

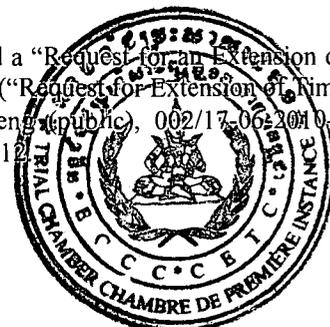
2. Internal Rule 34(4)(c) provides that an application for disqualification of a judge of the Trial Chamber must be submitted “concerning matters arising before the trial, at the initial hearing; or concerning matters arising during trial or of which the parties were unaware before the trial, before the final judgment in the case.”⁴ By contrast, Internal Rule 34(3) mandates the filing of disqualification applications as soon as the moving party becomes aware of the grounds in question. The Ieng Sary Defence has chosen to submit a disqualification application prior to the initial hearing. The Chamber agrees with the Ieng Sary Defence that, in view of the parties’ obligations of due diligence and the interests of effective trial management, the

¹ “Ieng Sary’s Application to Disqualify Judge Nil Nonn due to his Purported Admission that he has Accepted Bribes and Request for a Public Hearing or in the Alternative for Leave to Reply to Any Submissions Presented by Judge Nil Nonn in Response to this Application” (E5) (“Application”) and “Ieng Sary’s Request for Investigative Action Regarding Ieng Sary’s Application to Disqualify Judge Nil Nonn for Purportedly Admitting to Accepting Bribes by Requesting or Ordering Filmmaker Amanda Pike to Disclose the Video Footage of Her Interview with Judge Nil Nonn and his signed Release Form,” filed on 14 January 2011 and notified on 18 January 2011 (E6) (“Request”).

² Application, preamble, p. 1.

³ Application, paras 2-5. On 24 January 2011, the Co-Prosecutors filed a “Request for an Extension of Time to Reply to Ieng Sary’s Application to Disqualify Judge Nil Nonn” (E5/1) (“Request for Extension of Time”).

⁴ Decision on Application for Disqualification of Judge You Bunleng (Public), 002/17-06-2010-ECCC/PTC(09), Doc No. 8, 10 September 2010 (“*You Bunleng* Decision”), para. 12.



Application should be determined expeditiously.⁵ The Chamber therefore determines the Application to be timely. The Co-Prosecutors did not avail themselves of their opportunity to respond to the Application within the applicable time-limits.⁶ The Co-Prosecutors' Request for Extension of Time makes reference to uncertainty on when, under the present Rules, Judge Nil Nonn would be entitled to present written submissions in response to the Application.⁷ On 26 January 2011, President Nil Nonn indicated that he did not intend to make written submissions pursuant to Internal Rule 34(7).⁸ The Chamber denies the Co-Prosecutors' Request for Extension of Time in order to ensure the expeditiousness of proceedings.⁹

b. Request for a public hearing and recusal in relation to all pending matters

3. The procedure prescribed in Internal Rule 34(7) foresees a written decision by the Chamber, based on the application for disqualification and, where provided, submissions by the Judge. It does not expressly envisage a hearing, which is also not a requirement under Cambodian law.¹⁰ Other international tribunals also routinely decide similar applications on the basis of written pleadings alone.¹¹ The Chamber considers it to be in the interests of justice to proceed expeditiously. Transparency of proceedings will be ensured by the re-classification of all filings in relation to the Application and Request as public.

4. Internal Rule 34(6) provides that a judge who is the subject of a recusal motion shall be replaced by a reserve judge for the purposes of the application only. According to Internal Rule 34(5), a judge subject to a disqualification motion may continue to participate in the judicial proceedings pending a decision. A judge, however, may step down voluntarily. Contrary to what is alleged in the Application, decisions of the Chamber would not be nullified should a sitting judge subsequently be disqualified.¹²

⁵ Application, paras. 1-2.

⁶ The Request for Extension of Time was filed on the last day upon which the Co-Prosecutors' response was expected under Article 8.3 of the Practice Direction for the Filing of Documents Before the ECCC (Revision 5).

⁷ Request for Extension of Time, para. 2.

⁸ Email from Judge NIL Nonn to Members of the [...] bench regarding motion to disqualify him (E5/2).

⁹ The Co-Prosecutors "agree with the Defence that this Application should be dealt with as expeditiously as possible" (Request for Extension of Time, para. 4).

¹⁰ See Code of Criminal Procedure of the Kingdom of Cambodia ("CCP"), § 561 ("No hearing of the parties or the relevant judge is necessary") and *Ney Thol* Decision, para. 8.

¹¹ See e.g. *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, ICTR Bureau (ICTR-98-44-T), 7 March 2008; *Prosecutor v. Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber (IT-99-36-PT), 18 May 2000 ("*Brđanin and Talić* Decision").

¹² Internal Rule 34(9); cf. Application, para. 4.



c. Legal Framework

5. The right to an independent and impartial tribunal is a key element of the fundamental right to a fair trial.¹³ Reflecting this, Internal Rule 34(2) states:

Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.

6. 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.¹⁴ 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.¹⁵

7. The ECCC jurisprudence has further found that disqualification applications must seek the disqualification of a particular judge sitting on a particular case, not a general order of disqualification.¹⁶ A Rule 34 application for disqualification based on alleged improprieties in

¹³ See Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR"); *Prosecutor v. Karemera et al.*, Decision on Motion by Karemera for Disqualification of Trial Judges, ICTR Bureau (ICTR-98-44-T), 17 May 2004, para. 7 ("2004 Karemera Decision").

¹⁴ This test has been adopted and elaborated also by other international courts: see e.g. Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), 2187 UNTS 90, Article 41(2)(a) and ICC Rules of Procedure and Evidence, adopted 3-10 September 2002, ICC-ASP/1/3, Rule 34(1) (read together, requiring disqualification of any judge whose impartiality "might reasonably be doubted on any ground", including any prior involvement with or personal interest in the case, any relationship with the parties, or any position held or opinion expressed inconsistent with his impartiality). Rule 15 of the Rules of Procedure and Evidence of the ICTY and ICTR are in substance identical. See further *Prosecutor v. Norman*, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, SCSL Appeals Chamber (SCSL-2004-14), 28 May 2004, para. 28.

¹⁵ *Ney Thol* Decision, paras. 20-21 (equating a "reasonable observer" with "an informed person, with knowledge of all of 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"); *Prosecutor v. Furundžija*, Judgment, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000, para. 189 ("*Furundžija* Appeal Chamber Judgment"). See also *Prosecutor v. Sesay et al.*, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, SCSL Trial Chamber I (SCSL-04-15-T-909), 6 December 2007, para. 51; 2004 *Karemera* Decision, para. 8; Decision on Mr. El Sayed's Motion for the Disqualification of Judge Riachy from the Appeals Chamber Pursuant to Rule 25, STL President (CH/PRES/2010/08), 5 November 2010, paras. 19, 20.

¹⁶ Internal Rule 34(2). 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 (public), C11/29, 4 February 2008 ("*Ney Thol* Decision"), paras 9-11. See also *Prosecutor v. Delaño et al.*, Decision of



a different case is likely to fail unless there is evidence that it will prevent the judge from bringing “an impartial and unprejudiced mind” to the case under consideration.¹⁷ It follows that a finding of bias in a case does not by itself require the judge’s disqualification from other, unrelated cases.¹⁸

8. Internal Rule 34 and the above case law thus demonstrate that disqualification pertains to bias against a particular accused in relation to a particular case, and cannot be used to lodge a general complaint about the fitness of an individual to serve as a judge.

9. A pattern of improper conduct, however, may call into question a person’s qualifications to act as a judge at the ECCC.¹⁹ No relevant mechanisms are provided in the ECCC Law and Agreement. Cambodian Judges are not directly appointed by the ECCC itself but rather, by the Supreme Council of the Magistracy.²⁰ The mechanisms to determine whether a person is qualified to act as a Cambodian judge before the ECCC are therefore found within national law.

d. Disposition

i. The basis of the Application

10. The allegations giving rise to this Application pertain to a period prior to the creation of the ECCC. No allegation of misconduct in relation to Case 002 is made in the Application; indeed it acknowledges that its occurrence is improbable in view of the distinctive features of

the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, ICTY Bureau (IT-96-21-T), 25 October 1999, paras 8-9 (distinguishing between the administrative determination as to whether a person is qualified to act as a judge, on the one hand, and an application for disqualification, which pertains to the judge’s impartiality with respect to *a particular case*, on the other) (emphasis in original).

¹⁷ *Brđanin and Talić* Decision, para. 19.

¹⁸ See *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (defendant was entitled to discovery due to a judge’s pattern of accepting bribes in other cases because he offered a plausible reason, supported by evidence, why that pattern indicated “actual[] bias[] in [the] petitioner’s own case”) (emphasis in original); *Cartalino v. Washington*, 122 F.3d 8, 10 (7th Cir. 1997) (one month after the Supreme Court opinion in *Bracy*, reiterating that “the fact that a judge is bribed in some cases does not establish that he was not impartial in others. [...] It is merely a suspicious circumstance that warrants further inquiry.”)

¹⁹ See e.g. Article 10, ECCC Law (requiring that judges have “high moral character [and] a spirit of impartiality and integrity,” that they “shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”)

²⁰ ECCC Law, Article 11 new. Appointments by the Supreme Council of the Magistracy are confirmed by the King of Cambodia: see Preah Reach Kret NS/RKT//0506/214, 7 May 2006, “Law on Organization and Functioning of the Supreme Council of Magistracy”, Royal Kram No. 09 NS. 94/29 December 1994, Article 11 (“The Supreme Council of Magistracy shall make proposals to His Majesty the King regarding the appointment, transfer, leaves of absence and removal of all judges and prosecutors.”)



the ECCC.²¹ Citing various national and internationally-recognized legal provisions enshrining the principles of the independence, integrity and impartiality of the judiciary,²² the Application instead stresses the significance of all three principles both to the perception of a fair trial in particular cases and to the integrity and public trust enjoyed by a judicial system generally.²³

11. The Chamber agrees that safeguards to judicial independence are of paramount importance and are integral to instilling and maintaining public confidence in the judiciary.²⁴ However these principles are distinct from the test before the ECCC and other international tribunals regarding the disqualification of judges. As previously noted, the objective of disqualification provisions is to safeguard the impartiality of a judge in a specific case. The scope of Internal Rule 34 is accordingly limited to situations in which alleged misconduct has a demonstrable impact on a particular case. Where, instead, allegations concern the fitness of an individual to serve as a judge, the relevant mechanisms within the ECCC context are instead to be found in Cambodian national law.²⁵

ii. Mechanisms safeguarding judicial integrity in the Cambodian legal system and the role of the ECCC

12. The ECCC is a court, albeit one with special features, established within the existing Cambodian court structure.²⁶ In common with many national jurisdictions, the independence of the judiciary is enshrined as a fundamental principle in the 1993 Constitution of the Kingdom of Cambodia.²⁷ The Code of Judicial Conduct²⁸ further stipulates that judges shall adhere to the principles of independence and impartiality.²⁹ This Code includes guidelines in relation to the acceptance of gifts.³⁰ According to Cambodian law, the guarantor of the independence of

²¹ Application, para. 32.

²² Application, paras. 14-24, citing *inter alia* *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*, 6 June 2003 (“ECCC Agreement”), Article 3(3); ICCPR, Article 14(1); ECCC Code of Judicial Ethics, adopted 31 January 2008 and amended 5 September 2008, Articles 1-3; 2002 Bangalore Principles of Judicial Conduct, Values 1-4.

²³ Application, paras. 30-37,

²⁴ See e.g. “Accountability and competence of judges”, in *Global Corruption Report 2007* (Transparency International, 2007), pp. 40-66

²⁵ The ECCC Agreement and Law confers upon the ECCC no mechanism whatsoever to directly appoint, discipline or remove Cambodian judges (*supra*, para. 9).

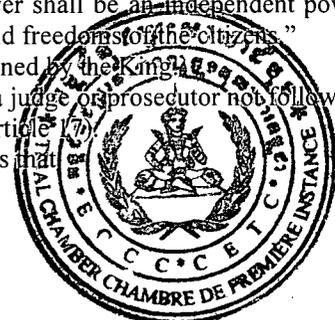
²⁶ Article 2 (new), ECCC Law.

²⁷ Article 128 (new) of the 1993 Constitution provides: “the Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”

²⁸ Voted by the Supreme Council of Magistracy on 5 February 2007 and signed by the King.

²⁹ The Code does not, however, address consequences or sanctions should a judge or prosecutor not follow the principles. The possibility of recusal from a case is nonetheless mentioned (Article 17).

³⁰ Judicial Code of Judicial Ethics, Article 20 (Acceptance of Gifts) provides that



the judiciary is the King.³¹ The appointment of judges is based upon the recommendation of the Supreme Council of Magistracy.³² Although, as in most legal systems, safeguards against arbitrary removal of judges exist, it is the responsibility of the Supreme Council of Magistracy to take disciplinary action against judges who commit misdeeds.³³ Further, the Supreme Council of Magistracy has the power to “decide and raise its suggestion to His Majesty the King regarding the appointment, transfer, disruption from (actual) function, suspension of job, [...] or removal of title, of all judges and prosecutors”³⁴. Cambodian judges are accordingly bound by ethical duties, and the responsibility for overseeing and enforcing these commitments rests with the Supreme Council of Magistracy.

13. In common with many countries weakened by decades of armed conflict, these provisions required time to implement and some have only recently been adopted. Others are still in the process of elaboration and norms in this area are evolving.³⁵ This should be viewed in the context of the various systemic weaknesses which have been observed within the Cambodian judiciary dating from the Democratic Kampuchea period, many of which have proved enduring.³⁶ These weaknesses were well-known at the time of the ECCC’s creation and were among the reasons for its establishment in the first place.³⁷

“Judges shall clearly separate any gift that is given to them individually by close friends or relatives from gifts that are given to them officially.

It shall not be an issue in the case where a judge receives a gift individually and the gift has little value and does not relate to his or her judicial or prosecutorial position.

Judges shall not exercise their authority to elicit gifts, parties, loans, or anything else for their personal satisfaction. However, a judge may accept a gift in the course of making remarks, hosting foreign guests, or participating in other events, as long as the gift is appropriate and not large” (unofficial translation).

³¹ Article 132 (new) of the 1993 Constitution: “The King is the Guarantor of the independence of the Judiciary. The Supreme Council of Magistracy assists the King in this task.”

³² Article 134 (new), paragraph 3 of the 1993 Constitution: “The Supreme Council of Magistracy submits to the King the proposal for appointment of judges and public prosecutors to all the Jurisdictions.”

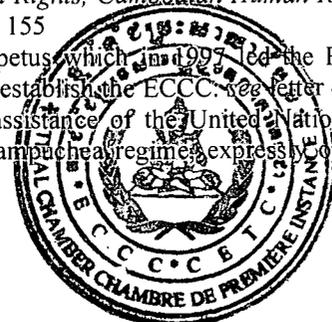
³³ Article 133 (new) of the 1993 Constitution: “The Magistrates are irremovable. However, the Supreme Council of Magistracy shall pronounce disciplinary sanctions against the Magistrates committing misdeeds.” This is carried out by the Disciplinary Council of the Supreme Council of Magistracy, chaired by the President of the Supreme Court (Article 134 (new) of the 1993 Constitution, paragraph 4).

³⁴ Unofficial translation.

³⁵ For instance, the notion of judicial misconduct is not clearly defined neither in the Law on the Organization and Functioning of the Supreme Council of Magistracy, nor anywhere else (*see e.g.* Law No. 09 NS.94; *see* Article 135 (new) of the 1993 Constitution: “The statutes of judges and public prosecutors and the judicial organization shall be stipulated in separate laws.”)

³⁶ *See e.g. The Cambodian Government in Report to the Human Rights Committee in 1993* (ICCPR/C/81/Add. 12, 23 September 1998), E9/6.8, ERN (Fr) 00333208, para. 212; *Report of United Nations Secretary-General for Human Rights, Mr. Michael Kirby (Australia) to the Commission on Human Rights, Cambodian Human Rights in 1994*, E/CN.4/1994/73, E9/6.6, ERN (Fr) 00333197, 00333198, paras 137, 155

³⁷ The lack of capacity of the domestic judiciary was precisely the impetus which led the Royal Government of Cambodia to request the assistance of the United Nations to establish the ECCC. *see* letter dated 21 June 1997 from the Royal Government of Cambodia requesting the assistance of the United Nations to investigate and prosecute the crimes committed during the Democratic Kampuchea regime, expressed on the



14. Although designed in part to reinforce measures intended to strengthen domestic judicial capacity in Cambodia, the ECCC has many features distinct from other internationalized courts and tribunals. As noted, the ECCC Agreement and Law confer no mechanism upon the ECCC to directly appoint, discipline or remove Cambodian judges. This stems from the hybrid nature of the ECCC, which instead vests independent responsibility in the the Supreme Council of Magistracy and United Nations for the appointment of national and international judges, respectively. The ECCC lacks both mandate and mechanism to directly address any alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary. It may, as a model court, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity. The Chamber agrees that the allegations in the Application must be taken seriously and emphasizes the importance of a genuine commitment on the part of the Royal Government of Cambodia to develop further judicial capacity and thereby fully restore public confidence in the judiciary.

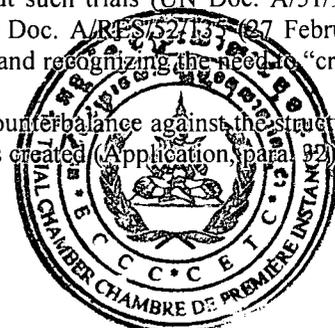
15. Although for the above reasons the ECCC cannot confront general questions of judicial independence and integrity directly, it can ensure that Accused in proceedings before it benefit from proceedings that are fair and conducted in accordance with international standards.³⁸ Internal Rule 34, in safeguarding the rights of Accused before the ECCC, protects the integrity of particular cases before it. The Chamber has discharged this duty in the present case.

iv. Conclusion

16. As noted, the Application alleges appearance of bias and emphasizes negative public perceptions as the result of weaknesses within the Cambodian judicial system. As noted however, recusal as provided in Internal Rule 34 and endorsed by consistent international jurisprudence is not the appropriate remedy. Where allegations of individual fitness to serve as a judge are entailed, recourse is instead to domestic mechanisms designed to uphold standards of judicial integrity within the Cambodian judiciary. The Chamber emphasizes the need for such mechanisms to operate effectively and equitably in order to safeguard public confidence in the judiciary and to strengthen the rule of law within Cambodia.

basis that Cambodia “does not have the resources or expertise” to carry out such trials (UN Doc. A/51/930-S/1997/488 (24 June 1997)); Situation of Human Rights in Cambodia, UN Doc. A/RES/52/137 (27 February 1998), para. 8 (acknowledging “corrupt practices within the judicial system” and recognizing the need to “create a functioning and impartial system of justice”).

³⁸ The ECCC’s internationalized nature is acknowledged as a significant counterbalance against the structural weaknesses that were well-known within Cambodia at the time the ECCC was created (Application, para. 92).



17. The Chamber finds that the Application neither alleges, nor seeks to establish, actual bias on the part of Judge Nil Nonn in relation to the case pending before the Trial Chamber. As the Application itself acknowledges, no risk of misconduct arises in the present case.³⁹ There can accordingly be no apprehension of bias by an objective observer informed of all relevant circumstances insofar as they pertain to Case 002. The Application is therefore dismissed, as it neither pertains to the judges' impartiality nor objectively gives rise to the appearance of bias in the case against the Accused. Having failed to satisfy the required threshold for relief under Internal Rule 34, the Request for Investigative Action is moot.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Co-Prosecutor's Request for Extension of Time as the applicable time limits for the Co-Prosecutors' response to the Application have expired;

DENIES the request for a public hearing on the Application and Request;

DENIES the Application;

REJECTS in consequence all other relief sought in the Application and Request as moot; and

DIRECTS the Court Management Section to re-classify as public all documents filed confidentially in relation to this Application and Request.

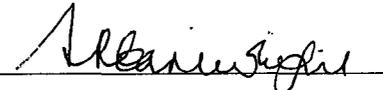
Pursuant to Internal Rule 34(8), this decision is not open to appeal. *pc* *ED*

Phnom Penh, 28 January 2011.



YA Sokhan





Silvia CARTWRIGHT



THOU Mony



Jean-Marc LAVERGNE



YOU Ottara

³⁹ Application, para. 32 ("The Defence submits that [the offering of a bribe by the Office of the Co-Prosecutors or the Civil Parties to Judge Nil Nonn in return for a favourable outcome at trial] is improbable ...").