

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**URGENT APPLICATION FOR DISQUALIFICATION OF JUDGE CARTWRIGHT**

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## I. INTRODUCTION

1. Pursuant to Article 557 of the Cambodian Code of Criminal Procedure (the ‘CCP’) and Rule 34 of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) submit this application to disqualify Judge Silvia Cartwright from all further proceedings in Case 002. For the reasons stated below, the Defence submits that: (i) the application is admissible; (ii) Judge Cartwright must (or, at the very least, should) step down pending the resolution of the instant application; and (iii) her association with the International Co-Prosecutor and/or the Deputy Director of Administration in the context of informal, *ex parte* meetings (the ‘Meetings’) would lead a reasonable observer, properly informed, to apprehend bias on her part. In light of the important legal issues raised herein and the general interest in transparent trial proceedings, this request should be classified as a public one.<sup>1</sup> In any event, the Defence will treat it as such.

## II. RELEVANT FACTS

2. For the sake of brevity, the Defence hereby adopts by reference all of the factual submissions set out at paragraphs three through twelve of ‘Ieng Sary’s Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright, and Others’ (the ‘Ieng Sary Request’). As it has not yet been placed on the case file, a copy of this submission is attached hereto.<sup>2</sup> Additionally, the Defence adopts, in their entirety, its previously filed requests to the Trial Chamber for information regarding the Meetings.<sup>3</sup> Finally, it must be emphasized that during the time period in which the *ex parte* meetings had taken place, the Trial Chamber was seised of a motion filed by the Defence seeking an investigation into, among other things, the effect of political interference by the Royal Government of Cambodia (the ‘RGC’) on Case 002.<sup>4</sup> Mr Cayley’s office opposed that application,<sup>5</sup> and Judge Cartwright and her colleagues in the Trial Chamber unanimously dismissed it.<sup>6</sup>

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<sup>1</sup> See para 8, *infra*.

<sup>2</sup> *N.B.* A courtesy copy of the Ieng Sary Request was circulated to the parties on 18 November 2011. To date, no official document number has been assigned by the Trial Chamber.

<sup>3</sup> See Document No E-137, Letter from the Defence to Nil Nonn, re ‘Request for information related to *ex parte* meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug’, 4 November 2011, ERN 00752773; Document No E-137/1, ‘Request for Information Regarding *Ex Parte* Meetings Among Judge Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration’, 15 November 2011, ERN 00753050–00753053 (the ‘Nuon Chea Request’).

<sup>4</sup> See Document No E-82, ‘Request for Investigation Pursuant to Rule 35’, 28 April 2011, ERN 00680941–00680955.

### III. RELEVANT LAW

#### A. Impartiality of the Judiciary

3. Article 128 of the Cambodian Constitution mandates an impartial judiciary: ‘The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of citizens.’ This fundamental concept is reflected in the ECCC Agreement and the Law, which provide that all judges ‘shall be persons of high moral character, impartiality, and integrity’.<sup>7</sup> Substantively identical guarantees are contained in the International Covenant on Civil and Political Rights (the ‘ICCPR’),<sup>8</sup> the European Convention on Human Rights (the ‘ECHR’),<sup>9</sup> the American Convention on Human Rights,<sup>10</sup> the African Charter on Human and Peoples’ Rights,<sup>11</sup> as well as the statutes of the ICC,<sup>12</sup> ICTY,<sup>13</sup> and ICTR.<sup>14</sup> Indeed, the UN Human Rights Committee has stated that the guarantee of impartiality ‘is an *absolute right that may suffer no exceptions*’.<sup>15</sup> As held by the European Court of Human Rights: ‘[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public’.<sup>16</sup> This Chamber has consistently echoed this sentiment:

<sup>5</sup> See Document No **E-82/1**, ‘Co-Prosecutors’ Response to Nuon Chea Request for Investigation Pursuant to Rule 35’, 9 May 2011, ERN 00686305–00686308.

<sup>6</sup> See Document No **E-116**, ‘Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88, and E92)’, 9 September 2011, ERN 00729330–00729339; see also Document No **E-116/1**, ‘Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation’, 10 October 2011, ERN 00746636–00746658.

<sup>7</sup> ECCC Agreement, Article 3(3); see also ECCC Law, Article 10 new (‘The judges of the Extraordinary Chambers [...] shall have high moral character, a spirit of impartiality and integrity [...].’)

<sup>8</sup> Article 14(1) (‘Everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.’)

<sup>9</sup> Article 6(1) (‘[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’)

<sup>10</sup> Article 8(1) (‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.’)

<sup>11</sup> Article 7(1) (‘Every individual shall have the right to have his cause heard. This comprises: [...] (d) the right to be tried within a reasonable time by an impartial court or tribunal.’) See, e.g., *Constitutional Rights Project v Nigeria*, African Commission on Human and Peoples’ Rights, Case No 87/93 (1995), Judgment, para 14 (‘Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1(d).’)

<sup>12</sup> Article 67(1) (chapeau) (‘In the determination of any charge, the accused shall be entitled [...] to a fair hearing conducted impartially [...].’)

<sup>13</sup> Article 13 (‘The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.’)

<sup>14</sup> Article 12(1) (‘The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.’)

<sup>15</sup> *Gonzalez del Rio v Peru*, Communication No 263/1987, UN Doc CCPR/C/46/D/263/1987, 28 October 1992 (emphasis added).

<sup>16</sup> *Ferrantelli and Santangelo v Italy*, ECtHR App Nos 48/1995 & 554/640, ‘Judgment’, 7 August 1996 (the ‘Ferrantelli Judgment’), para 58.

‘safeguards to judicial independence are of paramount importance and are integral to instilling and maintaining public confidence in the judiciary.’<sup>17</sup>

### B. Recusal and Disqualification of Judges

4. Rule 34, which purports to address ‘Recusal and Disqualification of Judges’ at the ECCC, provides in pertinent part:

Any party may file an application for disqualification of a judge in any case [...] concerning which the Judge has, or has had, any association which *objectively* might affect [...] her impartiality, or *objectively* give rise to the appearance of bias.<sup>18</sup>

The applicant ‘shall clearly indicate the grounds and shall provide supporting evidence’,<sup>19</sup> and the ‘application shall be filed as soon as the party becomes aware of the grounds in question’.<sup>20</sup> An application ‘against a Trial Chamber Judge, [...] concerning matters arising during trial’ must be submitted ‘before the final judgment in the case’.<sup>21</sup> In such case, the application is properly submitted to the Trial Chamber itself.<sup>22</sup> These provisions are consistent with existing, applicable Cambodian law, namely: the CCP.<sup>23</sup>

5. In a clear and unjustified departure from domestic law,<sup>24</sup> Rule 34(5) provides that, once an application for disqualification is filed, the ‘judge in question may continue to

<sup>17</sup> Document No E-5/3, ‘Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests’, 28 January 2011, ERN 00640427–00640435 (the ‘Nil Nonn Disqualification Decision’), para 11; *see also* *ibid.*, para 5 (‘The right to an independent and impartial tribunal is a key element of the fundamental right to a fair trial.’); para 11 (‘As previously noted, the objective of disqualification provisions is to safeguard the impartiality of a judge in a specific case.’); para 14 (‘It may, as a model court, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.’)

<sup>18</sup> Rule 34(2) (emphasis added).

<sup>19</sup> Rule 34(3).

<sup>20</sup> *Ibid.*

<sup>21</sup> Rule 34(4)(c).

<sup>22</sup> *See* Rule 34(5) (‘An application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber. In any other case it shall be submitted to the Chamber in which the judge in question is sitting.’)

<sup>23</sup> *See, e.g.*, CCP, Article 557 (‘The party who wishes to apply for disqualification of a judge shall file the application as soon as he becomes aware of the causes. Failure to do so shall cause the application to be inadmissible. In no case can an application for disqualification be made after the closing of the hearing.’); Article 558 (‘The application for disqualification shall clearly state the grounds for the challenge, supported by evidence, otherwise the application is inadmissible.’)

<sup>24</sup> *N.B.* The Defence has consistently objected to departures from existing Cambodian procedure unjustified by specific reference to Article 12(1) of the ECCC Agreement. *See, e.g.*, Document No E-51/3, ‘Consolidated Preliminary Objections’, 25 February 2011, ERN 00648279–00648310. As far as the Defence is aware, no such justification has ever been provided with particular respect to Rule 34. The Defence does not accept the position advanced on this point by the Trial Chamber. *See* Document No E-51/14, ‘Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules’, 8 August 2011, ERN 00707531–00707535. However, as this decision is not subject to immediate appeal, the Defence hereby reiterates its objections for an eventual appellate record.

participate in the judicial proceedings pending a decision. However, [...] she *may decide to step down voluntarily* at any point in the following proceedings'.<sup>25</sup> This is plainly at odds with Article 559 of the CCP, which states: '[the] judge [against whom the application is made] *shall cease* to participate in the investigation or trial.'<sup>26</sup> In any event, under both the Rules and the CCP, an impugned judge who steps down—whether voluntarily or mandatorily—'shall be replaced' for purposes of the application.<sup>27</sup>

6. In applying Rule 34, the Trial Chamber has adopted the test initially formulated by the ICTY Appeals Chamber in the case of Anto Furundžija.<sup>28</sup> According to that standard, a judge will be considered to lack independence and impartiality (and therefore be subject to disqualification) if either 'it is shown that actual bias exists' or there is an unacceptable 'appearance of bias' (the 'Objective Test').<sup>29</sup>
7. The Objective Test is met where 'the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias'.<sup>30</sup> A reasonable observer 'must be "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"'.<sup>31</sup> In other words, as set out by a special chamber of the ICTY: '[t]he Chamber must determine whether the perception of the hypothetical fair-minded observer, with sufficient knowledge

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<sup>25</sup> Rule 34(5).

<sup>26</sup> Emphasis added.

<sup>27</sup> See Rule 34(6) (noting that, should the impugned judge choose to step down, she 'shall be replaced in the Chamber by a reserve judge for the purposes of the application only'); CCP, Article 559 (indicating that the impugned judge 'shall be replaced by another judge to be appointed by the president of the court to which he belongs').

<sup>28</sup> See Nil Nonn Disqualification Decision, para 6 (citing *Prosecutor v Furundžija*, IT-95-17/1-A, 'Judgment', 21 July 2000 (the 'Furundžija Judgment'), as well as previous ECCC and other international jurisprudence).

<sup>29</sup> See Document No E-55/4, 'Decision on Ieng Thirith, Nuon Chea, and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne, and Thou Mony', 23 March 2011, ERN 00655691-00655700 (the 'Full Chamber Disqualification Decision'), para 11 ('The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias.') (citing *Furundžija Judgment*, paras 181-188); see also Document No E-63/5, 'Decision on Ieng Thirith and Ieng Sary's Applications for Disqualification of Judge You Ottara from the Special Bench & Request for a Public Hearing', 9 May 2011, ERN 00686820-00686826 (the 'You Ottara Disqualification Decision'), para 11.

<sup>30</sup> See Full Chamber Disqualification Decision, para 11 (citing *Furundžija Judgment*, para 189); see also *You Ottara Disqualification Decision*, para 11.

<sup>31</sup> Full Chamber Disqualification Decision, para 11 (citing *Furundžija Judgment*, para, 190); see also *You Ottara Decision*, para 11.

of the circumstances to make a reasonable judgment, would be that [the impugned Judge] might not bring an impartial and unprejudiced mind to the issues arising in the case.’<sup>32</sup>

8. The party seeking disqualification bears the burden of adducing sufficient evidence that the judge in question is not subjectively or objectively (as the case may be) impartial.<sup>33</sup> While neither the Rules nor the CCP envision an oral hearing on a disqualification application, ‘[t]ransparency of proceedings will be ensured by the [...] classification of all filings in relation to [such application] as public’.<sup>34</sup>
9. As recently submitted by the Ieng Sary Defence Team, ‘[a]t the international level [...], a Judge’s failure to disclose facts which were probative of an association which might affect her impartiality was held to be material to a finding that circumstances existed which “could well lead a reasonable, informed observer to objectively apprehend bias”’.<sup>35</sup>

### **C. *Ex Parte* Communications**

10. The Cambodian Code of Judicial Ethics (the ‘CJE’) prohibits *ex parte* communications between a judge and a party. Article 9 of that code states, in relevant part: ‘[a]ccording to the [adversarial] principle, judges shall not communicate with any party during the case proceeding in the absence of another party except where the law permits or with consent of the other [absent] party.’ The Defence hereby adopts by reference the further submissions set out in paragraphs thirteen through sixteen of the Ieng Sary Request.
11. As noted previously, Rule 19—establishing the Judicial Administration Committee (the ‘JAC’)—sets out the exclusive mechanism for dealing with ‘administrative and judicial support’ matters at the ECCC.<sup>36</sup> The JAC ‘shall be comprised of’ a mixed composition of national and international judges and ‘shall also include, in a consultative capacity, the Co-Prosecutors and the Director and Deputy Director of the Office of Administration’.<sup>37</sup> As far as the Defence is aware, there is nothing in the Rules—or any

<sup>32</sup> *Prosecutor v Karadžić*, IT-95-05/18-PT, ‘Decision on Motion to Disqualify Judge Picard and Report to the Vice President Pursuant to Rule 15(B)(ii)’, 22 July 2009 (the ‘Karadžić Decision’), para 18 (internal citations omitted).

<sup>33</sup> *See, e.g.*, *Furundžija Judgment*, para 196.

<sup>34</sup> *Nil Nonn Disqualification Decision*, para 3; *see also Full Chamber Disqualification Decision*, para 8.

<sup>35</sup> Ieng Sary Request, para 33 (citing *Prosecutor v Karemera*, Case No ICTR-98-44-AR-15bis2, ‘Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nziroera’s Motion for Leave to Consider New Material’, 22 October 2004, para 67).

<sup>36</sup> Rule 19(2).

<sup>37</sup> Rule 19(1).

other controlling ECCC provision—that provides for meetings ‘of an informal, *ad hoc* nature’<sup>38</sup> between or among a single international judge, the international Co-Prosecutor, and/or the UNAKRT Coordinator.

12. The procedural rules of other international criminal tribunals establish particular statutory bodies, much like the JAC, to deal with administrative activities. These committees—known at the ICC, the ICTY, and the ICTR as ‘Coordination Councils’—are comprised of the respective tribunal’s president, prosecutor, and registrar and meet pursuant to clearly defined and publicly available terms of reference.<sup>39</sup> On information and belief, none of these institutions’ legal frameworks provides for additional ‘informal, *ad hoc*’ administrative bodies, as suggested by the International Co-Prosecutor.<sup>40</sup>

#### IV. ARGUMENT

##### A. The Application is Timely and Admissible

13. As required by Rule 34(3), the instant application ‘clearly indicate[s] the grounds [for disqualification] and provide[s] supporting evidence’. It has been filed diligently,<sup>41</sup> with the Trial Chamber,<sup>42</sup> as soon as the Defence became ‘aware of the grounds in question’.<sup>43</sup> Accordingly, the Chamber should admit the request.

##### B. Judge Cartwright Must (or Should) Step Down Pending a Resolution of the Instant Application

14. Pursuant to Article 559 of the CCP, Judge Cartwright *must* step down pending a resolution of the instant application.<sup>44</sup> Should she and the Trial Chamber continue to disregard applicable Cambodian procedure, then—at the very least—she *should* step

<sup>38</sup> Letter from the UNAKRT Coordinator to Co-Lawyers for Ieng Sary, 7 November 2011.

<sup>39</sup> See ICC Regulations of the Court, Regulation 3 (‘Coordination Council’); ICTY Rules of Procedure and Evidence, Rule 23*bis* (‘The Coordination Council’); and ICTR Rules of Procedure and Evidence, Rule 23*bis* (‘The Coordination Council’).

<sup>40</sup> See Julia Wallace, *Cambodia Daily*, ‘KRT Defence Alleges Ex Parte Meetings’, 7 November 2011, p 1 (quoting Mr Cayley: ‘So in answer to these representations by the Nuon Chea and Ieng Sary teams: Administrative management meetings such as these take place in the ICC, ICTY and ICTR. They are normal. If they did not take place, these institutions, including the ECCC, would be paralyzed.’)

<sup>41</sup> Rule 34(4)(c) (An application ‘against a Trial Chamber Judge, [...] concerning matters arising during trial must be submitted ‘before the final judgment in the case’.)

<sup>42</sup> See Rule 34(5) (‘An application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber. In any other case it shall be submitted to the Chamber in which the judge in question is sitting.’)

<sup>43</sup> Rule 34(3).

<sup>44</sup> See para 5, *supra*.

down pursuant to Rule 34(5). In either event, Judge Cartwright should be replaced by Judge Fenz for purposes of the application.<sup>45</sup>

**C. Judge Cartwright's Participation in *Ex Parte* Meetings Would Lead a Reasonable Observer, Properly Informed, to Conclude That She Lacks Sufficient Impartiality to Remain on the Bench**

***1. The Objective Test Applies to the Instant Case***

15. The crux of this application is simple: Judge Cartwright's participation in (and failure to provide information about) informal, *ultra vires*, and *ex parte* meetings with Mr Cayley and/or Mr Rosandhaug gives rise to an unacceptable appearance of bias. It must be stressed at the outset that the Defence is not claiming the existence of any *subjective* (that is to say, actual) bias on the part of Judge Cartwright. Rather, on an *objective* analysis, her behavior 'would lead a reasonable observer, properly informed, to reasonably apprehend'<sup>46</sup> a lack of impartiality. In this case, the reasonable observer is an informed individual with knowledge of, among other things: (i) the administrative mechanisms in place at the ECCC and other international criminal tribunals;<sup>47</sup> (ii) the obligations of the Trial Chamber Judges in Case 002;<sup>48</sup> and (iii) the various crises of confidence—politically-related and otherwise—associated with the Court since its inception.<sup>49</sup>

***2. Judge Cartwright's Participation in the Meetings is a Violation of the Cambodian Code of Judicial Ethics***

16. Mr Rosandhaug's letter to the parties<sup>50</sup> and Mr Cayley's comments to the Cambodia Daily<sup>51</sup> confirm that the Meetings have been taking place for some time. As noted above, these gatherings are not justified by Rule 19 or any other applicable administrative regulation in place at the ECCC.<sup>52</sup> While all of the parties are well aware

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<sup>45</sup> See Rule 34(6) (noting that, should the impugned judge choose to step down, she 'shall be replaced in the Chamber by a reserve judge for the purposes of the application only'); CCP, Article 559 (indicating that the impugned judge 'shall be replaced by another judge to be appointed by the president of the court to which he belongs').

<sup>46</sup> Furundžija Judgment, para 189.

<sup>47</sup> See paras 11–12, *supra*.

<sup>48</sup> See para 3, *supra*.

<sup>49</sup> See, e.g., Document No E-116/1, 'Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation', 10 October 2011, ERN 00746636–00746658.

<sup>50</sup> See Ieng Sary Request, para 9.

<sup>51</sup> See Ieng Sary Request, para 10.

<sup>52</sup> See para 11, *supra*.



of the JAC<sup>53</sup> and its statutory activities (as well as the analogous provisions in place at the other international tribunals), the Defence has never been informed about—let alone consented to—the exclusive (and non-Cambodian) group acknowledged to be holding regular, secret meetings since April 2010.<sup>54</sup> To date, no ECCC official has *satisfactorily* explained why, when, how, and pursuant to what legal authority these international individuals have met. Accordingly, Judge Cartwright’s participation in the Meetings amounts to a violation of Article 9 of the CJE.<sup>55</sup>

***3. Judge Cartwright’s Failure to Provide Clarification to the Defence Has Created an Objective Appearance of Bias***

17. While both Messrs Rosandhaug and Cayley have revealed a measure of information related to the Meetings, Judge Cartwright has remained silent in the face of three distinct requests for disclosure. As noted previously, the Defence has reason to believe that something more than merely ‘administrative and operational matters’ has been discussed,<sup>56</sup> in particular: (i) continuing RGC interference at the ECCC; (ii) the effect of such interference on Cases 003 and 004; (iii) the effect of such interference on Case 002; and (iv) the Defence request for an independent investigation into such interference.<sup>57</sup>
18. Judge Cartwright is clearly in a position to confirm or deny such information. Her failure to do so—given the objectively unethical nature of the meetings themselves as well as the political realities of this Court—‘could well lead a reasonable, informed observer to objectively apprehend bias’ on her part.<sup>58</sup> Such an observer would surely note that the four points mentioned above have been the subject of intense scrutiny by all independent observers of the Tribunal and at least two of its international judges. Furthermore, as

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<sup>53</sup> See Rule 19.

<sup>54</sup> *N.B.* Prior to Mr Rosandhaug’s letter to the parties, the ECCC Defence Support Section has never been officially notified of the existence and/or content of the Meetings.

<sup>55</sup> See para 10, *supra*; see also Ieng Sary Request, paras 16, 28.

<sup>56</sup> *N.B.* Despite what the International Co-Prosecutor has suggested to Michiel Pestman, the Defence indeed has received this information from a reliable source (who currently wishes to remain anonymous). Much of the information received from this source has been independently confirmed, indeed some of it by Messrs Rosandhaug and Cayley themselves.

<sup>57</sup> See Nuon Chea Request, para 7. *N.B.* The right to a trial by an independent tribunal is a fundamental substantive right—as the Defence has consistently asserted since the beginning of Case 002.

<sup>58</sup> Ieng Sary Request, para 33 (citing *Prosecutor v Karemera*, Case No ICTR-98-44-AR 15bis.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).

mentioned previously, the request referenced in the fourth point was pending before the Chamber at the very same time that the Meetings were taking place.<sup>59</sup>

19. It has been suggested that the impetus behind the Meetings originated in New York with UN Under Secretary-General for Legal Affairs Patricia O'Brien: 'The aim was to add focus to communication between the UN component of the ECCC and UN headquarters,' Mr Rosandhaug informed the Defence.<sup>60</sup> While this may in fact be the case,<sup>61</sup> Ms O'Brien's motivations are irrelevant to the instant application. And while the secret, *ex parte* gatherings indeed may have been undertaken 'with the best of intentions',<sup>62</sup> the fact that the Meetings were clearly conducted in violation of the CJE (without soliciting, let alone receiving, the consent of the Defence) at a time when international/Cambodian divisiveness at the Tribunal was ascendant and the Defence was vigorously litigating issues related to political interference raises serious *objective* concerns regarding Judge Cartwright's impartiality.

## VI. CONCLUSION

20. Accordingly, the Defence hereby requests the Trial Chamber to:
- a. admit the application;
  - b. urge Judge Cartwright to step down pursuant to Article 559 of the CCP or—at the very least—voluntarily pursuant to Rule 34(5) pending resolution of the instant request, and appoint Judge Fenz to fill the vacancy;
  - c. order the immediate and permanent disqualification of Judge Cartwright from any further proceedings against Nuon Chea in Case 002.

Given the nature of the instant application, the Defence requests the Chamber to treat it as a matter of urgency.

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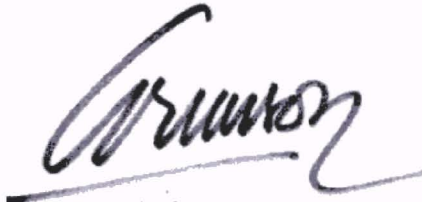
<sup>59</sup> See para 2, *supra*.

<sup>60</sup> Julia Wallace, *Cambodia Daily*, 'KRT Administrator Says Meeting Were Ad Hoc', 8 November 2011, p 19.

<sup>61</sup> See *ibid*. ('Martin Nesirsky, a spokesman for the UN's Office of Legal Affairs, declined to comment on whether Ms O'Brien had indeed made such a recommendation.')

<sup>62</sup> *Ibid* (quoting Clair Duffy, a court monitor for the Open Society Justice Initiative: 'I have to say that I am sympathetic to both sides on this issue,' she wrote in an e-mail. 'I think it's entirely necessary and reasonable for the leaders of the [tribunal] on the international side to meet to discuss issues concerning the ongoing management of the court, and I am sure that has been done with the best of intentions and integrity. But the defense are also legitimate in requesting more transparency on these kinds of issues, not least of all because of the court's lack of transparency in general, but particularly in relation to Cases 003/004.')

CO-LAWYERS FOR NUON CHEA

A handwritten signature in black ink, appearing to read 'Arun' or 'Arunon', with a long horizontal stroke extending from the bottom of the letters.

SON Arun

A handwritten signature in black ink, appearing to read 'Michiel Pestman' followed by a flourish.

Michiel PESTMAN & Victor KOPPE