BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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THIRD APPLICATION FOR DISQUALIFICATION OF JUDGE CARTWRIGHT

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla

Distribution

Co-Accused

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

Co-Lawyers for Civil Parties:
PICH Ang
Elisabeth SIMONNEAU-FORT

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 recent remarks to the New Zealand press demonstrate actual bias against Nuon Chea and, in the alternative, 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. In any event, the Defence will treat it as such.[1]

II. RELEVANT FACTS

2. On 4 February 2012, the following report appeared in the New Zealand press:

> […] Mrs Cartwright is one of two international judges who sit with three Cambodian judges in the Trial Chamber, which in 2010 found Duch guilty.
>
> She has lived in Phnom Penh, a hot, humid and chaotic city, since 2008, and says her experience at the court has been 'fascinating, if incredibly frustrating'.
>
> As the most senior-appointed official by the UN, Mrs Cartwright sees it as her responsibility to not only make sure the trials are held efficiently, but that the court is also managed in an honest and professional way.
>
> But it is not without its challenges, or controversy.
>
> Defence lawyers publicly criticized her last year for meeting with the prosecution team, something she admits to doing, but says she had little choice.
>
> ***The Defence Counsel 'put more emphasis on disruption than representing their clients,' she says.***
>
> *'It's a very common strategy by Defence Counsel. There's been an application to accuse me twice, once as a member of the entire tribunal and once personally and there have been other applications to accuse the president, who is Cambodian, and other Cambodian judges.'*
>
> She was asked by the UN two years ago to hold regular meetings with various parties to discuss 'governance' issues. 'I resisted for some time but realized it was essential so we meet to discuss

[1] *See* para 11, *infra*.

> such crucial issues as the budget for the court, staff issues, problems with IT, those sorts of things. Largely management issues that affect the conduct of the trial.'[2]

The same report was contained in the ECCC press clippings on 6 February 2012.[3] It must be assumed that, on their face, Judge Cartwright's assertions were directed at the Nuon Chea Defence Team—among others, perhaps.

3. A few days earlier, in response to an attempt to elicit relevant testimony from witness Prak Yut, Judge Cartwright suggested that the Defence has misunderstood its role in this case and is acting against the interests of Nuon Chea:

> JUDGE CARTWRIGHT: I'll tell you in English then, with the President's permission, while you're looking for new headphones. The President has ruled twice now that you are to remain within the confines of Trial 2 and the first trial in Trial 2. Is that clear enough now, Counsel? MR PESTMAN: My questions are within the scope of the first – JUDGE CARTWRIGHT: Please don't argue. You have been asked to move onto your next question, thank you. MR PESTMAN: I'd like to note to the record that I disagree with the decision. I'm here to establish the government interference in Case Number 2 and, for that purpose, I'm asking these questions; and I think they are well within the scope of this case, certainly Case Number 2. But I will continue with my questions. JUDGE CARTWRIGHT: ***I had understood that your role here was to represent and defend your client***. Please move on with your questions in relation to this trial. Thank you.[4]

These remarks were made publicly and in the presence of the Accused.

4. The timing and similarity of Judge Cartwright's in-court and extracurricular statements leave no doubt that the latter were clearly aimed at counsel for Nuon Chea.

III. RELEVANT LAW

A. Impartiality of the Judiciary

5. 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 ECCC Law, which provide that all judges 'shall be persons of high moral character, impartiality, and integrity'.[5] Substantively identical guarantees are contained in the International Covenant

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[2] Michelle Cooke, 'Cambodia still reeling from Khmer Rouge', Stuff New Zealand (Fairfax NZ News), 4 February 2012 (available at http://www.stuff.co.nz/world/asia/6367143/Cambodia-still-reeling-from-Khmer-Rouge) (emphasis added).

[3] *See* ECCC Media Clippings: 4–6 February 2012, p 68 (distributed by the Public Affairs Section on 6 February 2012).

[4] Document No **E-1/35.1**, Transcript of Trial Proceedings, 30 January 2012 (Trial Day 23), pp 75:17–76:13 (emphasis added).

[5] 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 […].')

on Civil and Political Rights (the 'ICCPR'),[6] the European Convention on Human Rights (the 'ECHR' or the 'European Convention'),[7] the American Convention on Human Rights,[8] the African Charter on Human and Peoples' Rights,[9] as well as the statutes of the ICC,[10] ICTY,[11] and ICTR.[12] Indeed, the UN Human Rights Committee has stated that the guarantee of impartiality 'is an *absolute right that may suffer no exceptions*'.[13] As emphasized by the European Court of Human Rights (the 'ECtHR' or the 'European Court'): '[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public'.[14] This Chamber has consistently echoed this sentiment: 'safeguards to judicial independence are of paramount importance and are integral to instilling and maintaining public confidence in the judiciary.'[15]

B. Recusal and Disqualification of Judges

6. 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 in which the Judge has a personal […] interest or 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.[16]

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[6] Article 14(1) ('Everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.')

[7] 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.')

[8] 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.')

[9] 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).')

[10] Article 67(1) (chapeau) ('In the determination of any charge, the accused shall be entitled […] to a fair hearing conducted impartially […].')

[11] 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.')

[12] 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.')

[13] *Gonzalez del Rio v Peru*, Communication No 263/1987, UN Doc CCPR/C/46/D/263/1987, 28 October 1992 (emphasis added).

[14] *Ferrantelli and Santangelo v Italy*, ECtHR App Nos 48/1995 & 554/640, 'Judgment', 7 August 1996 (the 'Ferrantelli Judgment'), para 58.

[15] 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.')

[16] Rule 34(2).

The applicant 'shall clearly indicate the grounds and shall provide supporting evidence',[17] and the 'application shall be filed as soon as the party becomes aware of the grounds in question'.[18] An application 'against a Trial Chamber Judge, […] concerning matters arising during trial' must be submitted 'before the final judgment in the case'.[19] In such case, the application is properly submitted to the Trial Chamber itself.[20] These provisions are consistent with existing, applicable Cambodian law, namely: the CCP.[21]

7. In a clear and unjustified departure from domestic law,[22] Rule 34(5) provides that, once an application for disqualification is filed, the 'judge in question may continue to participate in the judicial proceedings pending a decision. However, […] she *may decide to step down voluntarily* at any point in the following proceedings'.[23] 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.'[24] 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.[25]

8. In applying Rule 34, the Trial Chamber has adopted the test initially formulated by the ICTY Appeals Chamber in the case of Anto Furundžija.[26] According to that standard, a judge will be considered to lack independence and impartiality (and therefore be subject

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17 Rule 34(3).
18 *Ibid*.
19 Rule 34(4)(c).
20 *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.')
21 *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.')
22 *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.
23 Rule 34(5).
24 Emphasis added.
25 *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').
26 *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).

to disqualification) if either 'it is shown that actual bias exists' (the 'Subjective Test') or there is an unacceptable 'appearance of bias' (the 'Objective Test').[27]

9. In considering subjective impartiality, the ICTY Appeals Chamber 'has repeatedly declared that the personal impartiality of a judge must be presumed until there is proof to the contrary'.[28] Regarding 'the type of proof required [to overcome this presumption of impartiality], the [ECtHR] has, for example, sought to ascertain whether a judge has displayed hostility or ill will', among other things.[29] Noting the difficulty of establishing subjective bias, the ECtHR has emphasized the additional safeguards provided by the Objective Test—as an alternative to the more stringent subjective analysis.[30] In any case, the jurisprudence stresses a fluid application of the two tests,[31] depending on the particular facts at issue: 'there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).'[32]

10. The Objective Test is met where 'the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias'.[33] A reasonable observer 'must be "an informed person, with knowledge of all of the relevant circumstances, including the

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[27] *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.

[28] Furundžija Judgment, para 182 (citing ECtHR jurisprudence); *ibid*, n 244 (noting that 'there has yet to be a case in which a violation of Article 6 has been found under this element of the test'). *N.B.* This is no longer the case. *See* para 13, *infra*.

[29] *Kyprianou v Cyprus*, ECtHR Application No 73797/01, 'Judgment', 15 December 2005, para 119; *see also Olujić v Latvia*, ECtHR Application No 22330/05, 'Judgment', 5 May 2009, para 11.

[30] *Kyprianou*, para 119 ('Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee. In other words, the Court has recognized the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test.'); *see also Olujić*, para 11.

[31] *See*, *e.g.*, *Kyprianou*, para 120 (citing *Buscemi* and *Lavents*) ('Thus, where a court president publicly used expressions which implied that he had already formed an unfavorable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality. On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis of the subjective test.'); *see also Olujić*, para 12.

[32] *Kyprianou*, para 119; *see also Olujić*, para 11.

[33] *See* Full Chamber Disqualification Decision, para 11 (citing Furundžija Judgment, para 189); *see also* You Ottara Disqualification Decision, para 11.

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".'[34] 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 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.'[35]

11. 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.[36] While neither the CCP nor the Rules 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 applications] as public'.[37]

C. Statements Made to the Press by a Sitting Judge

12. Over the last decade, the ECtHR has developed a consistent body of jurisprudence on the issue of press statements made by a judge sitting in a case prior to its completion. In the seminal case on the matter (*Buscemi v Italy*), the European Court held as follows:

> [A]bove all, […] judicial authorities are required to exercise *maximum discretion* with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press […]. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.[38]

In particular, the ECtHR established that where a sitting judge 'publicly use[s] expressions which impl[y] that he ha[s] *already formed an unfavorable view of the [defendant]'s case*', this may be 'incompatible with the impartiality required of any court', pursuant to Article 6(1) of the European Convention.[39] In *Buscemi*, the court concluded that—where the president of the tribunal hearing the applicant's case made statements to the press

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[34] Full Chamber Disqualification Decision, para 11 (citing Furundžija Judgment, para, 190); *see also* You Ottara Decision, para 11.

[35] *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).

[36] *See*, *e.g.*, Furundžija Judgment, para 196.

[37] Nil Nonn Disqualification Decision, para 3; *see also* Full Chamber Disqualification Decision, para 8.

[38] *Buscemi v Italy*, ECtHR Application No 29569/95, 'Judgment', 16 September 1999, para 67; *see also Kyprianou*, para 120 (citing *Buscemi*); *see also Olujić*, para 12.

[39] *Buscemi*, para 68. *N.B.* Regarding the requirement of impartiality, Article 6(1) of the ECHR is substantively identical to Article 14(1) of the ICCPR, the latter of which is expressly incorporated by reference into the ECCC Law.

suggesting that the applicant had given inaccurate evidence[40]—such remarks 'objectively justif[ied] the applicant's fears as to [the judge's] impartiality'.[41]

13. Three-and-a-half years later, the ECtHR acknowledged a violation of Article 6(1) under the Subjective Test in a case of striking factual similarity to the instant one. In *Lavents v Latvia*[42], the applicant had filed a number of unsuccessful requests for recusal during criminal proceedings against him—one against the entire court and two against its president—each grounded in allegations of partiality and bias.[43] Shortly after the filing of the applicant's second request against the president, the latter engaged in public criticism of the defence in the Latvian press,[44] which included predictions about the substantive outcome of the case. Recalling the general standard set out in *Buscemi*, the court stressed the distinct impropriety of utilizing the press to express negative opinions as to defence strategy.[45] And while it was ultimately the president's stated position on the outcome of the case that most appalled the ECtHR,[46] it was determined that the public statements attributed to the president with regard to Lavents' attempts at recusal had indeed amounted to improper criticisms of '*the attitude of the defence* before the court',[47] Holding in favor of Lavents' claim, the court concluded that the president's conduct could 'not under any circumstances be considered compatible with the

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40 *Buscemi*, para 40.

41 *Buscemi*, para 68.

42 *See Lavents v Latvia*, ECtHR Application No 58442/00, 'Judgment', 28 February 2003.

43 *Lavents*, paras 28–29.

44 *See Lavents*, para 30 ('Lavents' lawyers took advantage of every opportunity to recuse me. […] If counsel for Lavents and [the accused] actually showed an interest in accelerating the consideration of the case, it could be concluded within six or seven months. It would be possible if they did not want to get rid of me. […] Besides, if they were really clever people, they could discuss the evidence found in the file. […] But the defence has decided to get rid of me by any means, and requests for recusal have been strung one after the other […].') (unofficial translation). *N.B.* The original French reads as follows: 'Les avocats de Lavents ont profité de toute occasion pour me récuser. […] Si les avocats de Lavents et de [son coaccusé] manifestaient vraiment de l'intérêt pour l'accélération de l'examen de l'affaire, celle-ci pourrait être terminée dans le délai de six ou sept mois. Ce serait possible s'ils ne voulaient pas se débarrasser de moi. […] D'ailleurs, s'ils étaient des gens vraiment intelligents, ils pourraient débattre les preuves qui se trouvent dans le dossier. […] Mais la défense a décidé de se débarrasser de moi par tout moyen, et les demandes en récusation s'enchaînent les unes après les autres. […].'

45 *See Lavents*, para 118 ('In particular, for the president or any member of a tribunal deciding a case to use public expressions *implying a negative assessment of the case of a party* is incompatible with the requirements of impartiality of any court […].') (*citing* Buscemi) (emphasis added) (unofficial translation). *N.B.* The original French reads as follows: 'En particulier, le fait, pour le président ou le membre d'un tribunal appelé à trancher une affaire, d'employer publiquement des expressions sous-entendant une appréciation négative de la cause de l'une des parties, est incompatible avec les exigences d'impartialité de tout tribunal.'

46 *See Lavents*, para 118.

47 *Lavents*, para 119 (emphasis added) (unofficial translation). *N.B.* The original French reads as follows: 'l'attitude de la défense devant le tribunal'.

requirements of Article 6(1) of the [European] Convention' and '[t]he applicant therefore had the strongest reasons to fear the lack of impartiality of the judge'.[48]

14. More recently, applying the Objective Test in another instructive case (*Olujić v Latvia*[49]), the ECtHR found violations of Article 6(1) where three members of a judicial council hearing the applicant's case had each made negative comments to the media regarding the defence.[50] In particular, the presiding judge had 'commented that the defence's allegations that the case was politically motivated were untrue'.[51] One of the other judges on the council told the press that he 'viewed the applicant and his statements about his [the judge's] lack of independence as comical'.[52] Again citing *Buscemi*'s general prohibition against negative comment on a pending defence case, the court concluded that the public statements by the three judges: (i) raised 'legitimate doubts as to [their] impartiality';[53] (ii) 'were such as to objectively justify the applicant's fears';[54] and (iii) 'clearly showed […] bias against the applicant'.[55] Accordingly, it was held that the judges' 'further participation in the proceedings […] was incompatible with the requirement of impartiality under Article 6(1) of the [European] Convention'.[56]

15. Finally, regarding the distinction between 'functional' and 'personal' bias—the latter of which applies to the instant case—the ECtHR has said:

> The second is of a personal character and *derives from the conduct of the judges in a given case*. In terms of the [O]bjective [T]est, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in *Buscemi*, but it may also be of such a nature as to raise an issue under the [S]ubjective [T]est (see, for example, *Lavents*) and even disclose personal bias.[57]

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[48] *Ibid* (unofficial translation). *N.B.* The original French reads as follows: 'ne peuvent en aucun cas être considérées comme compatibles avec les exigences de l'article 6 § 1 de la Convention. Le requérant avait donc les plus fortes raisons de craindre le manque d'impartialité de cette juge'.
[49] *Olujić v Latvia*, ECtHR Application No 22330/05, 'Judgment', 5 May 2009.
[50] *Olujić*, paras 15–20.
[51] *Olujić*, para 17.
[52] *Olujić*, para 19.
[53] *Olujić*, para 16.
[54] *Olujić*, para 18 (citing *Buscemi*).
[55] *Olujić*, para 19.
[56] *Olujić*, para 19.
[57] *Kyprianou*, para 121 (emphasis added); *see also Olujić*, para 13. *N.B.* 'The first is functional in nature: where the judge's personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another actor in the proceedings, objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test.' *Ibid* (internal citations omitted).

As noted above, 'whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct'.[58]

IV. ARGUMENT

A. The Application is Timely and Admissible

16. 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,[59] with the Trial Chamber,[60] as soon as the Defence became 'aware of the grounds in question'.[61] Accordingly, the Chamber should admit the request.

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

17. Pursuant to Article 559 of the CCP, Judge Cartwright *must* step down pending a resolution of this request.[62] Should she and the Trial Chamber continue to disregard applicable Cambodian procedure, then—at the very least—she *should* step down pursuant to Rule 34(5). In either event, Judge Cartwright should be replaced by Judge Fenz for purposes of dealing with the instant application.[63]

C. Because Judge Cartwright's Comments Are Incompatible with the Requirements of Impartiality, She Should Be Recused from Any Further Proceedings in Case 002

1. Judge Cartwright's Statements to the Media Demonstrate Her Actual Bias Against the Defence

18. While Judge Cartwright—like all judges of the Trial Chamber—enjoys a legal presumption of impartiality,[64] her disparaging personal statements[65] to the New Zealand press regarding

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[58] *Kyprianou*, para 121 (emphasis added); *see also Olujić*, para 13.
[59] 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'.)
[60] *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.')
[61] Rule 34(3).
[62] *See* para 5, *supra*.
[63] *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').
[64] *See* para 9, *supra*.
[65] *N.B.* This is clearly a case of personal bias as opposed to functional bias. *See* para 15, supra.

the 'very common strategy [employed] by [the] Defence'[66] are 'proof to the contrary' of any such presumption in the instant case.[67] By making her recent remarks to the media, she 'has displayed hostility or ill will' toward counsel's approach to the case[68] and revealed her 'personal conviction' to be firmly at odds with the manner in which the Defence has thus far conducted itself in court.[69] Much like the offending judges in the *Buscemi* and *Lavents* cases, Judge Cartwright has publicly criticized 'the attitude of the defence before the court'.[70] And much like the offended applicants in those cases, Nuon Chea now has strong 'reasons to fear the lack of [Judge Cartwright's] impartiality'.[71]

19. It is apparent from her public comments that Judge Cartwright considers the Defence to be more interested in pursuing tactical disruption rather than legal representation at the ECCC.[72] Such negative comment, *in and of itself*, is sufficient to establish a finding of subjective bias against Judge Cartwright pursuant to the test set out in *Buscemi*, which prohibits the use of public 'expressions which impl[y] that [a judge] ha[s] already formed an unfavorable view of the [defendant]'s case'.[73] Equally troubling is Judge Cartwright's suggestion that previous motions for disqualification have been unfounded and designed to frustrate her personally and/or the proceedings generally.[74] This too—on its own and, *a fortiori*, in conjunction with her previous comment regarding the Defence's preference for disruption—amounts to a subjective violation of the *Buscemi* rule.

20. Moreover, the implication that, by raising issues of political interference and/or the independence of the tribunal (as the Defence has consistently done since the beginning of the case), counsel is somehow acting against Nuon Chea's interests[75] amounts to a further assault on a legitimate legal strategy. It follows from Judge Cartwright's remarks to the media on 4 February 2012[76]—when read (as they must be) in conjunction with her in-court

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66 *See* para 2, *supra*.
67 *See* para 9, *supra*.
68 *Ibid*.
69 *Ibid*.
70 *See* para 13, *supra*.
71 *Ibid*.
72 *See* para 2, *supra* ('The Defence Counsel "put more emphasis on disruption than representing their clients," [Judge Cartwright] says.')
73 *See* para 12, *supra*.
74 *See* para 2, *supra* ('It's a very common strategy by Defence Counsel. There's been an application to accuse me twice, once as a member of the entire tribunal and once personally and there have been other applications to accuse the president, who is Cambodian, and other Cambodian judges.')
75 *See* para 3, *supra* ('I had understood that your role here was to represent and defend your client. Please move on with your questions in relation to this trial.')
76 *See* para 2, *supra*.

interjection five days earlier[77]—that she takes the position that: (i) such Defence challenges are legally baseless and/or futile; (ii) there is no government interference at the ECCC which has unduly impacted Case 002; and/or (iii) all of the judges of the Trial Chamber are immune from external political pressure. Such views are, of course, contrary to those held by the Defence and still very much open to debate in Case 002.[78] In this regard, Judge Cartwright has preempted—as far as she is concerned—the consideration of any further argument on these important issues. Again, this is indicative of actual bias on her part.[79]

21. For these reasons, according to *Buscemi* and its progeny, Judge Cartwright's public statements clearly amount to expressions implying an unfavorable view of Nuon Chea's case.[80] As the ECtHR has held, such subjective manifestations of personal bias '[can]not under any circumstances be considered compatible with the requirements of' judicial impartiality.[81] Accordingly, the Subjective Test is satisfied in the instant case.

2. Additionally, or in the Alternative, Judge Cartwright's Statements to the Press Would Lead a Reasonable Observer, Properly Informed, to Conclude That She Lacks Sufficient Impartiality to Remain on the Bench

22. Should the Trial Chamber fail to accept the existence of actual bias on the part of Judge Cartwright, her behavior 'would lead a reasonable observer, properly informed, to reasonably apprehend' a lack of impartiality on her part.[82] In this case, the reasonable observer is a well-informed individual with knowledge of, among other things: (i) the various applications and submission made to date by the Defence, especially its previous requests filed pursuant to Rules 34 and 35;[83] (ii) the Defence's position regarding political interference at the tribunal and the international judges' apparent lack of concern over government meddling in the proceedings;[84] and (iii) Judge Cartwright's general attitude toward the Defence in court, including her consistent and obvious displays of frustration and dissatisfaction with the positions espoused by international counsel. The identical factors discussed in paragraphs nineteen and twenty (above)

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77 *See* para 3, *supra*.
78 *N.B.* As in *Lavents*, motions for recusal are part of the Defence 'case'. *See* para 13, *supra*.
79 *See Buscemi* and *Lavents*.
80 *See* paras 12–14*, supra*.
81 *See* para 13, *supra*.
82 Furundžija Judgment, para 189.
83 *See*, *e.g.*, Document No **E-137/2**, 'Urgent Application for Disqualification of Judge Cartwright', 21 November 2011, ERN 00754616–00754626.
84 *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.

would—as in the *Buscemi* and *Olujić* cases—'*objectively* justify [Nuon Chea's] fears as to [Judge Cartwright's] impartiality'.[85] In other words, the reasonable observer would consider Judge Cartwright's statements to the press to be 'incompatible with the requirement of [judicial] impartiality'.[86] Accordingly, the Objective Test is also (or in the alternative) satisfied in the instant case.

3. The Trial Chamber Should Not Tolerate or Promote the Application of Double Standards

23. Whether Judge Cartwright's remarks to the press satisfy either the Subjective or the Objective Test (or both), her comments are clearly inappropriate. As noted time and again by the ECtHR, 'judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges'.[87] If '[Judge] Cartwright sees it as her responsibility to […] [ensure] that the court is […] managed in an honest and professional way',[88] then she should refrain from expressing public positions that do not accord with 'the higher demands of justice and the elevated nature of [her] judicial office'.[89] Simply put, judicial 'discretion should [have] dissuade[d] [her] from making use of the press'.[90] It is because of this lapse that she must now be recused from any further proceedings in Case 002.

V. CONCLUSION

24. 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.

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85 *See* para 14, *supra* (emphasis added).
86 *Ibid*.
87 *See* para 12, *supra*.
88 *See* para 2, *supra*.
89 *See* para 12, *supra*.
90 *Ibid*.

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

CO-LAWYERS FOR NUON CHEA

SON Arun Michiel PESTMAN & Victor KOPPE