

BEFORE THE CO-INVESTIGATING JUDGE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File N°: 002/19-09-2007-ECCC-OCIJ

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REQUEST FOR INFORMATION CONCERNING THE APPARENT BIAS &
POTENTIAL EXISTENCE OF CONFLICT OF INTEREST OF OCIJ LEGAL
OFFICER DAVID BOYLE

<p>ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម CERTIFIED COPY/COPIE CERTIFIÉE CONFORME</p> <p>ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 05 / 03 / 2008</p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA</p>	<p>Distributed to:</p> <p>The Co-Investigating Judges: YOU Bunleng Marcel LEMONDE</p>
<p>Filed by:</p> <p>Co-Lawyers ANG Udom Michael G. KARNAVAS</p>	

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby files this request seeking information concerning Legal Officer¹ David Boyle’s ethical and professional fitness to occupy his current position in the OCIJ,² given that the OCIJ, as an *independent office* within the ECCC³ must carry out its investigative functions *impartially*.⁴ This request is respectfully made for the following reasons:

1. As Your Honors are fully aware, David Boyle has authored numerous articles concerning the ECCC and the envisaged so called Khmer Rouge trials.⁵
2. In commenting on the ECCC – from its establishment, to the nature of the Khmer Rouge, to the historical events of the relevant period, to the individuals expected to be held responsible for alleged crimes, to the validity and application of the Royal amnesty and pardon issued to Mr. IENG Sary, and to the applicable laws and procedures, Legal Officer Boyle has been offering opinions and conclusions which, quite alarmingly, give the impression that he harbors prejudgments and biases, thus making him unqualified to hold any position within the OCIJ.
3. Undoubtedly, Your Honors are familiar with the oft cited aphorism of Lord Hewart from *Rex v. Sussex Justices; Ex parte McCarthy*: “... *it is not merely of some importance but is of fundamental importance, that justice should not only be done, but*


¹ The Defense is not privy to the precise job title of Mr Boyle but believes that the title of ‘Legal Officer’ best reflects his main role within the Office of the Co-Investigating Judges. The Defense is aware that his official job title may be that of ‘Investigator/Analyst’.

² While all proceedings before the ECCC are governed primarily by the Rules, whenever a procedural question arises which is not directly addressed therein, the Co-Investigating Judges *shall* seek guidance from the relevant sections of the ECCC 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 (the “Agreement”) and the ECCC Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 (the “Law”) while giving “particular attention to the fundamental principles set out in Rule 21 of the Internal Rules (“Rules”); *see* Rule 2.

³ Rule 14.1.

⁴ Rule 55.5.

⁵ *See* Annex 1 which lists the articles known to the IENG Sary Defence. Given Boyle’s penchant for commenting on the ECCC and the application of the various laws and procedures, it is not known whether this list contains all of the articles or written material generated by Boyle.

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should manifestly and undoubtedly be seen to be done.”⁶ Lord Hewart was encapsulating a principle that had been long known and often expressed.⁷

4. While Legal Officer Boyle is not a judge, the nature of his position is to provide objective and unbiased legal reasoning and advice to the Co-Investigating Judges (“CIJs”) (as well as drafting memoranda of law, orders, decisions) who, throughout the investigative phase, are entrusted with making findings of fact and conclusions of law. The Legal Officers working for the CIJs are “sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to the judge’s thoughts in a way that neither [the] parties to the lawsuit nor [the judge’s] most intimate family members may be.”⁸ As a consequence, “even if the judge has no reason to recuse herself based on her own circumstances, a law clerk’s relationship might cause the impartiality of decisions from that judge’s chambers in which the clerk participates reasonably to be questioned.”⁹ Thus, as the gatekeepers of what legal analysis and reasoning the CIJs will be exposed to, the Legal Officers, like Caesar’s wife, should be above suspicion.¹⁰
5. Given Boyle’s extensive public pronouncements and opinions on matters related to the ECCC and specifically to Mr. IENG Sary, unlike Caesar’s wife, Boyle is not above suspicion. As such, in order to more fully determine whether the Defence

⁶ *R v. Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. See also *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000, (“*Furundžija* Appeal Judgment”), para. 195.

⁷ A comprehensive historical treatment is given by Chief Justice Burger in *Richmond Newspapers Inc. v. Virginia*, 448 US 555, 564-75 (1980); See also Nettheim “The Principle of Open Justice” (1984-1986) 8 *University of Tasmania Law Rev* 28; Baylis “Justice Done and Justice Seen to be Done” (1991) 21 *Victoria University Law Rev* 177; Kelly “Reviewing the Observer of Bias” (1993) 67 *ALJ* 340 at 346.

⁸ *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983)

⁹ *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416-17 (9th Cir. 1995); As to the effect of impartiality by one of the Legal Officers working for the OCIJ, Article 128 of the Cambodian Constitution mandates an independent and impartial judiciary, reflected in the Agreement and the Law which provide that all ECCC judges “shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source” (see Agreement, Article 3(3); Law, Article 10 new). Substantively identical guarantees are contained in the ICCPR (Article 14(1)), the European Convention on Human Rights (Article 6(1)), the American Convention on Human Rights (Article 8), and the African [Banjul] Charter on Human and Peoples’ Rights (Article 8(1)). Indeed, the UN Human Rights Committee has stated that the guarantee of independence and impartiality “is an absolute right that may suffer no exceptions” (see *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 October 1992). Because the concepts of independence and impartiality are closely linked, it is normally appropriate to consider them together (see Jessica Simor and Ben Emmerson QC, *HUMAN RIGHTS PRACTICE*, (Sweet & Maxwell 2006), (“Simor and Emmerson”), § 6.120).

¹⁰ *Leeson v. The General Medical Council* (1889) 59 LJChNS 233 at 241.

should move for Legal Officer Boyle's disqualification, the following information is respectfully requested:

- a. a list of all articles, position papers, book chapters, letters to editors, etc. authored by Boyle on anything related to the ECCC, the Khmer Rouge, the laws and procedures related to any investigations and/or trials anticipated to be conducted by the ECCC, as well as anything else that might be relevant to the issue of Boyle's fitness to be fair and impartial in carrying out his functions as a Legal Officer;
- b. a list of all conferences, training seminars, hearings, lectures, workshops and meetings attended or participated in by Boyle, where anything related to the ECCC, the Khmer Rouge, the laws and procedures related to any investigations and/or trials anticipated to be conducted by the ECCC were discussed;
- c. copies of any internal memoranda authored by or contributed to by Boyle concerning the nature of the ECCC, the applicable laws and procedures to be followed by the ECCC, and the Royal amnesty and pardon offered to Mr. IENG Sary;
- d. a detailed description of Boyle's participation in the drafting of the Order for Provisional Detention, including but not limited, to the issue of the Royal amnesty and pardon offered to Mr. IENG Sary, particularly given that this issue was ruled upon without providing Mr. IENG Sary adequate and fair notice¹¹ or opportunity to brief the issue and make an informed submissions through his Co-Lawyers;¹²

¹¹ The rule of natural justice - the obligation to accord procedural fairness by way of a hearing - is in part based not only on the importance of appearances but also the importance of having notice and a fair opportunity to make adequate submissions. See *Murray v. Legal Services Commission* [1999] NSWCA 70; 46 NSWLR 224 at [68]. See also Jackson, P *Natural Justice* (2nd ed, 1979) Sweet and Maxwell, Chapter 4.

¹² See Case of IENG Sary, Expedited Request for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues & Reply Per the Invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' Response to the Defence Appeal on Provisional Detention, 18 February 2008.

- e. a detailed description of what was known by the OCIJ of Boyle's writings and stated positions prior to his employment with the OCIJ, and specifically:¹³
- whether Boyle had fully informed the OCIJ of all material he had authored relevant to the ECCC;
 - whether the CIJs discussed with Boyle his views, particularly as they relate to the issue of the Royal amnesty and pardon offered to Mr. IENG Sary, whether explicitly expressed in his writings or otherwise;¹⁴ and
 - whether the CIJ discussed with Boyle his previously held positions / opinions and whether said positions / opinions gave rise to the perception of bias and/or the existence of a conflict of interest.¹⁵

WHEREFORE, due to the importance of the issues raised herein, it is respectfully urged that this request be acted upon as expeditiously as possible and that all relevant information be

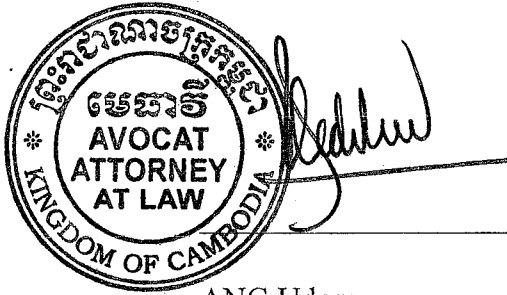
¹³ Appointments which give rise to a risk of undue influence over the outcome of the case are impermissible, and where legitimate doubt exists as to a judge's impartiality, he must withdraw from the case. Indeed in making the assessment, *all facts that are publicly known* should be considered; appearances are crucial (*see* Simor and Emmerson § 6.119 - §6.124).

¹⁴ A judge will be considered to lack independence and impartiality meriting disqualification if either "actual bias exists" (the "Subjective Test") or "[t]here is an unacceptable appearance of bias" (the "Objective Test"). *See Furundžija* Appeal Judgment, para. 189; *see also Prosecutor v. Karemera et al.*, ICTR-98-44-T, The Bureau's "Decision on Motion by Karemera for Disqualification of Trial Judges", 17 May 2004 ("*Karemera* Decision"), para. 8; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", 13 March 2004 ("*Sesay* Decision"), para. 4; *Prosecutor v. Blagojević et al.*, IT-02-60, "Decision on Blagojević's Application Pursuant to Rule 15(B)", 19 March 2003, para. 8. The reasonable observer is "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background an appraised also of the fact that impartiality is one of the duties that Judges swear to uphold". *Furundžija* Appeal Judgment, para. 190 (*quoting R.D.S. v. The Queen* (1997) Can. Sup. Ct., 27 September 1997, para. 111); *see also Prosecutor v. Brđjanin and Talić*, IT-99-36-T, "Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brđjanin-Talić Trial (Presiding Judge)", 3 May 2002, para. 17. The SCSL has formulated the test as follows: "The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that [the Judge] lacks impartiality." *Sesay* Decision, para. 15.

¹⁵ Because "the fundamental human right to be tried before an independent and impartial tribunal" is considered to be "an integral component" of the fair trial guarantee (*Furundžija* Appeal Judgment, para. 177), the ICTY has held that its own rule must "be read broadly to permit any ground of impartiality to be raised [...] as a basis for disqualification" *Karemera* Decision, para. 7. Query whether the OCIJ in interpreting the Law and Rules either narrowly or "broadly" ever considered Boyle to be disqualified given his publicly expressed opinions.

provided concerning Legal Officer David Boyle, so the IENG Sary Defence can determine whether in the interest of justice¹⁶ to formally move for the disqualification of David Boyle.¹⁷ In the alternative, should the CIJ find that David Boyle should immediately be relieved of his current position and should be dismissed from the OCIJ, then the request of the aforementioned information should be considered moot.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4th day of **March, 2008**

¹⁶ Pursuant to Article 12(1) of the Agreement, “[w]here Cambodian law does not deal with a particular matter [...] guidance may also be sought in procedural rules established at the international level.” Furthermore, Article 12(2) of the Agreement provides that all chambers of the ECCC “shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [(the “ICCPR”)], to which Cambodia is a party”. Article 14 (1) of the ICCPR, relevantly provides that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...” (Emphasis added).

¹⁷ Disqualification for bias of a judicial officer in order to guarantee judicial impartiality is determined by a test of what fair minded people - not just the parties, but the public - might reasonably apprehend or suspect. *See Webb & Hay v. The Queen* (1993-94) 181 CLR 41 at 47, especially the list of cases set out in footnote 36. The High Court of Australia expressly rejected the less strict “real likelihood of bias” test, applying instead the reasonable apprehension test to the conduct of a juror. *See, Webb & Hay v. The Queen*, refusing to follow the House of Lords in *R v Gough* [1993] AC 646.