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BEFORE THE PRE-TRIAL CHAMBER

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S SUBMISSION ON
CONFLICT OF INTEREST OF AN OCIJ INVESTIGATOR

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I. INTRODUCTION

1. The Co-Prosecutors request the Pre-Trial Chamber to dismiss the Charged Person IENG Sary's submission ("Submission") regarding the potential conflict of interest of an Investigator/Researcher/Analyst in the Office of the Co-Investigating Judges ("Investigator"). The Submission is inadmissible, barred by time, defective in form and, in any case, devoid of merit.¹

II. RELEVANT FACTUAL BACKGROUND

2. On 4 March 2008, the Charged Person filed an application ("Application") before the Co-Investigating Judges seeking sweeping information regarding an Investigator of their Office. The Application contended that the Investigator had offered "opinions and conclusions" that "give the impression that he harbours prejudgments and prejudices, thus making him unqualified to hold any position within the OCIJ."² As no decision was forthcoming, the Charged Person, by a letter of 24 April 2008, reminded the Co-Investigating Judges of his "interrogatories" and requested that they render a decision expeditiously.³ On 26 May 2008, the Co-Investigating Judges responded by issuing a letter ("Impugned Letter") and stated that:
 - a. The Application was similar to an unsuccessful request made by the Charged Person "concerning a potential conflict of interest" of another investigator.⁴ The Co-Investigating Judges recalled that, in rejecting this request on 24 January 2008, they had ruled that the investigators of their Office were akin to judicial police and that the relevant judicial officers or the prosecutors control their functions. They added that rules guaranteeing the independence and impartiality of courts applied only "to magistrates and not to investigators".⁵
 - b. The Internal Rules ("Rules") do not provide for the disqualification of an investigator.

¹ *Case of IENG Sary*, Appeal of Mr. Ieng Sary Against the OCIJ's Decision on the Defence Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 08), ERN 00195028 – 00195035, A162/III/1, 6 Jun 2008 [*hereinafter* Submission]. The Case File Officer electronically transmitted the Submission to the Co-Prosecutors on 9 June 2008 at 1212h.

² *Case of IENG Sary*, Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00165542 – 00165547, A162, 4 Mar 2008, para. 2 [*hereinafter* Application].

³ *Case of IENG Sary*, Request Concerning the Interview of Mr IENG Sary on His Conditions of Detention on 2 May 2008, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00185454 – 00185456, C31, 24 Apr 2008, p. 3.

⁴ *Case of IENG Sary*, Request for Information Regarding an Eventual Conflict of Interest, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00159515 – 00159516, A121/1, 24 Jan 2008 [*hereinafter* Heder Order].

⁵ Heder Order, p. 2.

- c. Rule 34 provides a specific procedure for disqualifying a judge. It is the requesting party, and not the judge, who should provide the evidence in support of such a request.⁶
3. Aggrieved by the Impugned Letter, the Charged Person has filed the current Submission.

III. PRELIMINARY REQUESTS

Oral Hearing is not Required

4. The Co-Prosecutors submit that this is an appropriate case to be determined on written pleadings only, without recourse to an oral hearing. They request that the Pre-Trial Chamber should not read the word “hearing” in Rule 77 only to mean an *oral* hearing, but should read it also to include a determination based on written pleadings alone. The Practice Direction on Filing of Documents (“Practice Direction”) supports this interpretation in that it envisages situations “where there is to be *no oral argument*”.⁷ This is also the practice before other international criminal tribunals.⁸ It supports judicial economy while safeguarding the rights of the parties.

Public Information

5. The Co-Prosecutors request the Pre-Trial Chamber to place this Response on this Court’s website along with such other filings related to this Submission that the Pre-Trial Chamber deems fit. This is consistent with Rule 77(6), which provides that the Pre-Trial Chamber may decide that all or a part of any of its hearings—and, by inference, decisions—are made public if it considers that this would be in the interests of justice and it does not affect public order or any protective measures authorized by this Court.⁹
6. In holding its hearings in public, seeking assistance from *amici curiae*, rendering public decisions and placing pleadings of the parties and its decisions on the Court’s website, the Pre-Trial Chamber’s practice has consistently reflected the spirit of this Rule.

⁶ *Case of IENG Sary*, Request for Information on the “Appearance the Apparent Bias and Potential Existence of Conflict of Interest Concerning MM S. Heder and D. Boyle”, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00193591, A162/2, 26 May 2008 [*hereinafter* Impugned Letter].

⁷ Filing of Documents Before the ECCC, Practice Direction 01/2007/Rev.1, 5 Oct 2007, art. 8.4. (emphasis added)

⁸ *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-T, ICTY Trial Chamber II, 24 Feb 1999, para. 64-68.

⁹ Rules, rule 77(6).

IV. LAW ON CONFLICT OF INTEREST

Independence and Impartiality of Judges

7. Article 128 of the Cambodian Constitution mandates an independent and impartial judiciary. This fundamental concept is reflected in the Agreement and the ECCC 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 source.¹⁰ Substantively identical guarantees are contained in the International Covenant on Civil and Political Rights (“ICCPR”),¹¹ the European Convention on Human Rights (“ECHR”),¹² the Inter-American Convention on Human Rights (“IACHR”) ¹³ and the African Charter on Human and Peoples’ Rights (“ACHPR”).¹⁴ Indeed, the UN Human Rights Committee has stated that the guarantee of independence and impartiality “is an absolute right that may suffer no exception.”¹⁵
8. The perceived independence and impartiality of international courts and tribunals are important requisites for legitimacy in the eyes of the parties, potential litigants and the international community.¹⁶ The notions of independence and impartiality are indispensable to the long-term attractiveness of international adjudication and its credibility as a depoliticized alternative to political dispute resolution.¹⁷ The consensual basis of many international adjudicatory processes, the weakness of enforcement procedures, *etc.* lend support for resorting to the strictest standards of independence and impartiality in order to build confidence in the work of the international judiciary and to facilitate voluntary compliance with its decisions.¹⁸ Mixed or hybrid courts, such as this one, bear the extra burden of setting best practice examples for domestic courts to follow.¹⁹
9. A presumption of impartiality attaches to judges and applies to the judges of this Court by virtue of Article 3.3 of the Agreement.²⁰ This presumption derives from their oath of office and the

¹⁰ Agreement, art. 3(3); ECCC Law, art. 10(new).

¹¹ ICCPR, art. 14(1).

¹² ECHR, art. 6(1).

¹³ IACHR, art. 8(1).

¹⁴ ACHPR, art. 7(1).

¹⁵ *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 Oct 1992.

¹⁶ Yuval Shany & Sigall Horovitz, *Judicial Independence in The Hague and Freetown*, *Leiden Journal of International Law*, 21 (2008), p. 120 [*hereinafter* Shany & Horovitz].

¹⁷ Shany & Horovitz, p. 120.

¹⁸ Shany & Horovitz, p. 120.

¹⁹ Shany & Horovitz, p. 120.

²⁰ *Case of NUON Chea*, Public Decision on the Co-Lawyers’ Urgent Application for the Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ERN 00160734 – 00160742, C11/29, 4 Feb 2008, para. 15 [*hereinafter* Ney Thol Decision].

qualifications required for their appointment.²¹ The applicant seeking to displace it bears a high burden²² and must adduce sufficient evidence to establish that the judge in question can be objectively perceived to be biased.²³ In the absence of the evidence to the contrary, it must be assumed that judges “can disabuse their minds of any irrelevant personal beliefs or predispositions”.²⁴

10. A judge’s views or inclinations of a general nature should be distinguished from an inclination to implement those views as a judge in a particular case.²⁵ Judges have personal convictions.²⁶ Absolute neutrality can hardly, if ever, be achieved.²⁷ Even political sympathies do not, of themselves, imply a lack of impartiality.²⁸ A judge should not be disqualified because of qualifications he possesses which, by their very nature, play an integral role in satisfying his eligibility requirements.²⁹ It would be “an odd result if operation of an eligibility requirement were to lead to an inference of bias.”³⁰ The possession of experience in any of the relevant areas by a judge cannot, in the absence of contrary evidence, constitute evidence of bias or impartiality.³¹
11. Rule 34(2), which provides the mechanism for disqualification of ECCC judges, is no different from similar rules applicable at the various *ad hoc* international tribunals like those for the former Yugoslavia (“ICTY”),³² Rwanda (“ICTR”),³³ Sierra Leone (“SCSL”) ³⁴ or permanent judicial bodies such as the International Criminal Court (“ICC”) ³⁵ and the International Court of Justice (“ICJ”).³⁶
12. This Court, being an internationalised court, applies international norms and standards.³⁷ The settled jurisprudence of the international tribunals is consistent with the test of bias applied before it.³⁸ In

Also see *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2; *Prosecutor v. Akayesu*, Judgment of the Appeals Chamber, Case No. ICTR-96-4, 1 Jun 2001, para. 90 [*hereinafter* Akayesu Judgment].

²¹ Ney Thol Decision, para. 16.

²² Ney Thol Decision, para. 15.

²³ Ney Thol Decision, para. 19; Akayesu Judgment, para. 88; *Prosecutor v. Furundzija*, Judgment, Case No. IT-95.17/1-A, ICY Appeals Chamber, 21 Jul 2000, para. 196 [*hereinafter* Furundzija Judgment].

²⁴ Furundzija Judgment, para. 196.

²⁵ Furundzija Judgment, para. 200.

²⁶ Furundzija Judgment, para. 203.

²⁷ Furundzija Judgment, para. 203.

²⁸ Furundzija Judgment, para. 203.

²⁹ Furundzija Judgment, para. 205.

³⁰ Furundzija Judgment, para. 205.

³¹ Furundzija Judgment, para. 205.

³² ICTY Rules of Procedure and Evidence, rule 15(A).

³³ ICTR Rules of Procedure and Evidence, rule 15(A).

³⁴ SCSL Rules of Procedure and Evidence, rule 15(A).

³⁵ ICC Rules of Procedure and Evidence, rule 34(1).

³⁶ Statute of the ICJ, art. 17(2).

³⁷ Ney Thol Decision, para. 30.

Furundzija, the ICTY held that a judge should not only be subjectively free from bias but that there should also be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. Therefore, a judge would be considered to lack independence and impartiality (and, therefore, be subject to disqualification) if either “actual bias exists” (“subjective test”) or there is an “unacceptable appearance of bias” (“objective test”).³⁹

13. Quoting *Furundzija* with approval, the Pre-Trial Chamber of this Court has held that there is an appearance of bias if:

- i. A judge is a party to a case, or has a financial or proprietary interest in the outcome of a case, or if his decision will lead to the promotion of a cause, in which he or she is involved, together with one of the parties. Under these circumstances, a judge’s disqualification from a case is automatic; or
- ii. The circumstances would lead a reasonable observer, properly informed, to apprehend bias.⁴⁰

14. A reasonable observer, in this context, must be an informed person, with the knowledge of all the relevant circumstances, including the tradition of integrity and impartiality, and aware of the fact that impartiality is one of the duties that the judges swear to uphold.⁴¹

15. In *Furundzija*, the ICTY denied a request for disqualification of Judge Mumba on the ground that she was adjudicating a case that could (and did) advance a legal and political agenda that she helped create while being a member of the United Nations Commission on the Status of Women before her appointment to that Tribunal.⁴² In *Akayesu*, the ICTR rejected the claim that political pressures destroyed that Tribunal’s independence and impartiality. The defendant had contended that public and private remarks made by judges coupled with “pressures and special arrangements” tended to show partiality against him. The Tribunal noted that the defendant had the burden to establish its lack of impartiality or independence by “adequate and reliable evidence” and that he could not meet this burden only by “bald allegations” of bias and selective prosecution.⁴³ Similarly, the ICJ denied a request by Israel to preclude Judge Elaraby from sitting in the *Wall Case* on the ground of the

³⁸ Ney Thol Decision, para. 20.

³⁹ *Furundzija* Judgement, para. 189-190; *Prosecutor v. Brdanin & Talic*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber II, 18 May 2000, para. 13, fn. 36.

⁴⁰ Ney Thol Decision, para. 20.

⁴¹ Ney Thol Decision, para. 21.

⁴² *Furundzija* Judgement, para. 215.

⁴³ *Prosecutor v. Akayesu*, Judgement of the Appeals Chamber, Case No. ICTR-96-4, 1 Jun 2001, para. 90.

judge's prior involvement as an Egyptian diplomat in the Palestine – Israel dispute and the views expressed by him on that issue in an interview. The Court held that on those facts it could not hold that the judge had “previously taken part in the case” in any capacity.⁴⁴ The SCSL, however, disqualified Judge Robertson from hearing a case for having expressed views in a published book about the crimes committed by a party to that case.⁴⁵

Independence and Impartiality of Court Officials other than Judges

16. Several countries' codes of criminal procedure provide for the disqualification of law clerks.⁴⁶ However, in an application filed by the Charged Person this Court has ruled that its investigators can be compared to the judicial police whose functions are controlled by the relevant judicial officers.⁴⁷ It added that the rules that guarantee independence and impartiality “only apply to magistrates and not to investigators”.⁴⁸ This decision attained finality after the Charged Person chose not to appeal it.
17. While considering civil law driven inquisitorial criminal jurisdictions (similar to the ECCC), the European Court of Human Rights has emphasized that Article 6 of the ECHR (guaranteeing the right to a fair and independent trial) would primarily apply to the tribunal that is called upon to determine the guilt of a defendant.⁴⁹ In a similar vein, the *Cour de Cassation* of Belgium made a distinction between an investigating magistrate and a trial judge in the application of the principles of independence and impartiality. It ruled that Article 6 of the ECHR is not, in principle, concerned with the rights of the defendant before the *juridictions d'instructions*.⁵⁰

⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, 30 Jun 2004, (2004) ICJ Rep 3.

⁴⁵ *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15, 13 Mar 2004.

⁴⁶ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Annexes to the Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding the Case, Pre-Trial Chamber-I of the ICC, Case No. 01/04-01/06, 31 Aug 2006.

⁴⁷ Heder Order, p. 1.

⁴⁸ Heder Order, p. 2.

⁴⁹ *Imbrioscia v. Switzerland*, Judgement, Application no. 13972/88, 24 Nov 1993, para. 36. (holding “Certainly the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a ‘tribunal’ competent to determine ‘any criminal charge’, but it does not follow that the Article (art. 6) has no application to pre-trial proceedings.”)

⁵⁰ Cass. (Belgium), 12 Dec 1982, Pas., 1983, I, 498-503.

V. ARGUMENT

Submission is Defective in its Form and Content

18. The Submission is unclear whether it is (1) an appeal under Rule 74(3) against a decision of the Co-Investigating Judges or, (2) an application under Rule 34(5) for disqualification of one or both of the Co-Investigating Judges.⁵¹ The Submission can be either an appeal or an application for disqualification. It cannot be both, as it claims to be.⁵² The formal and substantive requirements of the two mechanisms are different and hardly overlap. On this basis alone, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Submission as ambiguous and for not being properly before it.

19. Even if the Submission is considered an appeal, then it is inadmissible, barred by time and is substantively devoid of merit. On the other hand, if the Submission is considered an application for disqualification, then it is defective in its form, lacks material particulars and is substantively misconceived.

Submission, as an Appeal, is Inadmissible

20. The Submission purports to be an *appeal* "pursuant to Rule 34(5)."⁵³ Clearly, that provision does not provide for an appeal. The Submission is, therefore, ambiguous and defective.

21. Rule 74(3) exhaustively enumerates the types of orders against which a charged person may appeal to the Pre-Trial Chamber. It clearly does not envisage an appeal against an order refusing to provide information (such as the present Submission).

22. The exhaustive nature of Rule 74(3) is shown by the following:

- i. A plain reading of Section D of the Rules indicates that the principal jurisdiction of the Pre-Trial Chamber is to adjudicate disputes between the Co-Prosecutors and the Co-Investigating Judges.⁵⁴ The Agreement and the ECCC Law envisaged this as the *sole* function of the Pre-

⁵¹ Submission, para. 12 – 15.

⁵² Submission, para. 13 – 14.

⁵³ Submission, p. 1.

⁵⁴ Rules, rule. 71 – 72.

Trial Chamber.⁵⁵ Rule 73 provides the *Additional Jurisdiction* of the Pre-Trial Chamber and clearly limits it to the situations contained therein.

- ii. The title of Rule 74, *Grounds of Appeal*, is self-explanatory - it indicates that only the orders enumerated in that Rule can be appealed before the Pre-Trial Chamber. While it permits the Co-Prosecutors to appeal *all* orders of the Co-Investigating Judges, it limits the appellate rights of a charged person to the orders identified in Rule 74(3).
- iii. The Rules do not grant a residuary jurisdiction to the Pre-Trial Chamber in that they do not provide it an omnibus power (like that of a national supreme court) to hear appeals against any decision of the Co-Investigating Judges preferred by any party.

23. Almost analogously, Article 267 of the Cambodian Criminal Procedure Code provides for restrictive rights to appeal the decisions of the investigating magistrates. It does not envisage an appeal against an order denying an application for information regarding an investigator.

24. Consequently, an appeal against the Impugned Letter is clearly beyond the scope of Rule 74(3) and is, therefore, inadmissible.

Submission, as an Appeal, is Barred by Time

25. The Submission is barred by time as the Charged Person filed his Notice of Appeal on 6 June 2008. The deadline for its filing expired on 5 June 2008. The Submission gives no reason for this delay. It also does not contain a request (or provide good cause) to condone it. It merely states that the "Defence *orally* notified the Greffier of the OCIJ on 5 June 2008 [...] of its intention to appeal".⁵⁶

26. Rule 75(1) requires an appellant to file a Notice of Appeal within ten days of the date of notice of the impugned decision. In the present case, the Co-Investigating Judges issued the Impugned Letter on 26 May 2008 and the Case File Officer communicated it to the Charged Person's counsel on 27 May 2008.⁵⁷ Accordingly, the Notice of Appeal was due on 5 June 2008. The relevant Practice Direction requires that any person filing a document outside the time limit *shall* indicate the reasons for delay on the Filing Instructions. It authorises *only* the Judges to condone the late filing.⁵⁸

⁵⁵ Agreement, art. 7; ECCC Law, art. 20(new), 23(new).

⁵⁶ Submission, p. 1. (emphasis added)

⁵⁷ The Impugned Letter was electronically circulated to the parties by the Case File Officer at 1622h on 27 May 2008.

⁵⁸ Practice Direction, art. 9.

27. The Rules also envisage a *written* Notice of Appeal and not an oral one. This is clear from the use of the word “file” in Rule 75(1). An *oral* Notice of Appeal cannot be *filed* and hence is not valid. The Practice Direction also requires any document to be filed “in hard copy *only*.”⁵⁹ Therefore, the Charged Person’s *oral* notice to the Greffier on 5 June 2008 was invalid.

Submission, as an Application for Disqualification, is Deficient in Form and Content

28. An application for disqualification of a Co-Investigating Judge should satisfy *all* the following requirements. It should:

- i. Identify a case in which a judge has a personal or financial interest or concerning which the judge has, or has had, any association which objectively might affect his impartiality, or objectively, give rise to an appearance of bias.⁶⁰
- ii. Indicate grounds for disqualification and supporting evidence.⁶¹
- iii. Be filed as soon as the applicant became aware of the grounds for disqualification.⁶²

29. The Submission satisfies none of these requirements. In particular:

- a. It, on its own admission, is not an “actual” request for disqualification.⁶³
- b. Though there are two Co-Investigating Judges, it does not identify which of these Judge’s disqualification it is seeking.
- c. It fails to cite or identify any case in which one or both of the Co-Investigating Judges have a personal or financial interest.
- d. It does not identify a case concerning which one or both the Co-Investigating Judges have, or have had, any association which objectively might affect their impartiality, or objectively, give rise to an appearance of bias.
- e. It does not indicate grounds for disqualification. It only seeks information regarding an investigator of the Office of the Co-Investigating Judges. Nor does it demonstrate how only one

⁵⁹ Practice Direction, art. 3.1. (emphasis added)

⁶⁰ Rules, rule 34(2).

⁶¹ Rules, rule 34(3).

⁶² Rules, rule 34(3).

⁶³ Submission, para 13.

investigator may influence the decision(s) of the two Co-Investigating Judges where there are more than a dozen investigative and legal personnel working on the national and international sides of that Office.

- f. It does not indicate when the Charged Person became aware of the grounds of disqualifications, if any, and whether he filed the application as soon as he became aware of them.
- g. It, on its own admission, does not provide any supporting evidence.

30. Even if the Submission was unambiguous and had been properly placed before the Pre-Trial Chamber, it is inadmissible and defective in both its alleged formulations and should, therefore, be dismissed *in limine*.

Rules do not Permit Unsubstantiated Requests for Information

31. The Rules, as well as the Cambodian and international practice, do not permit requests for unsubstantiated omnibus information regarding judges and their investigators.⁶⁴ Even assuming that such a request was permissible, the Charged Person's Application made sweeping and ambiguous requests without specifying any evidence that could support an appearance or even an inference of bias on the part of either a Co-Investigating Judge or the Investigator. As an illustration, the Application sought the following information from the Office of the Co-Investigating Judges:

- i. All papers, book chapters and letters to editors, *etc.* on "anything related to the work of the ECCC".
- ii. Information concerning all conferences, seminars, hearings, lectures, workshops and meetings regarding the ECCC in which the Investigator participated.
- iii. Internal memoranda of the Office of the Co-Investigating Judges authored by the Investigator.
- iv. Description of the Investigator's participation in the drafting of the provisional detention order of this Charged Person.

⁶⁴ *Case of NUON Chea*, Disclosure of Credentials, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00156722, C11/13, 19 Dec 2007; Heder Order, p. 1.

- v. Description of what the Office of the Co-Investigating Judges knew about the Investigator's writings prior to his employment.⁶⁵

32. Although styled as a disclosure request and not a substantive application for disqualification, the Application failed to refer to any specific example of the Investigator's work that may give rise to an appearance of bias that would justify the request for disclosure. If the Charged Person had filed the Application in the mere hope that the requested information might reveal evidence that could support disqualification, then it was clearly a fishing expedition, which met a deserved rejection. In any event, the information sought under categories (i) and (ii) included material already available in the public domain or not necessarily likely to be in the possession of the Office of the Co-Investigating Judges. As regards categories (iii) to (v), the information likely pertained to that Office's internal work processes and output. Such information, for reasons of confidentiality, may not be amenable to disclosure.
33. The Pre-Trial Chamber has previously rejected an application by the Charged Person NUON Chea seeking personal and professional background information about its judges.⁶⁶ It held that neither the Rules nor the Cambodian or international legal practice provided for the provision of such information.⁶⁷

Rules do not provide for Disqualification of Investigators

34. Like any other international criminal tribunal, the judges of this Court enjoy special status, privileges and immunities.⁶⁸ The requirements of independence and impartiality, actual and apparent, are crucial to the discharge of their duties.⁶⁹ To strengthen these notions, the judges have adopted a voluntary Code of Judicial Ethics.⁷⁰ In keeping with their special status and the requirements of impartiality and independence, the Rules lay down a specific and judicially determinable procedure for their disqualification.⁷¹

⁶⁵ Application, p. 4 – 5.

⁶⁶ *Case of NUON Chea*, Disclosure of Credentials, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00156722, C11/13, 19 Dec 2007.

⁶⁷ *Case of NUON Chea*, Request for Resumes of PTC Judges, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ERN 00157561, C11/16, 9 Jan 2008.

⁶⁸ Rules, rule 6(2) - (3).

⁶⁹ Rules, rule 6(1).

⁷⁰ Available at http://www.eccc.gov.kh/english/cabinet/fileUpload/31/Code_of_Judicial_Ethics_31-01-08_ENG.pdf (accessed 19 Jun 2008).

⁷¹ Rules, rule 34.

35. Investigators of this Court are, however, employees of the ECCC or the United Nations and, as such, are governed by the regulations of those bodies.⁷² Although they are also bound to perform their duties without any external interference,⁷³ they are subject to the disciplinary supervision (including the power of removal) of the appropriate Cambodian and United Nations authorities.⁷⁴ Accordingly, proceedings for disqualification of Investigators are administrative in nature and are not subject to judicial determination, unless the punitive provisions of Rule 35 (which concerns an interference with the administration of justice) are invoked.
36. The Submission's reliance on the decisions of the ICC in *Lubanga* and an American federal court in *Hall* is erroneous.⁷⁵ Those cases pertained to officials/clerks of judicial chambers who had employer-employee relationship with a party appearing before the judge whom they were advising or assisting. The situation of the Investigator in question is quite different. Among other things:
- a. He has never had any personal or professional relationship with any of the parties before this Court. Neither does the Submission allege so.
 - b. There is no proof (or even an allegation) of subjective or objective bias.
 - c. He works for the Office of the Co-Investigating Judges that, although being neutral, does not determine the guilt or innocence of a defendant.
 - d. His job description is akin to that of an officer of the judicial police, who work under the control of the relevant judicial authorities. Investigators like him do not make judicial decisions and work strictly under rogatory letters.

Expression of Views on Relevant Legal Issues is not Bias

37. An investigator's expression of opinion on legal issues relating to the *Khmer Rouge* and the establishment of the ECCC (when it was not even established) does not, *ipso facto*, disqualify that person from working in a judicial office. Like judges, qualified lawyers such as the Investigator are often called upon to speak publicly on matters of contemporary relevance. Indeed, their public or academic standing and comments are a qualification for them to be selected for legal or judicial offices. Consequently, a legally trained investigator's views of a general nature should not, in and of

⁷² Rules, rule 6.

⁷³ Rules, rule 6(1).

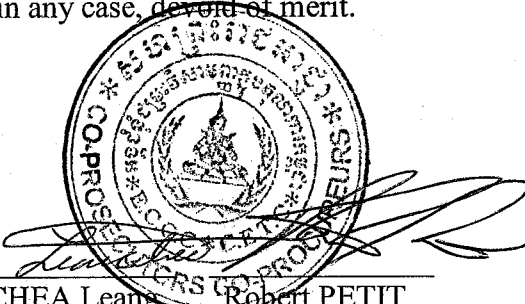
⁷⁴ Rules, rule 6(4).

⁷⁵ Submission, fn. 8, 13.

themselves, lead to a conclusion that those views would colour his opinion while assisting a judicial office in a particular case, upon analysis of relevant law and evidence.

VI. CONCLUSION

38. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to dismiss IENG Sary's Submission as inadmissible, barred by time, defective in form and, in any case, devoid of merit.



CHEA Leang Robert PETIT
Co-Prosecutor Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this twenty-third day of June 2008.