

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

Criminal Case File No: 002/19-09-2007-ECCC-OCIJ (PTC)

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**IENG SARY'S APPLICATION FOR DISQUALIFICATION OF OCIJ
INVESTIGATOR STEPHEN HEDER AND OCIJ LEGAL OFFICER DAVID BOYLE
IN THE OFFICE OF THE CO-INVESTIGATING JUDGES**

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I. INTRODUCTION

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Internal Rule 34(5) (“Rules”), hereby respectfully requests the Pre-Trial Chamber to disqualify Legal Officer David Boyle (“Legal Officer Boyle”) and Investigator Stephen Heder (“Investigator Heder”) from conducting any further work on Case File 002 for the Office of the Co-Investigating Judges (“OCIJ”). As set out herein, both Legal Officer Boyle and Investigator Heder have associations which might affect their impartiality in conducting the legal and investigative aspects of the OCIJ investigation in Case File 002. They therefore must be disqualified from continuing to work for the OCIJ in any capacity.

II. FACTUAL HISTORY

1. Mr. Ang Udom was assigned to represent Mr. IENG Sary as his Cambodian Co-Lawyer on 12 November 2007.¹ On 14 December 2007, Mr. Michael G. Karnavas was also assigned to represent Mr. IENG Sary as his Foreign Co-Lawyer.² Both assignments were recognized as permanent by the OCIJ on 7 February 2008.³
2. Upon being assigned to represent Mr. IENG Sary, the Defence became aware of a potential conflict of interest involving Investigator Heder. It appeared that Heder had worked for the Office of the Co-Prosecutors during the drafting of the Introductory Submission, before then joining the OCIJ in order to “impartially” investigate those same allegations. In order to verify its concerns and in an attempt to meet its ethical and professional obligations, the Defence sought more information from the OCIJ on Investigator Heder’s prior employment with the OCP and the effect this may have on his work with the OCIJ.⁴
3. The OCIJ responded defensively to this transparent request for information⁵ by claiming that Mr. Heder’s prior work for the OCP before being transferred to the OCIJ, “does not

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter to Co-Investigating Judges from Rupert Skilbeck, Head of DSS, 12 November 2007.

² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter to Co-Investigating Judges from Rupert Skilbeck, Head of DSS, 14 December 2007.

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Lawyers Recognition Decision, 7 February 2008.

⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning Potential Conflict of Interest, 10 January 2008 (“First Heder Request”).

⁵ *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled “Re: Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008 (“First Heder Decision”).

raise any problem regarding the independence and impartiality of the Co-Investigating Judges, and in no way prejudices the progress of ongoing judicial investigations.”⁶ The OCIJ did however confirm that Investigator Heder was hired in “July 2006 and assigned to the Office of the Co-Investigating Judges. However, before taking up his duties, he was detached to the Office of the Co-Prosecutors from July to December 2006.”⁷ No information was provided by the OCIJ in response to the Defence’s request regarding the exact nature of his work for both the OCP and OCIJ or his role, if any, in the drafting of the Introductory Submission (“IS”).⁸

4. Subsequent to the issuance of the First Heder Decision, the Defence also became aware that David Boyle, a Legal Officer employed by the OCIJ, had “authored numerous articles concerning the ECCC” and that in commenting on “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.”⁹ The Defence therefore sought further information on Mr. Boyle’s collected writings and pronouncements on this myriad of legal issues faced by the ECCC and directly affecting Mr. IENG Sary.¹⁰

⁶ *Id.*, p. 2.

⁷ *Id.*, p. 1.

⁸ In the request of 10 January 2009, the Defence had requested various different types of information from the OCIJ. This included: 1) Was Mr. Heder a member of the OCP? 2) If so: a) What were the exact dates of his employment? b) What was the exact nature of his work? c) Was he involved in any capacity in the investigative or drafting process of the Introductory Submission (reviewing and analyzing documents, interviewing witnesses, participating in brainstorming sessions, etc)? d) Did Mr. Heder fully disclose to the OCIJ the nature of his work prior to his engagement with the OCIJ? e) Did the OCIJ request of Mr. Heder to memorialize in writing the nature of his work with the OCP? What are Mr. Heder’s past and current responsibilities? 3) Has consideration been given by the OCIJ as to whether Mr. Heder’s employment with the OCIJ poses an actual or perceived conflict of interest?

⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Apparent Bias and Potential Conflict of Interest of OCIJ Legal Officer David Boyle, 4 March 2008, paras. 1-2 (“Boyle Request”).

¹⁰ The Defence sought the following information from the OCIJ: 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

5. Despite the importance of this issue, and the continuing impact that Mr. Boyle's role in advising the Co-Investigating Judges ("CIJs") could have on the fairness of the judicial decisions issued by the OCIJ, no response from the OCIJ to the Boyle Request was forthcoming. The Defence was forced to remind the OCIJ of the Boyle Request¹¹ and was finally provided with a substantive decision by the OCIJ on 26 May 2008.¹² In this decision, instead of providing the information requested concerning Legal Officer Boyle, the OCIJ merely asserted (without any citation in support) that "there does not appear to be any legal basis for such repeated demands." The Boyle Response proceeded to explain that "the ECCC Internal Rules do not provide for a party to request the disqualification of an investigator" and that for requests to disqualify a judge, "there is a specific procedure to be followed [...] in particular, the evidence in support of such a request must be provided by the requesting party, not by the judge in question."¹³
6. Aggrieved by the OCIJ's defensive and insufficient response, the Defence sought to appeal this decision, affecting as it does, the fair and impartial conduct of proceedings. An appeal was filed on 6 June 2008,¹⁴ to which the OCP responded on 23 June 2008.¹⁵ The Pre-Trial Chamber denied the Boyle Appeal as inadmissible¹⁶ without ruling on the merits as to whether the Defence's request for information on Legal Officer Boyle was justified in the circumstances. The Pre-Trial Chamber's legal basis for declaring the appeal inadmissible was unclear. It appears that the Pre-Trial Chamber did not consider

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 notice or opportunity to brief the issue and make an informed submissions through his Co-Lawyers; 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: i) whether Boyle had fully informed the OCIJ of all material he had authored relevant to the ECCC; ii) 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; and, iii) whether the CIJs 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. *See Boyle Request*, para. 5.

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request concerning the interview of Mr. IENG Sary on his conditions of detention on 2 May 2008, 24 April 2008.

¹² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request for information on "the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle", 26 May 2008 ("Boyle Decision").

¹³ *Id.*

¹⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC08), 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*, 6 June 2008 ("Boyle Appeal").

¹⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC08), Co-Prosecutors' Response to Ieng Sary's Submission on Conflict of Interest of an OCIJ Investigator, 23 June 2008 ("OCP Boyle Response").

¹⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC08), Decision on Ieng Sary's Appeals Against Letter Concerning Request for Information Concerning Legal Officer David Boyle, 28 August 2008 p. 5 ("Boyle Appeal Decision").

that the subject matter of the Boyle Appeal was one that fell within the categories enumerated in Rule 74.

7. However, the Pre-Trial Chamber also held that no issue concerning a violation of equality of arms between the OCP and Defence was raised by declaring the Appeal inadmissible.¹⁷ Although under Rule 74(2) the OCP has the right to appeal “all orders by the Co-Investigating Judges” while the Defence may only appeal the specific orders listed in Rule 74(3), this did not impact upon equality of arms for the Pre-Trial Chamber as the Boyle Decision did not constitute an order¹⁸ and so presumably neither the OCP nor Defence would have had the right to appeal this decision.¹⁹ Whatever the legal basis for declaring the appeal inadmissible, the Defence was left with no further avenue to appeal or reverse the OCIJ’s Boyle Decision.
8. In late 2008, it came to the attention of the Defence that, in a book proposal submitted on 18 December 2003 under the working title of ‘*Genocide and Auto-Genocide in Cambodia: Communism, Nationalism and Murder, 1975-1978*’, Investigator Heder referred to his qualifications as having “researched the CPK for 30 years, as a journalist, intelligence officer, human rights advocate, historian, UN official, legal scholar and political scientist” before working as an investigator for the OCIJ.²⁰ The Defence therefore requested “any information in the possession of the OCIJ regarding:
 - a. Investigator Heder’s prior employment as an intelligence agent including the precise role and activities of Heder in this position as well as anything else that might be relevant to the issue of Heder’s fitness to be fair and impartial in carrying out his functions as an investigator; and

¹⁷ *Id.*

¹⁸ *Id.*, para. 18.

¹⁹ This restrictive interpretation of the word “order” in Rule 74(3) by the Pre-Trial Chamber contrasts markedly with the broad interpretation given to the same word in a previous decision. When faced with the question of whether a decision in the form of a letter by the OCIJ which prohibited communication between Mr .IENG Sary and his wife could constitute an order “relating to provisional detention or bail” under Rule 74(3)(f) the Pre-Trial Chamber looked at the effect of the decision rather than simply the formal name to establish that it constituted a “segregation order” and therefore was admissible. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC05), Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, 21 March 2008.

²⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, para. 1 (“Second Heder Request”). As explained therein, the Defence was provided with documentation through a confidential source which appeared authentic, reflecting that Investigator Heder on 18 December 2003 submitted a book proposal: ‘*Genocide and Auto-Genocide in Cambodia: Communism, Nationalism and Murder, 1975-1978*’, Investigator Heder referred to his qualifications as having “researched the CPK for 30 years, as a journalist, intelligence officer, human rights advocate, historian, UN official, legal scholar and political scientist, which is my most recent professional reincarnation.”

- b. Whether this prior employment as an intelligence agent was disclosed to the Office of the Co-Prosecutors, for whom Investigator Heder worked initially, and subsequently to the OCIJ when Investigator Heder transferred to that office.”²¹
9. In its belated response to the Second Heder Request, the OCIJ again appeared defensive in claiming the lack of any legal basis for this type of request.²² The OCIJ did however confirm that it had “no knowledge of any information or documentation that might support the allegations in your request in any way at all.”²³ The question that begs to be answered however is whether the OCIJ actually put the matter to Mr. Heder, and if so, what if anything was Mr. Heder’s response.

III. PRELIMINARY OBSERVATIONS

A. Admissibility of the Application

10. As provided in Rule 34(5), “an application for disqualification of a Co-Investigating Judge shall be submitted to the Pre-Trial Chamber.” As set out below, the rules which are applicable to a Co-Investigating Judge when exercising either his judicial or investigative functions must apply equally to staff within the OCIJ which are either assisting with these functions or conducting them on behalf of the OCIJ. Therefore applications to disqualify Investigators or Legal Officers within the employ of the OCIJ are also admissible under Rule 34(5). Whether or not the Pre-Trial Chamber accepts that Investigator Heder or Legal Officer Boyle has not acted with the required impartiality is a question of substance and does not affect the admissibility of the Application.
11. The Application has also been filed “as soon as the party becomes aware of the grounds in question” as required by Rule 34(3). This obligation is subject to the requirement in the same provision that a party must “provide supporting evidence” for any application for disqualification. An application for disqualification must not be based on mere rumors of factors affecting impartiality. As soon as it came into possession of the relevant information causing a suspicion concerning the impartiality of Legal Officer Boyle and Investigator Heder, the Defence filed repeated requests for information to the OCIJ

²¹ *Id.* para. 5.

²² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled “Your Request for Information Concerning Mr. Stephen Heder, 29 May 2009 (“Second Heder Decision”).

²³ *Id.*

pertaining to this information. As can be seen from the above factual history however, the OCIJ was far from diligent in responding to the Defence's requests. The final response from the OCIJ was only issued on 29 May 2009,²⁴ all but four months after the request was filed. It would not have been possible to file this Application before now. The Defence was obliged to seek out the information itself rather than being provided with this information by the OCIJ. Moreover, because of the common issues affecting both Investigator Heder and Legal Officer Boyle, and in the interests of judicial economy, the Defence was mindful to file a consolidated application as expeditiously as practicable. The Application has also been filed "before the Closing Order" as required by Rule 34(4)(b).

B. Request for an Oral Hearing

12. This Application is lodged under Rule 34(5). In a similar vein to pre-trial appeals filed under Rule 74(3) the procedure for proceedings related to this application is set out by Rule 77.²⁵ Under Rule 77(3), the presumption for all pre-trial appeals and applications is that there will be an oral hearing.²⁶ The Pre-Trial Chamber has repeatedly granted a request for an oral hearing in an appeal for which there was disagreement between the parties.²⁷ When it was faced with another application for disqualification by the Nuon Chea Defence team²⁸ the Pre-Trial Chamber issued its decision on the application without recourse to an oral hearing.²⁹ This procedure may be explained in part by the fact that no oral hearing was requested by the Nuon Chea Defence.

13. In the present case, the Defence submits that the presumption should be in favor of holding an oral hearing for the following reasons:

- a. the Application raises complex issues that have not previously been raised before

²⁴ See Second Heder Decision.

²⁵ This Rule is titled "Procedure for Pre-Trial Appeals and Applications." (Emphasis added).

²⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation & Request for Expedited Filing Schedule and Public Oral Hearing, 10 March 2009, para. 10 ("Confidentiality Appeal").

²⁷ *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on KHIEU Samphan's Request for a Public Hearing, 4 November 2008; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 29 January 2009, ("Written Submissions Decision").

²⁸ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC01), Urgent Application for Disqualification of Judge Ney Thol, 28 January 2008.

²⁹ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC01), Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008 ("Ney Thol Disqualification Decision").

the Pre-Trial Chamber such as the extent of the obligation of impartiality of OCIJ staff members;

- b. the Application clearly and unequivocally impacts upon the legacy of the ECCC in providing a supposed example of fair and transparent judicial proceedings.

14. The Defence requests that the oral hearing is held at the Pre-Trial Chamber's earliest convenience. This should be the first available opportunity after the submission of responses to this Application by the OCP and Civil Parties. Further to the schedule drawn up by the Pre-Trial Chamber, and in the absence of any requests for extension of time filed by the other parties, this should be during the week of 27-31 July 2009.³⁰

IV. SUMMARY OF ARGUMENT

15. The Defence will show that:

- A. The obligation of impartiality on the judge applies equally to either Legal Officers or judicial investigators working directly for the judges ("OCIJ Investigators");
- B. The system of disqualifying judges under Rule 34(2) for a lack of impartiality applies equally to legal advisers or investigators working directly for judges;
- C. The book authored by Investigator Heder on the Khmer Rouge, his prior employment with the OCP and as an alleged intelligence agent with an unnamed agency objectively affects his impartiality and requires his disqualification;
- D. The prior articles and lectures given on controversial issues affecting the ECCC by David Boyle objectively affects his impartiality and requires his disqualification;

V. LAW

A. Duty of impartiality and independence under Cambodian and International Law

³⁰ According to the Pre-Trial Chamber, it will next hold oral hearings during the week of 27-31 July 2009. See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum, 19 December 2008.

16. Article 128 of the Cambodian Constitution³¹ mandates an independent and impartial judiciary: “The Judicial power shall be an independent power. The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of citizens.” This concept is reflected in Article 3 of the Agreement which provides that all ECCC judges “shall be persons of high moral character, impartiality and integrity [...] [and] “shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source”.³² Article 2(1) of the ECCC Code of Judicial Ethics also mandates that “Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.”³³ Substantively identical guarantees are contained in the International Convention on Civil and Political Rights,³⁴ the European Convention on Human Rights (ECHR),³⁵ the American Convention on Human Rights,³⁶ and the African Charter on Human and Peoples’ Rights.³⁷ The ECCC Code of Judicial Ethics also mandates that “Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.”³⁸ Indeed the UN Human Rights Committee has stated that the guarantee of independence and impartiality “is an absolute right that may suffer no exceptions”.³⁹

³¹ Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 (“Cambodian Constitution”).

³² 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, Article 3(3).

³³ ECCC Code of Judicial Ethics adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008.

³⁴ Article 14(1): “Everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”

³⁵ 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”. (Emphasis added)

³⁶ 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”. See, e.g., *Herrera-Ulloa v. Costa Rica*, Inter-American Court of Human Rights, Judgment, 2 July 2004, para. 171: “[T]he person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.”

³⁷ 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 People’s Rights, 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).”

³⁸ Article 2(1). ECCC Code of Judicial Ethics, 5 September 2008.

³⁹ *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 October 1992.

B. Applications for disqualification

17. Rule 34(2) provides:

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

18. Rule 34(2) is, in substance and spirit, no different from similar rules applicable at the various international criminal tribunals, namely the ICTY,⁴⁰ the ICTR,⁴¹ the SCSL,⁴² and the ICC⁴³ (collectively, the “International Tribunals”). Notwithstanding superficial differences in chosen language, the underlying concern of these rules is identical to that of the relevant human rights jurisprudence outlined above, namely that judges must be, and must be seen to be, independent and impartial. Based on this concern, the International Tribunals have been consistent in articulating their test for bias.⁴⁴

19. Pursuant to Rule 34(3) the applicant “shall clearly indicate the grounds and shall provide supporting evidence” and the “application shall be filed as soon as the party becomes aware of the grounds in question”.

20. Under Article 53 of the 2007 Cambodian Code of Criminal Procedure (“CPC”), “an Investigating Judge may be substituted by another Investigating Judge through the decision of the Court President for the sake of good administration of justice. That

⁴⁰ See ICTY Rules of Procedure and Evidence, Rule 15(A). “A Judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has or has had any associations which might affect his impartiality. He shall in any such circumstance withdraw [...]”

⁴¹ See ICTR Rules of Procedure and Evidence, Rule 15(A). “A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case.”

⁴² See SCSL Rules of Procedure and Evidence, Rule 15(A). “A Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground.”

⁴³ See ICC Rules of Procedure and Evidence, Rule 34(1). “[T]he grounds for disqualification of a judge [...] shall include, *inter alia*, the following: (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties; [...] (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could affect the required impartiality of the person concerned; (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.”

⁴⁴ See *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009, para. 2; See also *Prosecutor v. Vidoje Blagojevic*, IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, para. 2; *Prosecutor v. Vojislav Seselj*, Decision on Motion for Disqualification, 16 February 2007, para. 4; *Prosecutor v. Florence Hartmann*, Report on Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009, para. 24; *Prosecutor v. Eliézer Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, para. 45.

decision shall be made by a letter with explanation of reasons by the Prosecutor of the Kingdom or upon request from the relevant parties.” The grounds for challenging a judge, including an Investigating Judge,⁴⁵ are set out in Article 556 of the CPC:

“All judges may be challenged for the following causes:

- If the judge or his or her spouse, currently or formerly, is one of the parties;
- If the judge is linked with one of the parties by parental link up to sixth degree or by alliance up to third degree or has been linked by alliance up to third degree;
- If the judge is a guardian of one of the parties;
- If there is a pending litigation between the judge and one of the parties;
- If the judge is a witness or was called to witness as expert in the case;
- If the judge is or was a representative or assistant to one of the parties;
- If the judge has participated in making the decision on the case as an arbitrator, at the first instance decision which was subject to appeal or the appeal decision is subject to appeal or having given legal opinion in the case.”

VI. ARGUMENT

A. The judicial obligation of impartiality applies equally to either Legal Officers or Investigators working directly for the Co-Investigating Judges

21. As a matter of law and logic, the obligation for a judge to be impartial, must equally apply to those people who work closely with the Co-Investigating Judges, and carry out judicial functions on their behalf.

22. Under Article 5(1) of the Agreement between the United Nations and the Royal Cambodian Government the OCIJ is mandated exclusively to conduct the pre-trial investigation.⁴⁶ The Defence is prohibited from carrying out its own investigations and must channel all requests to the OCIJ.⁴⁷ Rule 55(5) confirms that this broad power held

⁴⁵ Article 556 refers to the “Grounds for Challenging a Trial Judge”. However, Article 53, which provides for the grounds for disqualifying an Investigating Judge, equally refers to Article 556 as being the grounds upon which applications for disqualification of Investigating Judges must be made.

⁴⁶ 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, Article 5(1) (“Agreement”).

⁴⁷ The OCIJ has emphasized the role of the parties with respect to ECCC investigations: “Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. [...] The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of

by the OCIJ is channeled towards “ascertaining the truth” regarding the facts set out in the IS.

23. The CIJs are not obliged to carry out all investigative actions personally. Under Rule 62(1), the CIJs may delegate to judicial police or investigators to carry out investigative actions on their behalf through Rogatory Letters. In so doing, under Rule 62(3) OCIJ Investigators: (a) “are obliged to draw up a written record of [their] investigations and findings”; (b) “may interview Civil Parties as provided in Rule 59(6)”; and (c) “may search for and seize evidence.”

24. The duties of OCIJ Investigators at the ECCC are:

1. With the assistance of the analyst and legal officers, conducting research and analysis of information, witness statements and documentary evidence collected through investigative activities.
2. Identifying gaps in evidence collected, future requirements for investigation (including sources of evidence for exploitation), criminal associations and patterns of criminal activity as well as political and military command structures.
3. Pursuant to Rogatory Letters, preparing and carrying out field missions notably to obtain relevant witness testimony and documentary evidence.
4. Ensuring the appropriate management and protection of information and evidence gathered, the correct post-mission submission of the investigative product and information as well as ensuring the completion of all necessary administrative and material steps necessary to support the mission.
5. Preparing any necessary graphs, charts, tables and other illustrative devices for visual presentation of data.
6. Assisting the Co-Investigating Judges and Legal Research Team in evaluating information, selecting essential elements and correlating new information with existing information, compiling information and analyzing findings.
7. Other tasks as considered necessary by the Co-Investigating Judges and the Investigation Team Leader.⁴⁸

25. In performing these delegated investigative actions OCIJ Investigators are bound, in the same vein as the CIJs themselves, to “conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.”⁴⁹ As such, OCIJ Investigators are under a

their right to request investigative action.” *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2. (emphasis added)

⁴⁸ See Investigator, L-3, Vacancy Announcement Number: 08-LEG-DESA-419528-S-Phnom-Penh, Issued on 3 October 2008.

⁴⁹ Rule 55(5). Emphasis added.

continuing duty of impartiality whenever they conduct any investigative actions on behalf of the OCIJ.

26. In addition to their investigative duties, the CIJs also have judicial functions during the investigative phase. In this respect they act in the same way as the Pre-Trial Judge or Pre-Trial Chamber at the *ad hoc* International Tribunals, impartially adjudicating upon pre-trial motions on a variety of issues. In Case File 002, the OCIJ has already been faced with, *inter alia*, motions on provisional detention,⁵⁰ the application of Joint Criminal Enterprise liability,⁵¹ the effect of ECCC corruption on the fairness of proceedings,⁵² the effect of a Royal Amnesty granted to Ieng Sary and his prior trial in 1979⁵³ and the admissibility or evidence obtained by torture.⁵⁴

27. The duties of Legal Officers advising the Co-Investigating Judges at the ECCC are:

1. Operational: Works closely with the Investigators, Analysts and other legal staff including Supervising Associate Legal Officers, Legal Assistants and Legal Interns in order to assess charges raised as well as the evidence filed by the parties and the evaluation of the need for further investigative measures; to advise the Co-Investigating Judges on any charges to be sustained and on the identification of any persons to be charged and brought forward for trial; Assists with the provision of legal advice to the Co-Investigating Judges, Investigators and Analysts on applicable international and Cambodian criminal law and procedure and on other legal issues arising.
2. Pre-trial proceedings: Provide appropriate and timely judicial responses to requests and applications filed by the parties concerned including conducting and co-coordinating in-depth legal research on applicable international and Cambodian criminal law and procedure, on international human rights standards and on other legal issues arising.
3. Collaboration: Within the tasks assigned to the incumbent, to liaise and work closely with all staff within and outside of the OCIJ in order to foster solid team spirit and to ensure the effective implementation of the hybrid framework of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

⁵⁰ See e.g. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion Against Extension of Provisional Detention, 28 October 2008.

⁵¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion Against the Application at the ECCC of the Form of Liability Known and Joint Criminal Enterprise, 28 July 2008.

⁵² *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, 27 March 2009.

⁵³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2007.

⁵⁴ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Defence Request for Exclusion of Evidence Obtained by Torture, 11 February 2009.

4. Administrative: Assists in the development and drafting of proposals as regards the Internal Rules/Practice Directions and with the drafting of the OCIJ Administrative Regulations and Standard Operating Practices; to provide any necessary translation support; and to assist as requested with any other relevant administrative tasks.⁵⁵

28. Legal Officers are required to provide objective and unbiased legal reasoning and advice to the CIJs on various legal issues. This may include drafting memoranda of law for the CIJs on complex matters beyond their expertise. Legal Officers would also logically have “provided appropriate and timely judicial responses to requests and applications filed by the parties.”⁵⁶ In domestic criminal systems, where both the CIJs appear to have exclusively worked prior to being employed by the ECCC,⁵⁷ the subject matter and the limited size of the cases means that the CIJs conduct all research and draft all their own decisions. By contrast the sheer number of decisions and orders that must be issued by the judges in international criminal proceedings, in conjunction with the complexity of these questions requires that the judges be assisted by able and well-qualified legal officers. Indeed, this is the very rationale of having such a large staff in the OCIJ.

29. Moreover, although the post is listed as that of Legal Officer, it appears evident from the job description that various investigative tasks fall within this post including the “evaluation of the need for further investigative measures.” As such, the explicit obligation of impartiality weighing on OCIJ Investigators detailed above⁵⁸ should logically apply equally to Legal Officers when they undertake investigative activities for the OCIJ.

⁵⁵ See Legal Advisor (2 Posts), L-3, Vacancy Announcement Number: 07-LEG-DESA-416275-S-PHNOM-PENH. Issued on 13 November 2007.

⁵⁶ *Id.*

⁵⁷ According to the UNAKRT website, International Co-Investigating Judge Marcel Lemonde spent his entire professional life working in France. Mr Lemonde “[e]ntered the Judiciary in 1976 and occupied the positions of investigating judge in Annecy then in Lyon, Vice President of the high Court of Lyon, Deputy Director to the National School of the Judiciary, judge in the Court of Appeals of Versailles and President of the Criminal Chamber of the Court of Appeals in Bastia. Since February 2005, he has presided in a Penal Chamber of the Court of Appeals in Paris. Mr. Lemonde was also President of the French Association of Investigating Judges from 1984 to 1987.”

You Bunleng “has been a judge in Cambodia’s Appeals Court and was appointed President of the Appeals Court in 2007. He previously worked at the Ministry of Justice for 11 years. There is no indication that he has previously worked in international law. See Phnom Penh Post, 12 February 2008 ‘Tribunal Glossary’ at http://www.phnompenhpost.com/index.php/component/option,com_myblog/Itemid,149/show,Glossary-Photo-948.html/

⁵⁸ See Rule 55(5).

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30. Therefore, while Legal Officers are not officially judges they do conduct both judicial and investigative functions. 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.”⁵⁹ The Legal Officers working for the CIJs must be impartial in the advice and assistance they provide. Pre-judging issues raised by the parties, providing advice that favors one party’s position or simply neglecting to research a certain issue from all perspectives all violate the duty of impartiality weighing on the Legal Officers.

31. Conversely, to find that although the CIJs must conduct their investigations or draft decisions impartially, staff who either draft decisions or conduct investigations on their behalf are under no such obligation, would be completely illogical. It would leave the right of the Charged Persons to fair and impartial judicial proceedings entirely to chance depending on who was responsible for the decision or investigative action in question.

B. Disqualification of ECCC judges under Rule 34(2) for a lack of impartiality applies equally to Legal Officers or Investigators Working Directly for the Co-Investigating Judges

32. The obligation of impartiality weighing on judges under the Constitution, Agreement and Rules is enforced at the ECCC by the system of applications for disqualification set out in Rule 34.

33. In assessing applications for disqualification the ICTY Appeals Chamber,⁶⁰ and the Pre-Trial Chamber,⁶¹ have found that a judge will be considered to lack independence and impartiality and therefore be subject to disqualification if either “actual bias exists” (the “Subjective Test”) or “[t]here is an unacceptable appearance of bias” (the “Objective Test”).⁶² The Objective Test is met where either:

- (i) A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from a case is automatic; or

⁵⁹ *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

⁶⁰ *Prosecutor v. Furundžija*, IT-95-17/1-A, “Judgment”, 21 July 2000 (“*Furundžija Judgment*”).

⁶¹ Ney Thol Disqualification Decision, para. 20.

⁶² *Furundžija Judgment*, para. 189.



(ii) The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁶³

34. This formulation is similar to the test employed in many municipal jurisdictions including both common-law and civil-law systems,⁶⁴ and reflects the view of Lord Hewart: “It is not merely of some importance, it is of fundamental importance that justice should not only be done, *but should manifestly and undoubtedly seen to be done.*”⁶⁵
35. The rationale behind these two tests is that the impartiality of the judicial process is so fundamental that a judge may be disqualified even where there is only the *appearance* of bias. The “fundamental human right to be tried before an independent and impartial tribunal” is therefore considered to be “an integral component” of the fair trial guarantee.⁶⁶ As such, 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.”⁶⁷
36. The fundamental importance of the right to an independent and impartial tribunal therefore mandates in favor of broadly applying Rule 34 with regards to the target of applications for disqualification as well as the grounds of impartiality which may be raised. Despite the wording of Rule 34(2) which appears to only expressly allow for applications for disqualification of “judges” it is respectfully submitted that this term must be read broadly to include those who carry out judicial functions on behalf of the OCIJ for five principal reasons.
37. Firstly, Rule 34 may not be used to artificially limit the right to be tried before an

⁶³ *Furundžija* 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 (“*Blagojević Decision*”), 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* Judgment, para. 190 (*quoting R.D.S. v. The Queen* (1997) Can. Sup. Ct., 27 September 1997, para. 111); *see also Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brdjanin-Talic 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.

⁶⁴ *See Furundžija* Judgment, paras. 183–188 (canvassing (i) UK, Australian, Canadian, South African, and US case law and (ii) German, French, Italian, and Swedish criminal codes).

⁶⁵ *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259 (emphasis added); *see also Furundžija* Judgment, para. 195.

⁶⁶ *Furundžija* Judgment, para. 177.

⁶⁷ *Karemera Decision*, para. 7 (emphasis added).

independent and impartial tribunal protected by the Constitution and International Treaties to which Cambodia is a party.⁶⁸ Rule 34 simply sets out the formal requirements for applications for disqualification. It does not therefore grant an extra right to the parties but simply implements the fair trial rights set out in the Constitution and Agreement. The Pre-Trial Chamber has held that the Internal Rules have primacy over the CPC.⁶⁹ However, there has been no determination at the ECCC of the status of the Constitution vis-à-vis the Rules. As the Constitution is “the supreme law of the Kingdom of Cambodia”⁷⁰ and the ECCC is “established within the existing Cambodian Court structure”⁷¹ and “under Cambodian law,”⁷² the Constitution logically has primacy over the Rules. Therefore, Rule 34 may not be interpreted to prevent a party from legitimately exercising the constitutionally protected right to a fair trial.

38. Secondly, it would be entirely and inherently illogical for the Rules to require the CIJs to be impartial in the exercise of his investigative or judicial functions and yet not make the same requirement of OCIJ Investigators or Legal Officers who conduct the same tasks on their behalf. To include judges but exclude Investigators and Legal Officers from the disqualification procedure in Rule 34 would be wholly arbitrary when they are conducting the same tasks. The Rules must be interpreted in a way that makes them internally consistent. As the Rules set forth obligations of impartiality on OCIJ Investigators there must be a way of enforcing these provisions. This is further reinforced by the Pre-Trial Chamber’s assertion that the Rules “form a self-contained regime of procedural law.”⁷³ As a self-contained regime, passed in its entirety, it must be presumed that the Rules are supposed to be internally consistent.
39. Thirdly, to impose an obligation of impartiality upon OCIJ Investigators or Legal Officers without interpreting the Rules to provide a robust enforcement mechanism would render the right to an impartial and independent tribunal illusory. Rights must be interpreted to make them effective.⁷⁴
40. Fourthly, only a broad interpretation of the term “judge” in Rule 34 in terms of the target of applications for disqualification would adequately reflect the object and purpose of this

⁶⁸ See Article 128 of the Cambodian Constitution and Article 14(1) of the ICCPR which is incorporated into the Cambodian Legal System via Article 31 of the Cambodian Constitution.

⁶⁹ *Chea* Annulment Appeal Decision, para. 14.

⁷⁰ Article 150, Cambodian Constitution.

⁷¹ *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC/TC, Decision on Request for Release, para. 10.

⁷² See Preamble to the Internal Rules.

⁷³ *Chea* Annulment Appeal Decision, para. 14.

⁷⁴ See *Artico v. Italy*, ECHR, 30 April 1980, para. 33.

Rule. The object and purpose of a treaty may be taken into account to aid with the interpretation of treaty.⁷⁵ Article 2(2) of the Agreement provides that the “Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.” The Rules were promulgated not by the Cambodian Parliament but by the Judges of the ECCC, seemingly under some form of implied authority under the Agreement. No other lawful basis appears to exist to justify the promulgation of these Rules. As Article 31 of the Vienna Convention applies to the Agreement, it is entirely logical that the same provision would apply in interpreting the Rules, which constitute an extension of the Agreement.

41. The object and purpose of the Rules is, as set out in the Preamble, to ensure that the procedure at the ECCC is consistent with international fair trial standards. Therefore, in line with these international standards, if the lack of impartiality of anyone working for the judges can be proven to affect the fairness of proceedings in the same manner as the lack of impartiality of a judge, this provision must be interpreted broadly to include such challenges within its ambit.
42. Fifthly, as previously held, the right to a fair trial set out in Rule 21 requires the Pre-Trial Chamber it to verify whether a provision of the Rules should be interpreted broadly.⁷⁶ Although that decision concerned the admissibility of an appeal rather than a direct challenge before the Pre-Trial Chamber, the same rationale applies. Both concern the manner in which Pre-Trial Chamber interprets its own jurisdiction.
43. As explained above, the right to an impartial tribunal is an integral component of the fair trial guarantee. Recognizing the impact of a lack of impartiality of judicial staff, other courts have held that the lack of impartiality of law clerk may result in his disqualification. For example, in *Hamid v. Price Waterhouse* it was found that “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.”⁷⁷ Domestic jurisdictions also

⁷⁵ See Article 31(1), Vienna Convention on the Law of Treaties 1969: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁷⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Decision on Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009.

⁷⁷ *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416-17 (9th Cir. 1995). See also *King v Sussex Judges, Ex Parte McCarthy* [1924] 1 KB 256, in particular 257-259; See also *Onishea v. Hopper*, 126 F.3d at 1323, 1340 (11th Cir. 1997) (“It is true that a law clerk’s involvement in a case and his or her relationship to one of the parties may constitute grounds for the judge’s disqualification.”)

provide for the possibility of challenges being made to court officials where their impartiality is in question or where that of the Judges could be challenged on that basis.⁷⁸ The jurisprudence of the International Criminal Court (“ICC”) also suggests that requests to disqualify legal staff must be decided under the legal provisions relating to the disqualification of judges.⁷⁹

⁷⁸ The Spanish Criminal Procedure Act then addresses the topic, “Concerning Challenges Brought Against Court and Tribunal Assistants,” (Ley de Enjuiciamiento Criminal (Spanish Criminal Procedure Act), Book I, Title III, Ch. 4) and provides that “challenges may be brought against the clerks of municipal courts, criminal investigation courts (*juzgados de instrucción*), high courts (*Audiencias*), and the Supreme Court,” and also “court officers,” on the exact same grounds listed in the Organic Law of the Judiciary (*See id.* , Book I, Title III, Chapter I, Art. 54 & Chapter IV, Art. 84). In Portugal, a judge is prohibited from exercising his function in a criminal proceeding “where he has taken part in the proceedings as a representative of the Public Prosecutor, a body of the judicial police, defence attorney, counsel for the party entitled to bring a private prosecution or to bring a private action for damages or expert.” (Código de Processo Penal (Portuguese Code of Criminal Procedure), Book I, Title I, Ch. VI, Art. 39(1)(c)). In the same chapter of the Code of Criminal Procedure, Art. 47 extends this same impediment to “experts, interpreters and court officials,” and provides a summary process for disqualification of these officials. The same formulation – of requiring the disqualification of judicial staff on the same grounds applicable to the judges themselves – has been enacted, *inter alia* , in criminal codes of jurisdictions in South America (including Argentina, Brazil, Paraguay, Colombia, and Bolivia) (, Central America (including Costa Rica). Código Procesal Penal (Argentine Code of Criminal Procedure), Book I, Title III, Ch. 4 (entitled “Disqualification and Challenges”), Art. 55(1). Art. 63 of the same chapter provides that “court clerks and assistants must disqualify themselves and may be challenged on the grounds described in Art. 55” In Brazil, a judge “may not exercise jurisdiction” in proceedings in which he or she, or his or her spouse or relative, “has acted as defence counsel or lawyer, representative of the Public Prosecution service, police authority, officer of the court or expert witness.” *See* , Código de Processo Penal (Brazilian Code of Criminal Procedure), Book I, Title VIII, Ch. I (entitled “Incompatibilities and Disqualifications”), Art. 252.I & II. A separate article in Chapter V states that “The provisions on the recusation of judges shall apply to clerks of the court and judicial officials, in matters applicable thereto.” *See id.* , Art. 274. In Paraguay, the law stating that a judge should be excused if he or she previously intervened in the proceedings “as a party, legal representative, proxy, defence lawyer, expert, or witness” is applied equally “to court clerks and anyone who provides any type of judicial assistance in proceedings.” *See* Código Procesal Penal (Paraguayan Code of Criminal Procedure), Book One, Title I, Ch. IV (entitled “Grounds for Disqualification and Challenges”), Arts. 50(8) & 51. Colombia and Bolivia have essentially the same code provisions. *See* Código de Procedimiento Penal (Colombian Code of Criminal Procedure), Book I, Title I, Ch. 7, Arts. 56(12) & 63; Código de Procedimiento Penal (Bolivian Code of Criminal Procedure), Part II, Book I, Title I, Chapter 5, Arts. 316(1) & 322. The Code of Criminal Procedure of Costa Rica, *see* Código Procesal Penal (Code of Criminal Procedure), Book I, Title I, Ch. 2 (entitled “Disqualification and Challenges”), Arts. 55(1)(a) and 60 (Art. 55(1)(a) requires disqualification from hearing a case if “in the course of the same proceedings,” the judge “has been involved as an official of the Public Prosecutor’s Office, legal representative, denouncer (*denunciante*), or plaintiff (*querellente*),” and Art. 60 applies the same rule to “court clerks and anyone who provides some kind of judicial assistance in proceedings”). The Romanian Criminal Procedure Code contains similar grounds for disqualification of judges under the section entitled “Incompatibility.” A judge “is incompatible to try” if among other, he “has been involved in criminal prosecution or has supervised criminal prosecution. . . .” Under Art. 49(1) these grounds are extended to the prosecutor, the assistant magistrate and the session clerk. *See* Codul de Procedura Penala (Romanian Criminal Procedure Code), Section I, Title II, Ch. II, Arts. 48(1)(e) & 49(1).

⁷⁹ *See Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, Decision on the Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case, 27 October 2006. The Trial Chamber considered that the Prosecutor’s Application to prevent the Senior Legal Officer from rendering advice in the case of *Lubanga* , “may be tantamount to a request for disqualification of the judges or might, at the very least, raise an issue regarding the disqualification of the judges which falls within the scope of article 41 (2) of the Statute”, p. 2. As a consequence, the request was referred to a plenary of the judges convened under Article 41(2)(c). It is important to note that the Prosecution’s request was for

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C. Investigator Heder is not impartial and must be disqualified

44. Investigator Heder was recruited by UNAKRT in July 2006. Although the OCIJ claimed that Heder was assigned to the CIJs and then simply “detached to the OCP”⁸⁰ the legal effects of this detachment appear to be clear. Investigator Heder was employed for the first six months of his work from July to December 2006 at the ECCC as an OCP Investigator. At this time, although the Internal Rules had not yet been passed, the OCP was conducting its “preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses.”⁸¹
45. The obvious targets for a Heder-led OCP preliminary investigation would be those people named in Investigator Heder’s book entitled “Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge.”⁸² In this book, Investigator Heder names seven people, including Mr. IENG Sary, who he believes should face “prosecution” for their crimes. Specifically, Investigator Heder asserts that Mr. IENG Sary:
- “explicitly advocated or defended after the fact the Party’s execution policies”⁸³
 - “knowingly contributed directly and substantially as an aider and abettor to the commission of crimes throughout the country”⁸⁴
 - “facilitated or failed to prevent the mass arrests and transfers to S-21”⁸⁵
 - “was aware of arrests and confessions of cadre in his ministry and failed to intervene to prevent these activities”⁸⁶
46. While the right of Investigator Heder to make these claims as a private citizen is not disputed, the situation is radically different when he changes into a purportedly impartial OCP investigator. In conducting their preliminary enquiries, the OCP investigators are

separation or disqualification of a Senior Legal Officer and not a judge and yet the ICC followed the procedure set out for the disqualification of a judge. It is only judges that are referred to in Article 41.

⁸⁰ See First Heder Decision.

⁸¹ Rule 50(1). The Internal Rules were not passed until 12 June 2007. Even well before this date however, it was clear that as the ECCC was a domestic court and would follow Cambodian law, the Co-Prosecutors would be responsible for initiating the judicial investigation. The Co-Prosecutors also had the benefit of the Draft Internal Rules published on 3 November 2006.

⁸² STEPHEN HEDER AND BRIAN TITMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2004) (“SEVEN CANDIDATES”).

⁸³ *Id.*, p. 90.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*, p. 92.

required to determine “whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses.”⁸⁷ In order to carry out this task, OCP investigators must conduct their preliminary investigations impartially. They must not have prejudged either the crimes that they believe may have occurred or who they believe is responsible for them.

47. The importance of this impartiality is accentuated by the impact on both the liberty of the persons names in the IS and the scope of the facts set out therein. As soon as a suspect is named in the IS submitted to the OCIJ he becomes liable to be charged by the OCIJ⁸⁸ and then provisionally detained.⁸⁹ The OCIJ may also charge any other persons not named in the IS.⁹⁰ The decision on provisional detention of a Charged Person is issued by the OCIJ rather than the OCP. However, the OCIJ’s determination of whether “there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission”⁹¹ will undoubtedly be based largely, if not entirely, on the evidence submitted by the OCP in support of the IS.
48. In addition, the scope of the OCIJ’s judicial investigation is limited to investigating the facts set out by the OCP in an IS or a Supplementary Submission.⁹² Therefore, the OCP has extensive control over the direction and indeed targets of the OCIJ’s judicial investigation. When these issues are at stake, it is fundamental that the OCP be completely impartial in the exercise of its preliminary investigations. It is respectfully submitted that Investigator Heder did not reach this required level of impartiality in drafting the IS in the OCP.
49. The importance of impartiality amongst OCP investigators is accentuated by the fact that investigative resources available to the OCP appear to have been extremely limited at the time that Investigator Heder was employed in that office. Investigator Heder is fluent in Khmer⁹³ and was also Deputy Director of the United Nations Transitional Authority in Cambodia Information/Education Division in 1993, prior to joining the OCIJ/OCP.⁹⁴ Based on his language skills and prior experience in Cambodia it is logical and reasonable

⁸⁷ Rule 50(1).

⁸⁸ Rule 55(4).

⁸⁹ Rule 63(1)(a).

⁹⁰ *Id.*

⁹¹ Rule 63(3)(a).

⁹² Rule 55(2).

⁹³ SEVEN CANDIDATES, Introduction, p. IX.

⁹⁴ *See* United Nations Transitional Authority in Cambodia (UNTAC), Cambodian Election Materials, 1992-1993, Dr. Stephen Heder, collector.

to assume that Investigator Heder played a dominant role in deciding upon the likely targets of the OCP's preliminary investigations, targets which he had already preselected.

50. Subsequent to his participation in drafting the IS for the OCP, Investigator Heder, proceeded to transfer to the OCIJ in approximately December 2006.⁹⁵ In July 2007, after the adoption of the Rules, the OCP submitted the IS to the OCIJ. As an OCIJ Investigator, Heder was then responsible for taking "any investigative action conducive to ascertaining the truth"⁹⁶ regarding the facts set out in the IS. In pursuit of this truth, the OCIJ must "conduct their investigation impartially, whether the evidence is inculpatory or exculpatory."⁹⁷ Effectively therefore, Investigator Heder was now responsible for investigating the allegations that he had drafted while working for the OCP. This placed Investigator Heder in an irreconcilable conflict of interest. In conducting investigations for the OCIJ, Heder would have a clear motive to locate and prioritise the accumulation of incriminating evidence to support his preliminary investigations while with the OCP. It also directly violates the express right of a Charged Person that "ECCC proceedings shall be fair and adversarial and [...] shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication."⁹⁸

51. According to the OCIJ, however:

"This is not an unusual situation. Indeed, in accordance with the relevant articles of the Internal Rules (Rules 13(4), 14(5), 15, 16, 50(2), 55(9) and 62), ECCC investigators may be compared with judicial police officers: they are subject to a comparable accreditation process and, with the exception of coercive measures that can only be undertaken by judicial police officers, they have the same attributions in the preliminary investigation and during the judicial investigation; the exercise of these functions is controlled by the relevant judicial officer.

These provisions of the Internal Rules are drawn from Cambodian law, where the judicial police works under the authority of the Prosecutor during preliminary investigations and under the authority of the Investigating Judge during the judicial investigation phase (see Article 37(1) of the Cambodian Criminal Procedure Code).

This is common practice in all countries applying a comparable procedural system [to] that of Cambodia (for instance, see Articles 14, 75 and 151 of the French Criminal Procedure Code; Articles 9 and 56 of the Belgian Criminal Investigation Code etc ...). In addition, the relevant case-law recalls that the rules governing the

⁹⁵ See First Heder Decision.

⁹⁶ Rule 55(5).

⁹⁷ Rule 55(5).

⁹⁸ Rule 21(1)(a).

incompatibility of functions aimed at guaranteeing the independence and impartiality of courts, only apply to magistrates and not to investigators.”⁹⁹

52. The OCIJ’s apparent justification for allowing Investigator Heder to transfer from the OCP to the OCIJ, while undoubtedly convenient for the OCIJ, does not stand up to scrutiny. It is based on both a misreading of the applicable provisions of the CPC and a failure to comprehend the relationship, as set down by the Pre-Trial Chamber, between the provisions of the CPC and the Internal Rules.
53. Certain provisions of the Rules do assimilate Judicial Police with ECCC Investigators, except with regards to coercive measures which only the former may conduct. These provisions also allow both the OCP and CIJs to delegate their preliminary or judicial investigations to both ECCC Investigators and Judicial Police. However, this provision must be read in the light of Rule 21(1)(a) which mandates a separation between the prosecuting and judicial authorities. While members of the Judicial Police may conduct tasks for both the Investigating Judges and Co-Prosecutors the same member of the Judicial Police may not do both. There should be, in effect, a complete separation between the two sets of Judicial Police who work for the prosecuting and adjudicating authorities respectively in order to guarantee the impartiality of both. The OCIJ’s reliance upon the provisions of the CPC which purportedly allow the same member of the Judicial Police to investigate and adjudicate on the same case are trumped by the guarantee in Rule 21(1)(a) due to the primacy of the Internal Rules over the CPC.¹⁰⁰
54. Tellingly, the OCIJ admits that even the French judicial system has “rules governing the incompatibility of functions aimed at guaranteeing the independence and impartiality of courts.”¹⁰¹ The OCIJ claims, unfortunately without any citation in support, that these rules “only apply to magistrates and not to investigators.”¹⁰² Without being provided by the OCIJ with an explanation as to which rules are relied upon to distinguish judges from their support staff it is impossible to verify the OCIJ’s assertion. However, as can be seen from the extensive provisions relied upon above,¹⁰³ such a distinction between judges and their judicial officers, does not appear in many other developed legal systems. These systems appear to accept that when a judicial police officer conducts investigative tasks

⁹⁹ First Heder Decision, p. 2.

¹⁰⁰ *Chea* Annulment Appeal Decision, para. 14.

¹⁰¹ First Heder Decision.

¹⁰² *Id.*

¹⁰³ *See infra* para. 43.

on behalf of a judge, he should be treated in the same way as a judge. It is worrying and indefensible that the OCIJ does not follow this logic.

55. The Defence also recently acquired information that Investigator Heder, prior to his employment with the OCIJ may have represented and/or work as an intelligence agent. It was unclear which agency Investigator Heder had worked for, or when, for how long and in what political and geographical area he had done so. Information was sought from the OCIJ in this regard but was not provided. As explained previously by the Defence:

“As an intelligence agent, Investigator Heder would have taken instructions from a foreign government. Given Investigator Heder’s nationality, it would appear likely that he was employed by the United States Central Intelligence Agency (“CIA”), a country that has an unsavory history in South-East Asia. In the 1970s, the United States Government conducted extensive bombing of Cambodia resulting in untold deaths and injuries and which massively destabilized Cambodian society. In the judicial investigation against Mr. IENG Sary and others for crimes allegedly committed in this period, evidence of the scale of this bombing and its effects would have been uncovered. Unquestionably, the United States Government maintains a strong interest in minimizing its role in the bombing of the Cambodian people and its extensive intelligence operatives in the region. If one of the investigators working for the OCIJ was employed as an intelligence agent, who had formerly or was still taking instructions from a foreign government spy agency, this would certainly affect his independence and impartiality in the investigation.”¹⁰⁴

56. The OCIJ’s response to this open and transparent request for information was to assert that “we choose to indicate that we have no knowledge of any information or documentation that might support the allegations in your request in any way at all.”¹⁰⁵ No indication is given that Investigator Heder who, although having left his position as an OCIJ Investigator in mid 2008 continues to perform consulting services for the office to the knowledge of the Defence, was consulted on the Defence’s request. Nor is there any indication that any other form of investigation was conducted into this issue. Instead, as the Defence has previously alleged, on a fundamental issue affecting the very fairness of proceedings the Co-Investigating Judges appear to prefer to remain willfully and blissfully ignorant rather than address the important issues within their very own office.¹⁰⁶
57. In light of his prejudgment of the preliminary investigation as set out in his book, the impossibility of him being impartial while working for the OCIJ in the judicial

¹⁰⁴ Second Heder Request, para. 2. Footnotes omitted.

¹⁰⁵ Second Heder Decision.

¹⁰⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC20), Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order On Request for Investigative Action Regarding Ongoing Allegations of Corruption & Request for an Expedited Oral Hearing, 4 May 2009, para. 34.

investigation of allegations he has already made for the OCP and his prior employment as an intelligence agent, Investigator Heder does not meet the required standard of impartiality. He must therefore be disqualified under Rule 34.

D. Legal Officer Boyle is not impartial on the legal issues facing the OCIJ

58. There has been a proliferation in recent years of new journals relating to issues of international criminal justice. Initiated by the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively and spurred on by the creation of the permanent International Criminal Court in 2002 and other courts for Sierra Leone, Cambodia and Lebanon, there have been many opportunities for aspiring academics to submit their perspectives on current issues of international criminal law.

59. Many of these articles are of great assistance in raising and addressing complicated and controversial aspects of this field of law. Indeed, under the Statute of the International Court of Justice, reliance may be placed on “teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”¹⁰⁷ Many of these recently created international courts also make extensive reference to academic articles in their decisions as they often fill in the gaps in the complex and quickly drafted Statutes and rules of these courts. A significant amount of the articles written for these journals are penned by the Legal Officers and Associate Legal Officers working for these new international courts. Concern has grown therefore that people who advise judges on complicated legal issues should not have written public articles on these very same issues. Simply, this is because commenting on these issues and thus prejudging them, places the author in a conflict of interest when he is later required to dispense impartial advice on these issues to a judge when the same issue arises in the context of a case.¹⁰⁸

60. At the International Criminal Court, during the confirmation hearing in the case of *Katanga and Ngudjolo*, the Pre-Trial Chamber was confronted with this very issue. The

¹⁰⁷ Article 38(1)(d), Statute of the International Court of Justice.

¹⁰⁸ See *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary’s Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor’s Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 3 October 2008.

Defence in that case made oral submissions on one of the modes of liability, namely indirect co-perpetration, under which their client was charged by the Prosecution.¹⁰⁹ This form of liability was extensively commented upon in two articles written by the Hector Olasolo, the Legal Officer working for the very same Pre-Trial Chamber.¹¹⁰ Recognising that continuing to work for the judges put him in a conflict of interest, Olasolo “requested to be temporarily excused from performing any function in the present case until a decision on whether or not to confirm the charges is issued by the Chamber.”¹¹¹ This request was accepted by the Pre-Trial Chamber.¹¹²

61. Indeed the UN Staff Rules recognize the inherent problems of staff members drafting articles on certain issues while being simultaneously employed to assist judges in the determination of these issues. Under Rule 101.2 (p) of the United Nations Staff Rules:

“Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any of the following acts, if such act relates to the purpose, activities or interests of the United Nations:

- (i) Issue statements to the press, radio or other agencies of public information;
- (ii) Accept speaking engagements;
- (iii) Take part in film, theatre, radio or television productions;
- (iv) Submit articles, books or other material for publication.¹¹³

62. It is surely beyond dispute that articles concerning the functioning of the ECCC and how it should address some of the more complicated legal issues that it will face is within the purpose, activities or interests of the United Nations. The UN’s involvement in the creation and functioning of the ECCC was predicated on its supposed desire to ensure that the Khmer Rouge trials were conducted fairly with full regard for due process.¹¹⁴

¹⁰⁹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-46-ENG, Transcript, 11 July 2008, pp. 29-37.

¹¹⁰ See *Héctor Olásolo & Ana Pérez Cepeda*, The Notion of Control of the Crimes and its Application by the ICTY in the Stakić Case, *International Criminal Law Review* 4 (2004) 475–526; *Héctor Olásolo*, Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement, *International Criminal Law Review* 7 (2007) 143–161.

¹¹¹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Transcript, 13 July 2008, p. 2.

¹¹² *Id.*

¹¹³ Status, Basic Rights and Duties of United Nations Staff Members, ST/SGB/2002/13, 1 November 2002.

¹¹⁴ See for example Transcript of Briefing by Hans Correll, Under Secretary General for Legal Affairs and United Nations Legal Counsel, 8 February 2002 reproduced in Helen Jarvis, *Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide*, *Critical Asian Studies* 34:4 (2002) 607, 617 (“8 February 2002 Transcript”). In this briefing, Correll explains that “international standards of justice [were] necessary for the continued participation of the United Nations.”

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63. Legal Officer Boyle has written a prolific number of articles relating to issues facing the ECCC. In addition to maintaining a website,¹¹⁵ Legal Officer Boyle is also the author of at least the following letters, speeches and articles on these issues:

- i) Trying Ieng Sary, Letter to the Phnom Penh Post, October 13–16, 2000
- ii) 2005 speech: Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims.
- iii) Boyle David. "One More Step - Adoption of the Khmer Rouge Trial Law." *Judicial Diplomacy*, Revue Internet (August 5, 2001).
- iv) Quelle justice pour les Khmers rouges?" *Revue Trimestrielle des Droits de l'Homme* 773, 10e année, N° 40 (1999).
- v) David Boyle, "Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes", *Yearbook of International Humanitarian Law*, vol. 5, 2002, TMC Asser Press, 2005.
- vi) David Boyle, Correspondents Report – Cambodia, *Yearbook of International Humanitarian Law*, vol. 3, 2000, p. 437-39.
- vii) David Boyle, "Une juridiction hybride chargée de juger les Khmers rouges", *Droits fondamentaux*, Revue internet, N° 1, juillet-décembre 2001.
- viii) Boyle, D., "The Rights of Victims, Participation, Representation, Protection, Reparation", *Symposium on Khmer Rouge trials*, *Journal of International Criminal Justice* (2006), at 307-313.
- ix) The Cambodian Extraordinary Chambers: A *sui generis* system leaving many questions unanswered, David Boyle. Powerpoint Presentation.

64. These articles comment, in detail, about certain fundamental issues facing the ECCC, and initially faced by the OCIJ. In the Phnom Penh Post Article, Legal Officer Boyle addresses the effect of the Royal Pardon and Amnesty granted to Mr. IENG Sary:

"The case of Ieng Sary is an example of the problems that will arise before the Cambodian Court. Ieng Sary has been granted a constitutionally valid pardon and immunity for certain crimes and for prosecution under the 1994 law. To what extent is this constitutionally valid amnesty and pardon applicable before the Khmer Rouge trials? This has been left to the court to decide. All these questions will be raised by the defense, and should be dealt with beforehand in order to avoid that talented lawyers will slow trials down so much that three years will not be enough to finish. There are two possible avenues for partially resolving these issues. One would be for the judges immediately after having been nominated by the SCM to get together with prosecutors and investigating

¹¹⁵ <http://www.ridi.org/boyle/>

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judges and work out exactly what is the applicable procedures for the courts.
They cannot change the law, but they can work out what the law means.”¹¹⁶

65. This statement clearly shows Mr. Boyle’s misguided beliefs that the Defence should be excluded from assisting the court in its determination of any issues related to Mr. IENG Sary’s “constitutionally valid pardon and amnesty”. Not only does he imply the Defence would have nothing to contribute and would only attempt to stall the proceedings, but he goes on to advocate for a *Star Chamber*-like *ex parte* procedure: for the judges, along with the OCP (a party) and OCIJ (purportedly an impartial institution to the proceedings) to clandestinely resolve the issue before the Defence has had time to react. Indeed, Mr. Boyle’s conclusion that the matter must be dealt with before the Defence has had a chance to “slow trials down” appears to explain why the OCIJ decided *proprio motu* to address the jurisdictional issues of *ne bis in idem* and amnesty in the Provisional Detention Order.¹¹⁷ It also appears to amount to a legal opinion in the case, which constitutes a ground for disqualification under Article 556 of the CPC.

VII. CONCLUSION & RELIEF SOUGHT

66. Investigator Heder and Legal Officer Boyle are not judges. However, they do carry out tasks on behalf of judges which require that they be absolutely impartial. Sadly, neither Heder nor Boyle are impartial. To artificially limit Rule 34 to exclude applications for disqualification of Investigator Heder and Legal Officer Boyle when the CIJs would be liable for disqualification for performing the same acts would be completely arbitrary and make a mockery of the supposed international standards to which the ECCC aspires.

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

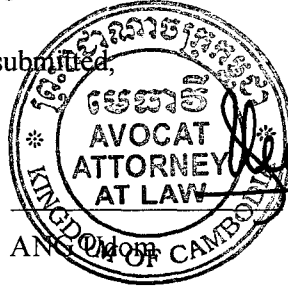
¹¹⁶ Report from a conference held in Phnom Penh March 2-3, 2005 organized by FIDH, LICADHO and ADHOC, *International Criminal Court Programme: Articulation between the International Criminal Court and the Khmer Rouge Tribunal: the Place of Victims*, B. The Legal Framework of the Khmer Rouge Tribunal, p. 18 (emphasis added), available at: <http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf>. Emphasis added.

¹¹⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2007, paras. 5-14.

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- a. DISQUALIFY OCIJ Investigator Stephen Heder from all analytical or investigative tasks on Case File 002; and
- b. DISQUALIFY OCIJ Legal Officer David Boyle from all legal, analytical or investigative tasks on Case File 002.

Respectfully submitted,



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 8^h day of July, 2009