

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATION
 FOR DISQUALIFICATION OF INVESTIGATORS HEDER AND
 BOYLE OF THE OFFICE OF THE CO-INVESTIGATING JUDGES**

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I. INTRODUCTION

1. The Co-Prosecutors request that the Pre-Trial Chamber dismiss IENG Sary's Application ("Applicant" and "Application") for disqualification of Investigators Stephen Heder and David Boyle of the Office of the Co-Investigating Judges ("OCIJ").¹ The Application, as filed, is inadmissible and, in any event, devoid of merit.²

II. SUMMARY OF ARGUMENT

2. Rule 34—under which the Application is moved—pertains to the disqualification of judges and not investigators. The Application, therefore, is inadmissible.
3. Even if investigators were to be considered for disqualification under Rule 34, the Application does not identify any information regarding the OCIJ Investigators that would lead to an actual or apparent bias of the two Co-Investigating Judges. The Application erroneously argues that the Investigators' prior knowledge—indeed, the very knowledge that qualified them for their employment at the OCIJ—would lead to an objective or subjective bias in the work of the Co-Investigating Judges.

III. PRELIMINARY REQUEST

Oral Hearing is not Required

4. The Applicant seeks a public oral hearing of this Application as, according to him, it raises "complex issues that have not previously been raised before the Pre-Trial Chamber" and as the Application "clearly and unequivocally impacts upon the legacy of the ECCC in providing a supposed example of fair and transparent judicial proceedings".³

¹ In the Application, Mr. Boyle is referred to as an "OCIJ Legal Officer", while Mr. Heder is referred to as an "OCIJ Investigator." The Co-Prosecutors, however, understand that both individuals shared the following designation: "Investigator/Analyst/Researcher". For clarity, both individuals will be referred to as "OCIJ Investigator" or "Investigator" in this filing.

² *Case of IENG Sary*, 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, Case File No. 002/08-07-2009-ECCC-PTC, ERN 00348412-40, 8 July 2009 [*hereinafter* Application].

³ Application, para. 13.

5. The right to a hearing does not necessarily mean oral hearing; it may include a reasoned and public determination on written pleadings alone.⁴ If the parties are given sufficient opportunity to put forward their case in writing and to comment on the submissions of the other parties, a judicial chamber may find that the requirements of fairness are complied with and an oral hearing is not required.⁵
6. While issues in this Application are important, a disposal of the Application on written pleadings alone cannot be any less public or transparent, if the filings and decision of the Pre-Trial Chamber are made available to the public. It has been the practice of the Pre-Trial Chamber to place all the party filings concerning appeals and the subsequent decisions on the ECCC website. The Pre-Trial Chamber rarely departs from this practice unless the interests of the parties (particularly, the defendant) are affected.⁶ International tribunals—trying cases of a similar magnitude and complexity as this Court—regularly decide motions and appeals on written pleadings alone. Indeed, they routinely dismiss applications for oral hearings made solely on the ground of the “complexity of issues”.⁷
7. A clear practice has emerged regarding the Pre-Trial Chamber’s decisions to hold oral hearings. The Chamber has orally heard all but one of the detention appeals⁸ and such appeals that may lead to the termination of proceedings and the consequential release of a

⁴ *Jussila v. Finland*, Judgment, 23 November 2006, Application No. 73053/01, Grand Chamber of the European Court of Human Rights, para. 41.

⁵ *Vilho Eskelinen et al v. Finland*, Judgment, 19 April 2007, Application No. 63235/00, Grand Chamber of the European Court of Human Rights, para. 74.

⁶ *Case of IENG Sary*, Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: Ieng Sary’s Appeal Regarding Appointment of an Expert, 24 July 2008, A189/1/6, ERN 00207784-00207785, para. 4.

⁷ Application, para. 13(a); *Prosecutor v. Marijacic*, Judgement, Case No. IT-95-14-R77.2-A, 27 September 2006, ICTY Appeals Chamber, paras. 9-10 [*hereinafter* Marijacic Judgement].

⁸ The Pre-Trial Chamber orally heard five original detention appeals of all the five detainees of this Court. Thereafter, it concluded detention extension appeal hearings of IENG Thirith, IENG Sary and KHIEU Samphan. By agreement of the parties, the detention extension appeal of NUON Chea was determined on written pleadings alone.

defendant.⁹ In sum, the liberty of a defendant has been the paramount consideration in the Chamber's determination on whether or not to hold a public hearing.¹⁰

8. The Applicant has erroneously argued that the criterion adopted by the Pre-Trial Chamber is the opinion or consent of the parties.¹¹ While this factor has been considered by the Pre-Trial Chamber, it has not been the sole determining criterion. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber determine this Application on written submissions alone.

IV. APPLICABLE LAW

Independence and Impartiality of Judges

9. Article 128 of the Cambodian Constitution mandates an independent and impartial judiciary. This aspiration is reflected in the founding documents of this Court, *i.e.* the Agreement between the United Nations and the Government of Cambodia ("Agreement") and the ECCC Law. These documents envisage all ECCC judges to be independent in the exercise of their functions and not to seek or accept instructions from external sources.¹² Substantively identical guarantees are contained in the African Charter on Human and Peoples' Rights,¹³ the European Convention on Human Rights,¹⁴ the Inter-American Convention on Human Rights,¹⁵ and the International Covenant on Civil and Political Rights.¹⁶ In a similar vein, the United Nations Human Rights Committee has stated that the guarantee of independence and impartiality of judges is an absolute right that may suffer no exception.¹⁷
10. The perceived independence and impartiality of an international tribunal are important requisites for legitimacy in the eyes of the parties, potential litigants and the international

⁹ *Case of KHIEU Samphan*, Decision on Khieu Samphan's Request for a Public Hearing, 4 November 2008, A190/1/8, ERN 00226251-00236254, para. 8. This reflects the purpose of Rule 77(6) that public hearings may be held "in particular, where the case may be brought to an end by the [Pre-Trial Chamber's] decision".

¹⁰ *Case of KHIEU Samphan*, Decision on the Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13, ERN 0027631-0027633.

¹¹ Application, para. 12.

¹² Agreement, art. 3.3; ECCC Law, art. 10(new).

¹³ ACHPR, art. 7(1).

¹⁴ ECHR, art. 6(1).

¹⁵ IACHR, art. 8(1).

¹⁶ ICCPR, art. 14(1). This provision is binding on this Court.

¹⁷ *Gonzalez el Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 October 1992.

community.¹⁸ Independence and impartiality are indispensable to the long-term attractiveness of international justice and its credibility as a depoliticized alternative mode of dispute resolution.¹⁹ The consensual basis of many international adjudicatory processes, the weakness of enforcement procedures, *etc.*, lend support for resorting to the strictest standard of independence and impartiality to build confidence in the work of the international judiciary and to facilitate voluntary compliance with its decisions.²⁰ Additionally, mixed or hybrid tribunals, such as this Court, bear the extra burden of setting best practice examples for the domestic courts to follow.²¹

11. Article 3.3 of the Agreement holds this Court's judges to a high standard of impartiality.²² This presumption of the impartiality derives from the oath of office and the qualifications required for appointment.²³ An applicant seeking to displace the presumption of impartiality bears a heavy burden²⁴ and must establish that the judge-in-question can be objectively perceived to be biased.²⁵ In the absence of such evidence, it must be presumed that judges "can disabuse their minds of any irrelevant personal beliefs or predispositions."²⁶
12. A judge's general views or inclinations should be distinguished from an inclination to implement those views in a particular case.²⁷ Judges have personal convictions.²⁸ Their absolute neutrality can hardly, if ever, be achieved.²⁹ Even political sympathies do not, of

¹⁸ Yuval Shany & Sigall Horowitz, *Judicial Independence in The Hague and Freetown*, *Leiden Journal of International Law*, 21 (2008), p. 120 [*hereinafter* Shany & Horowitz].

¹⁹ *Id.*

²⁰ *Id.*, p. 120.

²¹ *Id.*

²² *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 00160734-42, C11/29, 4 February 2008, para. 15 [*hereinafter* Judge Ney Thol Decision]. See also *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].

²³ Judge Ney Thol Decision, para. 16.

²⁴ *Id.*, para. 15.

²⁵ *Id.*, para. 19; Akayesu Judgment, para. 88; *Prosecutor v. Furundzija*, Judgment, Case No. IT-95.17/1-A, ICTY Appeals Chamber, 21 July 2000, para. 196 [*hereinafter* Furundzija Judgment].

²⁶ Furundzija Judgment, para. 196.

²⁷ *Id.*, para. 200.

²⁸ *Id.*, para. 203.

²⁹ Furundzija Judgment, para. 203.

themselves, imply a lack of impartiality.³⁰ A judge should not be disqualified because of his or her qualifications, which, by their very nature, play an integral role in satisfying his or her eligibility requirements.³¹ It would be “an odd result if operation of an eligibility requirement were to lead to an inference of bias.”³² The possession of experience in any of the relevant areas by a judge does not, in itself, constitute evidence of bias or impartiality.³³

13. The mechanism for disqualification of ECCC judges³⁴ is no different than rules applicable at the *ad hoc* international tribunals for the former Yugoslavia (“ICTY”),³⁵ Rwanda (“ICTR”),³⁶ Sierra Leone (“SCSL”) ³⁷ or permanent judicial bodies such as the International Criminal Court (“ICC”) ³⁸ and the International Court of Justice (“ICJ”).³⁹ Each of these tribunals notably limits its disqualification mechanisms to judges, not investigators or legal officers.
14. This Court, being a special internationalised tribunal, applies international norms and standards.⁴⁰ The test for bias in this Court is, therefore, consistent with the jurisprudence of the other international tribunals.⁴¹ In *Furundzija*, the ICTY held that a judge should not only be subjectively free from bias, but also there should be nothing in the 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) either if “actual bias exists” (“subjective test”) or there is an “unacceptable appearance of bias” (“objective test”).⁴²

³⁰ *Id.*

³¹ *Id.*, para. 205.

³² *Id.*

³³ *Id.*

³⁴ Rules, rule 34(2).

³⁵ ICTY Rules of Procedure and Evidence, rule 15(A).

³⁶ ICTR Rules of Procedure and Evidence, rule 15(A).

³⁷ SCSL Rules of Procedure and Evidence, rule 15(A).

³⁸ ICC Rules of Procedure and Evidence, rule 34(1).

³⁹ Statute of the ICJ, art. 17(2).

⁴⁰ Judge Ney Thol Decision, para. 30.

⁴¹ *Id.*, para. 20.

⁴² *Furundzija* Judgment, paras. 189-190; *Prosecutor v. Brdjanin & 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.

15. Quoting *Furundzija* with approval, the Pre-Trial Chamber of this Court has held that there is an appearance of bias if one of the following is the case:⁴³
- a. A judge is a party to a case or has a financial or proprietary interest in its outcome; or if his decision will lead to the promotion of a cause in which he or she is involved with one of the parties. Under these circumstances, disqualification is automatic.
 - b. The circumstances would lead a reasonable and informed observer to apprehend bias. A reasonable observer, in this context, must have knowledge of all the relevant circumstances, including the judicial tradition of integrity and impartiality, and the awareness that impartiality is one of the duties that the judges swear to uphold.⁴⁴
16. In *Furundzija*, the ICTY denied a request for disqualification of a judge on the ground that she was adjudicating a case that could (and did) advance a legal and political agenda she helped create while she was a member of the United Nations Commission on the Status of Women before her appointment to that Tribunal.⁴⁵ Similarly, in *Akayesu*, the ICTR rejected the claim that political pressures destroyed that Tribunal's independence and impartiality. The defendant, in that case, had contended that public and private remarks made by the ICTR judges, coupled with "pressures and special arrangements", showed partiality against him. The Tribunal noted that the defendant had the burden to establish 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.⁴⁶ Likewise, the ICJ denied a request by Israel to preclude Judge Elaraby from sitting in the *Wall Case* on the ground of his prior involvement as an Egyptian diplomat in the Israel-Palestine dispute and the views expressed by him on that issue in a media interview. The Court found that it could not hold that Judge Elaraby had previously "taken part in the case" in any capacity.⁴⁷ The SCSL,

⁴³ Judge Ney Thol Decision, para. 20.

⁴⁴ *Id.*, para. 21.

⁴⁵ *Furundzija* Judgment, para. 215.

⁴⁶ *Akayesu* Judgment, para. 90.

⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, 30 June 2004, (2004) ICJ Rep 3.

however, disqualified Judge Robertson from a case for having expressed views in a published book about the crimes committed by a party to that case.⁴⁸

Independence and Impartiality of Court Officials Other Than Judges

17. Several countries' codes of criminal procedure provide for the disqualification of law clerks.⁴⁹ However, in an application filed by this very Applicant, this Court ruled that its investigators should be compared to the judicial police, whose functions are controlled by the relevant judicial officers ("First Dismissal Order").⁵⁰ The Court added that the rules that guarantee independence and impartiality "only apply to magistrates and not to investigators."⁵¹ The First Dismissal Order attained finality after the Applicant elected not to appeal it.

V. ARGUMENT

Application re Mr. Boyle Raises an Issue that has Already been Decided

18. The Applicant raised identical allegations of bias against Mr. Boyle in 2008. This previous request to the Co-Investigating Judges was dismissed by the First Dismissal Order. Whilst dismissing the request, the Co-Investigating Judges held that "[t]he ECCC Internal Rules do not provide for a party to request the disqualification of an investigator."⁵² The Pre-Trial Chamber found the appeal against the First Dismissal Order inadmissible.⁵³ The First Dismissal Order, therefore, attained finality.

19. In his current Application, the Applicant seeks an identical relief *i.e.* the disqualification of Mr. Boyle as an OCIJ Investigator. Such a request is barred by *res judicata*. The Co-

⁴⁸ *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15, 13 March 2004.

⁴⁹ *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 Decision from Rendering Legal Advice Regarding the Case, Pre-Trial Chamber-I of the ICC, Case No. 01/04-01/06, 31 August 2006.

⁵⁰ *Case of IENG Sary*, OCIJ Letter to the Defence of Ieng Sary re Request for Information on the Apparent Bias and Potential Existence of a Conflict of Interest Concerning MM S Heder and D Boyle, Case File No. 002/19-09-2007-ECCC/OCIJ, A162/II, 26 May 2008, p. 1 [*hereinafter* First Dismissal Order].

⁵¹ *Id.*, p. 2.

⁵² First Dismissal Order, para. 4.

⁵³ Application, para. 6.

Prosecutors request that the Pre-Trial Chamber reject the Application re Mr. Boyle on this ground.

Judicial Disqualification Procedure do not Apply to Investigators

20. The international judges of this Court were appointed by the United Nations Secretary-General pursuant to the Agreement and the ECCC Law. They, like their national counterparts, were subsequently confirmed by the Cambodian Supreme Council of Magistracy. Like the judges of any other international criminal tribunal, the ECCC judges enjoy special status, privileges and immunities.⁵⁴ The requirements of independence and impartiality, actual and apparent, are crucial to the discharge of their duties.⁵⁵ To strengthen these notions, the ECCC judges have adopted a voluntary Code of Judicial Ethics.⁵⁶ In keeping with their special status and the requirements of impartiality and independence, Rule 34 enumerates a specific and judicially determinable procedure for their disqualification.⁵⁷
21. Investigators of the OCIJ are, however, not judges. They are employees of the ECCC or the United Nations and, as such, governed by the regulations of those bodies.⁵⁸ There is no statutory provision specifically relating to the appointment of investigators. Although they are bound to perform their duties without any external interference,⁵⁹ they are subject to the Rule 6 disciplinary procedures, including the power of removal, of the appropriate Cambodian and United Nations authorities. Accordingly, proceedings for disqualification of investigators are administrative in nature and are not subject to judicial determination, unless the provisions of Rule 35 (which concerns an interference with the administration of justice) are invoked.
22. The Applicant argues that only a broad interpretation of the term ‘judge’ in Rule 34 would adequately reflect the object and purpose of that Rule.⁶⁰ In so arguing, he invokes Article 31

⁵⁴ Rules, rules 6(2)-(3).

⁵⁵ *Id.*, rule 6(1).

⁵⁶ Available at the website http://www.eccc.gov.kh/english/cabinet/fileUpload/31/Code_of_Judicial_Ethics_31-01-08_ENG.pdf (accessed 22 July 2009).

⁵⁷ Rules, rule 34.

⁵⁸ *Id.*, rule 6.

⁵⁹ *Id.*, rule 6(1).

⁶⁰ Application, pp. 16-17.

of the Vienna Convention on the Law of Treaties, which states that “[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.”⁶¹ Applying the Vienna Convention, it cannot be concluded that the ordinary meaning of the word “judge” encompasses the entirety of the OCIJ, including investigators, who assist the Co-Investigating Judges and act merely as their “sounding boards”.⁶² As Mr. Heder was and Mr. Boyle is one of the many investigators of the OCIJ, it is erroneous to presume that they fall under the description of the term “judge” as used by the Rules.

23. ECCC investigators can be compared to judicial police of the Cambodian domestic judiciary. Both the Co-Prosecutors and the Co-Investigating Judges may instruct the judicial police to undertake investigative actions. The OCIJ investigators, in particular, work strictly under rogatory letters. Investigators cannot initiate investigation on their own, rendering them incapable of exerting their alleged biases on the Co-Investigating Judges. In any event, the Co-Investigating Judges do not decide the guilt or innocence of a defendant and hence are not a “judicial chamber”.

Assuming the Application is Admissible, it is Deficient in Evidence to Invite Disqualification

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

- a. identify a case in which a Co-Investigating 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;⁶³
- b. indicate grounds for disqualification and supporting evidence;⁶⁴ and

⁶¹ *Id.*, p. 17.

⁶² *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), ERN 00195028-35, A162/III/1, 6 June 2008, fn. 7.

⁶³ Rules, rule 34(2).

⁶⁴ Rules, rule 34(3).

- c. be filed as soon as the applicant became aware of the grounds for disqualification.⁶⁵

25. The Application satisfies none of these requirements. In particular,:

- a. It fails to cite or identify any case in which one or both of the Co-Investigating Judges have a personal or financial interest.
- b. 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.
- c. It does not demonstrate how only two Investigators may influence the decision(s) of the two Co-Investigating Judges where there are more than two dozen investigative and legal personnel working on the national and international sides of the OCIJ.
- d. It does not provide any credible supporting evidence. While the evidence against Mr. Heder is based on a “confidential source”⁶⁶, the evidence against Mr. Boyle is a collection of press and other articles without actually stating how these documents lead to a bias in the decision-making of the Co-Investigating Judges.

26. The Application should, therefore, be dismissed for being devoid of evidentiary support.

Expression of Views on Relevant Legal Issues is not Bias

27. A defendant is entitled to a fair, but not a perfect, trial, as there are no perfect trials.⁶⁷ Absolute neutrality can hardly, if ever, be achieved.⁶⁸ Political sympathies do not, of themselves, imply a lack of impartiality.⁶⁹ Therefore, an investigator’s expression of opinion

⁶⁵ *Id.*

⁶⁶ Application, fn. 20.

⁶⁷ *United States v Hasting*, 461 U.S. 499, 508 (1983); *Delaware v Van Arsdall*, 475 U.S. 673, 681 (1986).



⁶⁸ Furundzija Judgment, para. 203. *See also Attorney General v. Adolf Eichmann*, Case. No. 40/61 in the District Court of Jerusalem, District Court of Jerusalem, Appeal Session 02-03. Available online at: <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts//Appeal/Appeal-Session-02-03>.

⁶⁹ Furundzija Judgment, para. 203.

on legal issues relating to the Khmer Rouge and establishment of the ECCC—before this Court was even established—does not disqualify him from working in the OCIJ. Like judges, qualified professionals, such as the investigators, are often asked to speak publicly on matters of contemporary relevance. Indeed, their academic and public comments and standing are a qualification for them to be selected for legal or investigative positions. Consequently, a legally trained person's views of a general nature should not, of themselves, lead to a conclusion that those views could colour that person's opinion whilst assisting a judicial officer in a particular case, after analysis of relevant law and evidence.

VI. CONCLUSION

28. The Co-Prosecutors, accordingly, request that the Pre-Trial Chamber dismiss the Application.



YET Chaktra
Deputy
Co-Prosecutor

Signed in Phnom Penh on this twenty-third day of July 2009.