

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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

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**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**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rule 34(5) of the ECCC Internal Rules (“Rules”) hereby files this appeal against the letter issued by the Office of the Co-Investigating Judges (“OCIJ”) on 26 May 2008¹ rejecting its “Request for information concerning the apparent bias and potential existence of a conflict of interest of OCIJ Legal Officer David Boyle”, filed on 4 March 2008 (“Request”). The Defence orally notified to the greffiers of the OCIJ on 5 June 2008, within the time limit specified by Rule 75(1), of its intention to appeal the decision.

I. REQUEST FOR INFORMATION CONCERNING DAVID BOYLE

1. Mr. IENG Sary filed the Request seeking information concerning Legal Officer² David Boyle’s ethical and professional fitness to occupy his current position in the Office of Co-Investigating Judges (“OCIJ”), given that the OCIJ, as an independent office within the ECCC³ must carry out its investigative functions impartially.⁴ The information sought included, *inter alia*, a list of everything authored by Mr. Boyle, any conferences, training seminars, hearings, lectures, workshops and meetings attended by Mr. Boyle relating to the ECCC or the Khmer Rouge, a description of Mr. Boyle’s participation in the drafting of the Provisional Detention Order, and an explanation of what was known by the OCIJ concerning Mr. Boyle’s positions and writings at the time he was hired.
2. Mr. IENG Sary’s concern stems from the fact that Mr. Boyle, prior to his employment with the OCIJ, authored numerous articles concerning the ECCC and the envisaged Khmer Rouge trials.⁵ In commenting on the ECCC – including on the validity and application of the Royal amnesty and pardon issued to Mr. IENG Sary – Mr. Boyle has offered opinions and conclusions which, quite alarmingly, reflect prejudgments and biases against Mr. IENG Sary. Simply put, the *prima facie* evidence seems to reveal that Mr. Boyle is unqualified to hold any position within the OCIJ.

¹ Case of IENG Sary, Case No. 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”, (“Letter”). The Defence notes that although the Letter was dated 26 May 2008, it was only notified to the Defence on 27 May 2008. As such any deadline pursuant to the Internal Rules will run from this date.

² The Defense is not privy to the precise job title of Mr. Boyle but believes that the title of ‘Legal Officer’ best reflects his main role within the Office of the Co-Investigating Judges. The Defense is aware that his official job title may be that of ‘Investigator/Analyst’.

³ Internal Rule 14.1.

⁴ Internal Rule 55.5.

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

3. Mr. Boyle has stated, for example:

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 trial? 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 judges and work out exactly what is the applicable procedure for the courts. They cannot change the law, but they can work out what the law means.*⁶

4. 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.
5. While Mr. Boyle is not a judge, the nature of his position is to provide objective and unbiased legal reasoning and advice to the OCIJ which, throughout the investigative phase, is entrusted with making findings of fact and conclusions of law.⁷ Those who

⁶ 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>.

⁷ According to their job description, even Associate Legal Officers assist in "the assessment of the charges raised as well as of the evidence filed by the parties and the evaluation of the need for further investigative measures; the provision of advice to the Co-Investigating Judges on any charges to be sustained ... [and] the provision of legal advice to the Co-Investigating Judges, Investigators and Analysts on applicable international

assist judges in this way are “sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to the judge’s thoughts in a way that neither [the] parties to the lawsuit nor [the judge’s] most intimate family members may be.”⁸ As a consequence, “even if the judge has no reason to recuse herself based on her own circumstances, a law clerk’s relationship might cause the impartiality of decisions from that judge’s chambers in which the clerk participates reasonably to be questioned.”⁹ Thus, as the gatekeepers of what legal analysis and reasoning the OCIJ will be exposed to, Legal Officers should be above suspicion.¹⁰

6. Given Mr. Boyle’s extensive public pronouncements and opinions on matters related to the ECCC and specifically to Mr. IENG Sary, Mr. Boyle is not above suspicion. As such, in order to more fully determine whether the Defence should move for Mr. Boyle’s disqualification, the Defence respectfully made the Request of the OCIJ.
7. The OCIJ responded to the Defence Request on 27 May 2008. In this Letter, the OCIJ claimed that there “does not appear to be any legal basis for such repeated demands.” The OCIJ considered that “following this clarification, we do not see any reason to continue this exchange and, therefore, this letter shall be the last on this matter, as far as we are concerned.” With all due respect to the OCIJ, this letter displays both a misunderstanding of the Request and a worrying refusal to provide the information

and Cambodian criminal law and procedure and on other legal issues arising.” They also “[a]ssist with the provision of appropriate and timely judicial responses to requests and applications filed by the parties concerned through legal research on applicable international and Cambodian criminal law and procedure, on international human rights standards and on other legal issues arising.” *Associate Legal Officer job description currently available at*

https://jobs.un.org/Galaxy/Release3/vacancy/Display_Vac.aspx?lang=1200&VACID=43216be8-2388-48ab-b66c-01f68b42b0af.

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

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

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

requested. The Letter also appears to fetter the OCIJ's discretion in forestalling any future attempt by the Defence to correct this misunderstanding. It also prematurely rejects any possible future attempt to disqualify Mr. Boyle. As such the Defence is obliged to appeal this decision rather than seek to clarify its request before the OCIJ.

8. It is important to note that the original Request was for further "information" and not for the disqualification of Mr. Boyle. For the Defence to be properly able to decide whether to seek Mr. Boyle's disqualification, it considered that certain information needed to be reviewed that was in the OCIJ's possession and control. The Letter could and should therefore have been limited to granting or denying the Request. Instead, the OCIJ appears to have *proprio motu* decided the issue of whether anyone in the OCIJ, apart from the Co-Investigating Judges themselves, could be subject to disqualification. This decision appears in part to stem from a misunderstanding of the Request.
9. The first example of this misunderstanding is that the Letter claims that "the ECCC Internal Rules do not provide for a party to request the disqualification of an investigator". Secondly, the Letter recalls 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". In making this point the OCIJ appears to have believed that the Request was for Mr. Boyle's disqualification and that the Defence had therefore failed to provide the necessary information supporting such a request.
10. By prematurely seeming to resolve the ultimate issue of whether Mr. Boyle could be disqualified, in order to reject the pertinent issue placed before it, the Letter causes further concern regarding Mr. Boyle's impartiality. It gives rise to an unwholesome perception that the OCIJ has something to hide by refusing to provide the requested information.
11. Furthermore, by claiming that it is for the requesting party to provide the information "not the judge in question", the Letter places the Defence in an impossible position. If the information requested is in the OCIJ's possession, as is the case here, it is only by requesting and being provided with such information, as the Defence has sought in

this case, that any subsequent request for disqualification may be properly supported. If the OCIJ may simply elect to deny such a request *in limine* when the relevant information is in the possession of that office, any subsequent request for disqualification could never succeed. This could never be the intention of the Internal Rules which seek to ensure “consistency with international standards” according to their Preamble. Finally, it also bears recalling that when a request for disqualification was brought by another party before the ECCC,¹¹ the judge concerned, in the spirit of openness and transparency, provided the information requested.¹²

II. ADMISSIBILITY OF THE APPEAL

12. The Defence submits that the appeal against the Letter must be brought before the Pre-Trial Chamber. Under Internal Rule 34(5), an “application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber”. This provision not only entitles but mandates the Defence to file before the Pre-Trial Chamber any request for disqualification. It is not clear whether this request may first be filed before the OCIJ and then an appeal filed before the Pre-Trial Chamber or whether it must be filed before the Pre-Trial Chamber at first instance. In either case, whether as an appeal or a request at first instance, the Defence submits that this appeal is admissible.
13. Although the Request is merely for information, rather than an actual request for disqualification, the fact that the information requested would be required as “supporting evidence” for such a subsequent disqualification request under Rule 34(3), directly connects the Request with such an application for disqualification. It would be entirely illogical to require a request for disqualification of a Co-Investigating Judge to be filed before the Pre-Trial Chamber but not allowing a request for information to support such disqualification to be filed before the same Chamber.

¹¹ *Case of Nuon Chea*, 002/19-09-2007-ECCC/PTC(01), Urgent Application for disqualification of Judge Ney Thol, 28 January 2008.

¹² *Case of Nuon Chea*, 002/19-09-2007-ECCC/PTC(01) Judge Ney Thol’s Brief in Response to Application for Disqualification from Nuon Chea’s Co-Lawyers dated 28 January 2008, 31 January 2008.

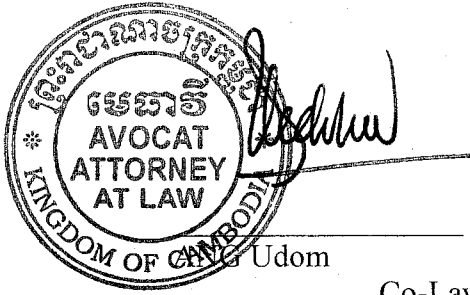
14. Furthermore, as explained above, the OCIJ appear to have interpreted the Request as seeking disqualification rather than simply seeking further information, thereby granting the Defence the right to file directly before the Pre-Trial Chamber. Finally, although the Request concerns the existence of apparent bias and conflict of interest of a Legal Officer rather than a Co-Investigating Judge *per se*, the jurisprudence of the ICC suggests that the motions for the former must be decided under provisions relating to the latter.¹³
15. If Mr. Boyle does indeed harbor a bias, this bias will infect every future decision of the OCIJ concerning Mr. IENG Sary. Thus, it is imperative that this issue be addressed immediately, transparently and properly. Justice must be seen to be done. By bluntly stating that "this letter shall be the last on this matter, as far as we are concerned", the Letter confirms that further recourse to the OCIJ by the Defence would not be met with any response. It also appears to prematurely reject any possible future Defence attempt to disqualify Mr. Boyle or indeed anyone working for the OCIJ who is not one of the CIJs themselves, by refusing to entertain any further submissions on this issue. Intervention by the Pre-Trial Chamber at this stage is thus necessary.

III. CONCLUSION & RELIEF SOUGHT

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to reverse the OCIJ's decision and compel the production of the information requested.

Respectfully submitted,

¹³ See *Prosecutor v. Thomas Lubanga Dyilo*, Case No.: 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 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.



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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 6th day of **June, 2008**