ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Application N° 002/08-07-2009-ECCC-PTC

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 22 September 2009

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PUBLIC
DECISION ON THE CHARGED PERSON'S APPLICATION FOR DISQUALIFICATION OF DRS. STEPHEN HEDER AND DAVID BOYLE

Co-Prosecutors

CHEA Leang
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

Charged Person

IENG Sary

Respondents

Stephen HEDER
David BOYLE

Co-Lawyers for the Charged Person

ANG Udom
Michael G. KARNAVAS

ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of the "Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges" (the "Application"), submitted by Ieng Sary (the "Charged Person") under Internal Rule 34.

I. PROCEDURAL BACKGROUND

1. On 8 July 2009, the Charged Person submitted to the Pre-Trial Chamber the Application pursuant to Internal Rule 34 for disqualification of Drs. Stephen Heder and David Boyle, respectively investigator and legal officer in the Office of the Co-Investigating Judges.[1]

2. On 23 July 2009, the Co-Prosecutors filed a "Response to Ieng Sary's Application for Disqualification of Investigators Heder and Boyle of the Office of the Co-Investigating Judges" (the "Response").[2]

3. The Application was notified to Dr. Boyle on 10 July 2009. No written submissions were presented by Dr. Boyle to the Pre-Trial Chamber within 10 (ten) days of his receipt of the Application, as prescribed in Internal Rule 34(7).

4. The Application was notified to Dr. Heder on 23 July 2009. No written submissions were presented by Dr. Heder to the Pre-Trial Chamber within 10 (ten) days of his receipt of the Application.

II. APPLICABLE LAW

5. The Pre-Trial Chamber refers to Internal Rules 21(1), 34 and 35.

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[1] Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, Doc. No. 1.
[2] Response to Ieng Sary's Application for Disqualification of Investigators Heder and Boyle of the Office of the Co-Investigating Judges, 23 July 2009, Doc. No. 2.

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III. ADMISSIBILITY OF THE APPLICATION

6. The Charged Person requests the Pre-Trial Chamber to disqualify Dr. Heder from all analytical or investigative tasks on Case File 002, and Dr. Boyle from all legal, analytical or investigative tasks on Case File 002.[3]

7. The Charged Person submits that the present Application is admissible under Internal Rule 34 because the judicial obligation of impartiality must equally apply to those people who work closely with the Co-Investigating Judges and carry out judicial functions on their behalf.[4] He argues that investigators and legal officers conduct judicial and investigative functions therefore Internal Rule 34 should be seen as also applying to them.[5]

8. The Charged Person further submits that the fundamental importance of the right to an independent and impartial tribunal shall lead to a broad application of Internal Rule 34 with regard to the subject of applications for disqualification.[6] In support of this argument, he submits that "other courts have held that the lack of impartiality of law clerk may result in his disqualification".[7]

9. In response, the Co-Prosecutors submit that Internal Rule 34 pertains to the disqualification of judges and not investigators, therefore the Application is inadmissible.[8] They further submit that the "mechanism for disqualification of ECCC judges is no different than rules applicable at the *ad hoc* international tribunals", which limit their disqualification mechanisms to judges.[9]

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[3] Application, para. 66.
[4] Application, para. 10.
[5] Application, paras 30 and 38.
[6] Application, paras 36, 40 and 42.
[7] Application, para. 43.
[8] Response, para. 2.
[9] Response, para. 13..

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10. In relation to the Application for disqualification of Dr. Boyle, the Co-Prosecutors submit that "[s]uch a request is barred by *res judicata*" because the Applicant seeks an identical relief on which a Dismissal Order has attained finality.[10]

11. In relation to the Application for disqualification of Dr. Heder, the Co-Prosecutors submit that investigators in the Office of the Co-Investigating Judges are not judges, but rather "employees" of the ECCC or United Nations and subject to the United Nations Staff Regulations and Rules under Internal Rule 6(4).[11] In this respect, "proceedings for disqualification of investigators are administrative in nature and are not subject to judicial determination, unless the provisions of [Internal] Rule 35 (which concerns an interference with the administration of justice) are invoked".[12]

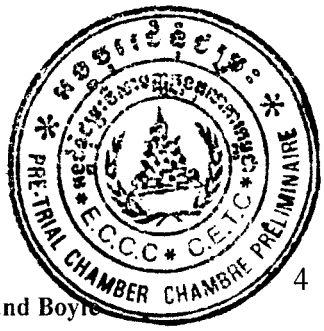
Considerations of the Pre-Trial Chamber

12. The Pre-Trial Chamber is not convinced that the Application was filed as soon as the Defence became aware of the grounds for disqualification alleged in their Application, as required by Internal Rule 34(3). Considering that the Co-Prosecutors have not made any submissions on this issue and the following reasoning of the Pre-Trial Chamber on the admissibility, the Pre-Trial Chamber finds that it is in the interest of justice to decide on the admissibility of the Application.

13. The Pre-Trial Chamber observes that Internal Rule 34 deals with the disqualification or recusal of a "judge" and explicitly provides the grounds for the admissibility of an application for disqualification. In this respect, Internal Rule 34 provides:

> "4. To be admissible an application must be submitted:
>
> a) against a Co-Investigating Judge, before the Closing Order;
>
> b) against a Pre-Trial Chamber Judge, before its final decision in a particular case;

[10] Response, paras 18 and 19.
[11] Response, para. 21.
[12] Response, para. 21.



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c) against a Trial Chamber Judge, concerning matters arising before the trial, at the initial hearing; or concerning matters arising during trial or of which the parties were unaware before the trial, before the final judgment in the case; or

d) against a Supreme Court Chamber Judge, concerning matters before the appeal, at the beginning of the appellate proceedings; or concerning matters arising during the appellate proceedings or of which the parties were unaware before the start of the appeal, before the final decision on the appeal."

14. The Pre-Trial Chamber considers that these grounds of admissibility are exclusive and clearly refer only to specific judges. The Pre-Trial Chamber finds that this provision is strictly to be applied when the allegations are made against judges and do not apply to staff members. On this basis, the Application does not fall within the ambit of Internal Rule 34.

15. The Pre-Trial Chamber notes that the procedural rules established at the international level regarding disqualification apply exclusively to judges and do not extend to the staff members of a court.[13] Contrary to the assertions made by the Co-Lawyers, decisions of international tribunals related to court officers indicate that their lack of impartiality may bring cause for the disqualification of the judge with whom they are associated, not of the officer him or herself.[14] Disqualification of a judge in these circumstances may be possible when the "objective test for bias"[15] is met by the applicant. The Pre-Trial Chamber finds that the procedure for disqualification set out in Internal Rule 34 is in accordance with the procedural rules established at the international level.

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[13] ICTY Rules of Procedure and Evidence, Rule 15; ICTR Rule of Procedure and Evidence, Rule 15; SCSL Rules of Procedure and Evidence, Rule 15; ICC Rules of Procedure and Evidence, Rule 34.

[14] *In the Case against Florence Hartmann*, IT-02-54-R77.5, "Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer", 27 March 2009, para. 54.

[15] 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, C11/29, para. 20, referring to *Prosecutor v. Furundzija*, IT-95-17/1-A, Appeals Chamber, 21 July 2000, para. 189; *Prosecutor v. Lubanga*, ICC-01/04-01/06, "Decision on the Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division frm Rendering Legal Advice regarding the Case, Pre-Trial Chamber, 27 October 2006.

PRE-TRIAL CHAMBER CHAMBRE PRÉLIMINAIRE E.C.C.C. C.E.T.C.

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16. The Pre-Trial Chamber notes that the Charged Person asserts that Internal Rule 34 should be interpreted broadly in order to ensure his right to be tried by an independent and impartial tribunal, which is a fair trial right enshrined in Internal Rule 21.[16]

17. Internal Rule 21 reads, in its relevant part:

> "1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication."

18. The Pre-Trial Chamber will examine whether Internal Rule 21 requires a broader interpretation of the Charged Person's right to file an application for disqualification in order to ensure fairness of the proceedings during the investigation.

19. The argument put forward by the Co-Lawyers in support of their call for a broader interpretation of Internal Rule 34 under the spirit of the provisions of Internal Rule 21 is that because investigators and legal officers conduct the "same tasks" as judges, application of Internal Rule 34 for their disqualification is justified.

20. The Pre-Trial Chamber observes that the role and functions of investigators or legal officers are distinct from those of the Co-Investigating Judges. Pursuant to the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed During the Period of Kampuchea Democratic ("Agreement"), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law") and the Internal Rules, the Co-Investigating Judges have sole authority and responsibility to conduct

[16] Application, para. 42.

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the judicial investigation and determine what they will rely upon in their decisions and orders.[17] In these circumstances, the independence and impartiality of the Co-Investigating Judges safeguard the fair trial rights of the Charged Person.

21. In addition, the Pre-Trial Chamber notes that charged persons can request the removal from the case file of any evidence found to have been improperly obtained by using the annulment procedure.[18]

22. For these reasons, the Pre-Trial Chamber finds that the provisions for disqualification of judges, together with the procedure for annulment, are sufficient to protect the fair trial rights of the Charged Person. The Pre-Trial Chamber finds that Internal Rule 21 does not force it to interpret the Internal Rules in such a way that the Application should be declared admissible.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Application is inadmissible.

In accordance with Internal Rule 34(8), this Decision is not subject to appeal.

Phnom Penh, 22 September 2009

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Vuthy PRAK Kimsan

[17] Article 5 of the Agreement, 6 June 2003; Article 23(new) of the ECCC Law, 27 October 2004; Internal Rules 15, 55(5), 55(9), 62 and 67.
[18] Internal Rule 76.

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