

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO THE DECLARATION OF A POSSIBLE  
CONFLICT OF INTEREST FILED BY THE INTERNATIONAL CIVIL PARTY  
LEAD CO-LAWYER**

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**Distributed to:**

**Supreme Court Chamber**  
Judge KONG Srim, President  
Judge Chandra N. JAYASINGHE  
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**Accused**

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## I. INTRODUCTION

1. A declaration of a possible conflict of interest (“the Declaration”) was filed by the International Civil Party Lead Co-Lawyer (“ICPLCL”) Megan Hirst on 12 September 2019 and notified on 28 November 2019.<sup>1</sup> The Co-Prosecutors submit that the situation described in the Declaration does not amount to any conflict of interest or constitute a risk of conflict of interest that would affect the administration of justice in Case 002/02. Nor would the circumstances described undermine the presumption of judicial impartiality afforded to judges at the ECCC.

## II. APPLICABLE LAW

2. Regarding the ICPLCL: ECCC Internal Rule 12 *ter* (2) provides that “The Civil Party Lead Co-Lawyers derive their powers from these IRs. They shall be obliged to promote justice and the fair and effective conduct of proceedings.”<sup>2</sup>
3. As a barrister, the ICPLCL is bound by the Code of Ethics of the Bar Association of the Kingdom of Cambodia (“BAKC”)<sup>3</sup> as well as by the rules of the England and Wales Bar Association. The BAKC Code of Ethics “aims at protecting and strengthening the independence and freedom of the legal profession and guaranteeing the dignity of lawyers both within and beyond the practice of the legal profession in order to enhance public confidence” but fails to address the particular situation described in the Declaration.<sup>4</sup> The England and Wales Bar Code of Conduct in the Bar Standards Board Handbook provides in Rule C8 that “You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).”<sup>5</sup>
4. Regarding the ECCC Judges: Article 128 of the Cambodian Constitution, Article 3(3) of

<sup>1</sup> F53/7 Declaration of a possible conflict of interest by Megan Hirst, 12 September 2019, EN 01627498 (“the Declaration”).

<sup>2</sup> See also, although not directly applicable to the CPILCL, the DSS Administrative Regulations of ECCC that contain some general principles of ethics. Article 9.1 and 9.2 provide “lawyers shall not engage in activity that is incompatible with the discharges of [their] duties” and have the obligation to “exercise all care to ensure that no conflict of interest arises”.

<sup>3</sup> Case 004-D361/4/1/5.1.1 Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia, 2012 (“BAKC Code of Ethics”).

<sup>4</sup> BAKC Code of Ethics, Art. 1. See also Art. 3 “In all circumstances, lawyers shall abide by their oath of allegiance and shall conform to the principle of conscience, humanity, and dignity of the profession”. Article 25 deals with conflict of interest arising between clients of a lawyer or between the lawyer and his client.

<sup>5</sup> Bar Standards Board Handbook, Version 4.3, Part 2 – Code of Conduct, 15 Oct 2019, rC8, accessed on 6 Dec 2019 at <https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&audience=&q=>. Note that rC21 concerns situations of conflict of interest but mainly address the arising of conflict between two clients or between a barrister and his/her client.

the Agreement between the Royal Government of Cambodia and the United Nations and Article 10 new of the ECCC Law mandate an independent and impartial judiciary. A presumption of impartiality is attached to the ECCC judges by virtue of Article 3(3) of the Agreement. Internal Rule 34(2) provides the mechanism for disqualification of ECCC judges.<sup>6</sup> The *Furundžija* test (existence of an actual bias or an unacceptable appearance of bias)<sup>7</sup> and its “reasonable observer” standard has been adopted and applied at the ECCC.<sup>8</sup> Finally, the ECCC Code of Judicial Ethics adopted by the ECCC judges in 2008 provides in Article 2(2) that “Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest”.<sup>9</sup>

### III. SUBMISSIONS

5. The circumstances described in the Declaration do not meet the standards required to constitute a conflict of interest, create the risk of, or a perception of, such conflict of interest. The facts declared would not prejudice in any way the administration of justice or the fairness and integrity of the proceedings in Case 002/02. Nor would these facts undermine the ethics of the ICPLCL or the independence and impartiality of Reserve Judge Rapoza.
6. The interactions between the ICPLCL and Reserve Judge Rapoza were too remote in time and too tangential to affect the confidence of the public in the ECCC and in the moral

<sup>6</sup> See also **D163.2** Bangalore Principles of Judicial Conduct, EN 00316264, 66. They provide that a judge shall exercise the judicial function independently, “free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason” (Value 1.1), that “A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge’s court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality” (Value 4.3).

<sup>7</sup> **F53/4.1.13** *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, para. 189 [“A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: 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 the case is automatic; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”]. See also **F53/4.1.30** *Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, para. 203; **F53/4.1.14** *Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para. 39; **F53/4.1.37** *Nahimana et al.*, ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007, para. 49.

<sup>8</sup> See e.g. **C11/29** 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, Pre-Trial Chamber, 4 February 2008, paras 20-21; **E5/3** Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, Trial Chamber, 28 January 2011, para. 6; **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, Special Panel, 23 March 2011, paras 11-12; **F53/5.2.2** Decision on Ieng Thirith’s Application to Disqualify Judge Som Sereyvuth for Lack of Independence, Supreme Court Chamber, 3 June 2011, para. 10; **E314/12/1** Reasons for Decision on Applications for Disqualification, Special Panel, 30 January 2015, para. 33.


<sup>9</sup> **F53/4.1.1** Code of Judicial Ethics, ECCC Judges, 2008, Article 2(2).

authority and integrity of its judiciary. As pointed out in the declaration, such interactions between actors of the international criminal law area are not unusual. As described, those interactions took place long before Ms. Megan Hirst was appointed as the ICPLCL (*in tempore non suspecto*), were limited in number and did not relate to the ECCC proceedings in any way. They related to the production of a textbook on domestic Timorese criminal law. Further, it is relevant to note that Judge Rapoza as a reserve Supreme Court Chamber (“SCC”) Judge does not at the moment take part in judicial decisions issued by the SCC. Therefore, the Co-Prosecutors submit that the ICPLCL is not in breach of any ethical or code of conduct obligation that she is subject to at the ECCC. Similarly, the Co-Prosecutors submit that these interactions do not give rise to an actual bias or an appearance of bias on behalf of Reserve Judge Rapoza. Moreover, in the opinion of the Co-Prosecutors, any further interaction between the ICPLCL and Reserve Judge Rapoza that relates exclusively to the production of the textbook on Timorese criminal law would not be incompatible with their respective functions at the ECCC.

#### IV. RELIEF REQUESTED

7. For the foregoing reasons, the Co-Prosecutors request the Supreme Court Chamber to declare that the past interactions between the ICPLCL and Reserve Judge Rapoza did not amount to a conflict of interest or create the risk of such conflict.

Respectfully submitted,

Date	Name	Place	Signature
9 December 2019	CHEA Leang National Co-Prosecutor	Phnom Penh	
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