

JUDICIAL ETHICS IN THE INTERNATIONAL TRIBUNALS

Drawn from Michael G. Karnavas's lecture at the ADC-ICTY's 12th Defence Symposium

I. INTRODUCTION

On 24 January 2014, I was invited to lecture on Judicial Ethics at the ADC-ICTY's twelfth Defence Symposium for interns and staff at the ICTY. Some 45 interns and other court staff attended. Hardly an academic exercise in theoretical constructs, I tried to keep the presentation lively with vivid examples such as *Harhoff's folly*, *Sow's dilemma*, *Robertson's hubris*. My aim was to present practical applications of the jurisprudence on judicial ethics (and misconduct) to young lawyers—primarily from the defence perspective—though relevant for young, impressionable lawyers working in Chambers and for the Prosecution.

I explored (in general terms due to time constraints) the jurisprudence of the international tribunals, giving practical advice on what to do when a potential instance of bias may affect a client. The step-by-step process, if you will. Because occasionally there is an insufficient amount of on-record evidence to support a challenge, I shared my thoughts on setting up a challenge for disqualification by drawing out the dubious conduct or insidious evidence needed for a credible challenge.

In short, my lecture was about highlighting some of the inequities and hypocrisy defence lawyers face when making challenges of judicial bias, perceived or otherwise; how foolhardy it is to make specious claims that fail to meet the well-established criteria in showing bias due to a lack of impartiality or independence; why it is important for defence lawyers to make timely objections, move for disqualification when deemed necessary and reasonable; and the importance of perfecting the trial record in order to preserve errors for appeal.

The lecture centered on *Furundžija*,¹ the seminal case at the ICTY, which set the criteria in determining the bases for judicial disqualification, applied by the various international criminal tribunals and hybrid courts. It is worth noting that although *Furundžija* set the criteria for international tribunals, the rule was hardly novel in July of 2000.²

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

² See *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942, 1955 U.S. LEXIS 807 (U.S. 1955): “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must

The *Furundžija* Appeals Chamber held that:

[A] Judge should be not only *subjectively* free from bias but also there should be nothing in the surrounding circumstances which *objectively* gives rise to an appearance of bias....

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 is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³

[A] reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.⁴

The issue in *Furundžija* was whether the accused's conviction should be vacated because of an appearance of bias on the part of Judge Florence Mumba, due to her prior involvement with the United Nations Commission on the Status of Women (UNCSW). One of the main concerns was Judge Mumba's membership in the UNCSW, even if she was not a member of the UNCSW while serving as a Judge at the ICTY – cases involving mass and systematic rape and sexual violence have come before the ICTY – a topic of special concern advocated by the UNCSW.⁵ The Defence argued that due to Judge Mumba's personal interest, she should be disqualified based on the test that “a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Mumba has or had any associations, which might affect her impartiality.”⁶ In this regard, the Defence submitted that:

Judge Mumba should have been disqualified as an appearance was created that she had sat in judgment in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the

be considered. This Court has said, however, that ‘every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.’ *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’ *Offutt v. United States*, 348 U.S. 11, 14.”

³ *Id.*, para. 189.

⁴ *Id.*, para. 190.

⁵ *Id.*, para. 166.

⁶ *Id.*, para. 169.

UNCSW.⁷

The Defence did not argue that Judge Mumba was actually biased but that a “reasonable person could have an apprehension as to her impartiality.”⁸ The Appeals Chamber rejected this argument, *inter alia*, because the UNCSW’s relevant objectives are shared by the UN and “to endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.”⁹ The Appeals Chamber considered that Judge Mumba’s involvement with the UNCSW and, in general, her previous experience in this area are relevant to the requirement under Article 13(1) of the ICTY’s Statute for experience in international law, including human rights law.¹⁰ This was the first case in which the Appeals Chamber had to determine how to interpret the requirement of impartiality under Article 13(1) of the ICTY Statute.¹¹ The *Furundžija* criteria emerged as *the* standard for judicial disqualification for lack of independence or impartiality.

II. OPENING CASES—SETTING THE STAGE

I began the lecture by quoting a few passages from ICC Judge Chile Eboe-Osuji’s response to a motion for his disqualification, based on the allegations made by the Defence counsel in *Prosecutor v. Banda & Jerbo* that Judge Eboe-Osuji could not be fair and impartial because of his Nigerian nationality, which was common to the victims.¹² The Defence asserted that “[a]ny reasonable observer would expect that the natural sympathies of a judge towards fallen victims from his or her own country, who had sacrificed their lives in a mission they undoubtedly believed would serve the cause of peace, would make that judge more likely than one from a neutral country to find those who participated in this attack criminally responsible.”¹³

⁷ *Id.*

⁸ *Id.*, para. 170.

⁹ *Id.*, paras. 201-02.

¹⁰ *Id.*, para. 205.

¹¹ *Id.*, paras. 177–78.

¹² *Prosecutor v. Banda Abakaer Nourain & Jerbo Jamus*, ICC-02/05-03/09, Defence Request for the Disqualification of a Judge, 2 April 2012.

¹³ *Id.*, para. 15.

Judge Eboe-Osuji, as was his right,¹⁴ elegantly dispensed with the claims of perceived bias in his response, *Memorandum concerning 'Defence Motion for Disqualification of a Judge.'*¹⁵ Judge Eboe-Osuji dramatically opened his retort *to recuse or not to recuse* with a quote from a Canadian Supreme Court Decision:

Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realisation of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfillment of a life's dreams. It is never taken lightly, [...] Courts have rightly recognized that there is a presumption that judges will carry out their oath of office, [...] This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something that the judge has done gives rise to a reasonable apprehension of bias.¹⁶

Judge Eboe-Osuji went on to state:

As a preliminary matter, I should observe that, taking the motion as asking questions, it is perfectly understandable that learned counsel, from their own subjective corner, may want to ask whether an ICC judge should sit in a case in which the victims of the conduct under inquiry share a nationality with the judge. Viewed from that subjective perspective, it is arguable that the question is one that counsel owe their clients the duty to ask in good faith—since it has occurred to them to ask it. I respect the question and treat it with dignity. I do not presume that counsel were acting in bad faith in asking it. This is notwithstanding that challenges of bias against a judge are really questions about 'judicial integrity' concerning 'not simply the personal integrity of the judge, but the integrity of the entire administration of justice,' as Justice Cory had observed at the Supreme Court of Canada. In accepting counsel's statement, as I do, that their intention is not to attack my integrity, I must assume that counsel were unaware of such eminent observations on the matter as that conveyed by Justice Cory.¹⁷

A few paragraphs later, Judge Eboe-Osuji deftly articulated a judge's duties and obligation in stepping down or in resisting to step down when his or her independence and / or impartiality is called into question, explicitly using language from *Furundžija*.

¹⁴ Rome Statute of the International Criminal Court as corrected by the procès-verbaux of 16 January 2002, Article 41(2)(c): "Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision."

¹⁵ *Prosecutor v. Banda Abakaer Nourain & Jerbo Jamus*, ICC-02/05-03/09, Judge Eboe-Osuji's Memorandum concerning 'Defence Motion for Disqualification of a judge,' Annex 2, 16 April 2012.

¹⁶ *Id.*, para. 1 *citing* RDS v R [1997] 3 SCR 484, paras. 116 and 117 [Supreme Court of Canada].

¹⁷ *Prosecutor v. Banda Abakaer Nourain & Jerbo Jamus*, ICC-02/05-03/09, Judge Eboe-Osuji's Memorandum concerning 'Defence Motion for Disqualification of a judge,' Annex 2, 16 April 2012, para. 8.

From my own past experience as an advocate representing parties in cases, I must acknowledge the anxiety of counsel to keep the Bench perfectly pure in impartiality. Hence, every act and word that counsel see as out of place in a judge runs the risk of provoking fear of bias. Many a time, these bouts of fear result in motions for recusal. [I do not recall ever making one, though I had suspected it once or twice; but managed to keep my thoughts to myself] But, these motions have become truly unexceptional in their frequency in international criminal practice. At the ICTR and ICTY, open allegations of bias have been made against more judges than not, unconcerned that such a challenge to judicial impartiality ‘is a serious step that should not be undertaken lightly.’ It is only a matter of time before that epidemic makes its way to the ICC.¹⁸

It is, however, important always to keep in mind that the law does not appraise fear of judicial bias exclusively from the lens of the complaining counsel. In this connection, it has been correctly observed that, ‘in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive. ‘What is decisive is whether this fear can be held objectively justified.’¹⁹

This brings us to the yardstick against which complaints of judicial bias must be assessed. In that regard, we must recall this settled point of law. The correct test for recusal of a judge is *whether the fair-minded and informed observer, having considered all the facts and all the circumstances, would consider that there was a real danger of bias.*²⁰

Unstintingly recognizing that it is in the finest tradition of the Bar to make applications for disqualification when perceived to be warranted, Judge Eboe-Osuji cogently underscored the need to meet not only the subjective prong of the *Furundžija* criteria, but also — and this is the more difficult one — the objective prong.

With the stage set, it was time to dissect the *Harhoff matter*. *Judge Harhoff’s folly*, due to what I would later refer to as the *Harhoff syndrome* is a treasure trove for a lecture on judicial ethics – the perfect point of departure for discussing the *Furundžija* “reasonable apprehension of bias” test.

The Harhoff Syndrome

Judge Frederik Harhoff, in a letter to fifty-six personal contacts²¹ that was apparently leaked to the press, expressed some of his innermost thoughts, which, even when viewed in the light

¹⁸ *Id.*, para. 25.

¹⁹ *Id.*, para. 26.

²⁰ *Id.*, para. 27 (emphasis added).

²¹ ICTY Judge Frederik Harhoff’s Email to 56 contacts, 6 June 2013, available at <http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>.

most favorable to him, demonstrate his inability (or perhaps his unwillingness) to adhere to the universally recognized fair trial right to the presumption of innocence, with the burden being with the prosecution.²² Judge Harhoff's sentiments are quite frequently shared (though not revealed – at least not on paper or in transparent gatherings) by many human rights/humanitarian advocates appointed as international judges, who, although possessing impressive credentials, lack necessary practical experience, and, more worrisome, are challenged when it comes to rigorously applying the most fundamental precepts of fair-trial rights: the presumption of innocence afforded to the accused and burden of proof resting on the prosecution. Judge Harhoff assuredly understands as a theoretical construct the presumption of innocence. But when it came to applying it, his predilection for *victim-based justice* and unwillingness to conform to the standards of justice led him to take the position that an accused (at least if a high military officer) must, ineluctably, be deemed guilty as charged, unless proved otherwise. A classic case of inappropriate burden-shifting. This, in my opinion, is the *Harhoff syndrome* in its purest form. Judges at the international tribunals who suffer from this affliction—and there are a few—are generally discreet, frustrating a defence counsel's ability to establish the objective prong of *Furundžija* when the need to disqualify is seemingly palpable.

To demonstrate the *Harhoff syndrome*, I examined some of the musings of Judge Harhoff's tortured soul in meeting *his* perceived mission as an international judge; words which proved to be the tripwire for the Chamber finding him biased and thus unfit to continue with the deliberations in the *Šešelj* case;²³ words such as “presuming it was right to convict leaders for the crimes committed with their knowledge,” because it was a “set practice,” and of his “professional and moral dilemma,” in having to apply faithfully the jurisprudence as it was emerging from the ICTY which he obviously found abhorrent and contrary to *his* view of what the law is or should be. These were the words latched onto by the *Šešelj* Defence in

²² See International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (“ICCPR”), Article 14; Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended 7 July 2009 by Resolution 1877, Article 21 (“ICTY Statute”); The Law on the Establishment of the Extraordinary Chambers as amended 27 October 2004 (“ECCC Law”), Articles 33 (new) and 35 (new); Rome Statute of the International Criminal Court as corrected by the procès-verbaux of 16 January 2002, Article 66; Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, Article 20; Statute of the Special Court of Sierra Leone (“SCSL Statute”), adopted 15 August 2000, Article 17.

²³ This of course caused other problems briefly commented on, such as how is it possible to claim that *Šešelj* received a fair trial if the judge replacing Judge Harhoff never participated in any of the courtroom proceedings. Additionally, there is the issue of all the split decisions made during the proceedings where Judge Harhoff was in the majority. It is doubtful if this sort of flexibility in the pursuit of justice would be countenanced in national courts with vibrant judicial institutions and an abiding appreciation for the strict application of the rule of law.

showing an unreasonable appearance of bias.²⁴

The Chamber convened by the Vice-President explicitly noted how Judge Harhoff's comments met the criteria for disqualification for lack of impartiality:

The Majority, Judge Liu dissenting, considers that the Letter differs from other public statements in that Judge Harhoff refers to what he perceives as a 'set practice' of convicting military commanders and makes clear his dissatisfaction with his perceived change in the Tribunal's direction in this regard. With regard to Judge Harhoff's reference to military commanders, the Chamber notes that the accused is charged with participating in a JCE by *inter alia* directing paramilitary forces including a group known as 'Šešelj's men'.

By referring to a 'set practice' of convicting accused persons without reference to an evaluation of the evidence in each individual case, the Majority, Judge Liu dissenting, considers that there are grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction. This includes for the purposes of the present case. This appearance of bias is further compounded by Judge Harhoff's statement that he is confronted by a professional and moral dilemma, which in the view of the Majority, is a clear reference to his difficulty in applying the current jurisprudence of the Tribunal.²⁵

Judge Harhoff, with his "deep professional and moral dilemma," clearly believed that it was his professional duty to convict—particularly Serb and Croat accused. His quasi-public accusations show his dissatisfaction with the ICTY's jurisprudence and practice, which demonstrates a reluctance to apply the law. Judge Harhoff also engages in speculation—the American and Israeli governments certainly have something to do with shielding military commanders from responsibility—right? While we may never know whether Judge Harhoff's accusations are true, he certainly did not go through the proper channels to discuss such a dilemma. Judge Harhoff did not contact the Tribunal's President on this issue, consult the Plenary, or even write a dissenting opinion. Additionally, as Security Council Resolution 837 created the ICTY, Judge Harhoff could have taken his complaint to the members of the Security Council (although reports submitted to the Security Council are funneled through the Presidency).²⁶ In any event, there were a number of available, more appropriate means for Judge Harhoff to discuss his "professional and moral dilemma." If Judge Harhoff was so tortured by the specific direction requirement (subsequently reversed by the *Šainović* Appeal

²⁴ *Prosecutor v. Šešelj*, IT-03-67-T, Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013.

²⁵ *Id.*, paras. 12-13.

²⁶ United Nations Security Council, Resolution 827 S/RES/827, 25 May 1993, Statute of the ICTY, Article 34.

Chamber),²⁷ why did he not dissent to the Trial Chamber's (Judge Harhoff sitting) adoption of specific direction in the *Stanišić and Župljanin* judgment?²⁸

Judge Harhoff also made serious allegations against Judge Meron – revealingly referred to by Judge Harhoff as “the American presiding judge”²⁹ – effectively challenging his independence by claiming that he was influenced by or doing the bidding for the governments of the US and Israel. Judge Harhoff queried:

You would think that the military establishment in leading states (such as USA and Israel) felt that the courts in practice were getting too close to the military commanders' responsibilities. One hoped that the commanders would not be held responsible unless they had actively encouraged their subordinate forces to commit crimes. In other words: The court was heading too far in the direction of commanding officers being held responsible for every crime their subordinates committed. Thus their intention to commit crime had to be specifically proven.

Now apparently the commanders must have had a direct intention to commit crimes—and not just knowledge or suspicion that the crimes were or would be committed. Well, that begs the question of how this military logic pressures the international criminal justice system? Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction? We will probably never know. But reports of the same American presiding judge's tenacious pressure on his colleagues in the Gotovina - Perišić case makes you think he was determined to achieve an acquittal - and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute. Both judgements then became majority judgements 3 -2.³⁰

Upset about the acquittal of Gotovina and other accused, Judge Harhoff stated that:

[T]he court's Appeal Chamber suddenly back-tracked last autumn with the three Croatian generals and ministers in the Gotovina case. They were acquitted for the Croatian army's war crimes while driving out Serbian forces and the Serbian people from major areas in Croatia—the so-called Krajina area in August 1995...³¹

²⁷ *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeal Judgment, 23 January 2014, paras. 1649–50. The *Šainović* Appeals Chamber criticized the *Perišić* Appeals Chamber for misreading prior jurisprudence on specific intent and failing to give primary consideration to “positions expressly taken and clearly set out in the judgement concerned.” *Id.*, para. 1621. Judge Harhoff could have legitimately made similar criticism of the *Perišić* Appeals Chamber, rather than instead assuming that the Judges involved were lacking in independence.

²⁸ See *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Judgement, 27 March 2013, para. 107.

²⁹ ICTY Judge Frederik Harhoff's Email to 56 contacts, 6 June 2013, available at <http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>.

³⁰ *Id.*

³¹ *Id.*

Judge Harhoff also accused Judge Orie, a Dutch judge, of taking directions from the American Government:

Was Orie under pressure from the American presiding judge? It appears so! Rumour from the corridors has it that the presiding judge demanded that the judgement against the two defendants absolutely had to be delivered last Thursday—without the three judges in the premium authority having had time to discuss the defence properly—so that the presiding judge's promise to the FN's security service could be met. The French judge only had 4 days to write the dissent, which was not even discussed between the three judges in the department. A rush job. I would not have believed it of Orie.

Judge Harhoff, insinuated that “the Turkish Judge,” Judge Mehmet Güney, lacked independence since he was elderly and easily manipulated:

But reports of the same American presiding judge's tenacious pressure on his colleagues in the Gotovina - Perisic case makes you think he was determined to achieve an acquittal - and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute...³²

Examining Judge Harhoff's assertions about Judge Güney's in a different context begs the question whether — at least in Judge Harhoff's mind — Judge Güney is currently fit to serve as a judge at the ICTY. If Judge Güney, the “elderly Turkish Judge,” is too old and easily manipulated by his peers, does this not affect his impartiality and independence? If he is so easily lead or mislead by other judges, applying the *Furundžija* standard, would a reasonable observer apprehend bias? Perhaps so. Curiously, Judge Harhoff was silent on this point. So much for his deep and abiding reverence for judicial independence and impartiality. But when you dissect his assertions and insinuations, it becomes rather obvious that Judge Harhoff simply lacks the basic understanding of the deliberative process: judges lobby other judges with a fair amount of horse-trading when deciding issues of the finer points of the law.³³ And since much of what is applied is customary international law, the contours as elusive as they are malleable.

³² *Id.*

³³ Maybe newly appointed judges who do not come from a judicial background should be required to read *The Brethren: Inside the Supreme Court* by Bob Woodward and Scott Armstrong. For extra credit, they could also read *The Nine: Inside the Secret World of the Supreme Court*, a fascinating read on the intricacies of judicial deliberations. But then again, any good biography on any justice from the US Supreme Court, particularly on Justice Brennan, reveals how *stare decisis* is adhered to, developed, and refined through a variety of means such as lobbying, negotiating, and nuancing legal positions. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

Judge Harhoff's assertions go to the credibility of the Tribunal, arguably bringing it into disrepute. Under the ICTY Statute, the Chambers shall be composed of a maximum of sixteen permanent *independent* judges.³⁴ While the ICTY Statute and Rules of Procedure and Evidence do not specifically detail what is meant by the independence of judges, the general rule has been adopted by the 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."³⁵ Judge Harhoff asserts a level of control over Judge Meron by the American and Israeli Governments, implicitly accusing Judge Meron, the President of the ICTY, of lacking of independence. This is a damning accusation, which, if true (and Judge Harhoff provides no evidence other than speculative musings), sullies the reputation and legacy of the ICTY. Although there is no code of ethics for judges at the ICTY as there is for the judges at the ICC or ECCC³⁶ (curiously strange as it seems), Judge Harhoff's behavior amounts to sanctionable offense. Under the ICC Code of Ethics, "[w]hile judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court."³⁷ Defence counsel at the ICTY are bound by a similar rule: "counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute."³⁸ By analogy, it would be sound to say that judges at the ICTY are equally bound. There is no cogent reason to argue otherwise.

The Sow dilemma

Having discussed *Harhoff* in some detail (an entire day can be spent analyzing all the nuances of this matter), I segued into what I referred to as the *Sow dilemma*: what can and should a judge do when — rightly or wrongly — he or she is confronted with a perceived act of injustice in the making by fellow judges in a case in which he or she is sitting.

³⁴ ICTY Statute, Article 12.

³⁵ 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, Phnom Penh, 6 June 2003, Article 3.

³⁶ ECCC Code of Judicial Ethics, 5 Sept. 2008, Article 7: "While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the ECCC."

³⁷ ICC Code of Judicial Ethics, ICC-BD-02-01-05, Article 9.

³⁸ Code of Professional Conduct for Counsel Appearing before the International Tribunal (ICTY), IT/125 Rev. 3, as amended 22 July 2009, Article 3(V).

Judge Malik Sow, in an unusual and dramatic fashion, effectively accused his brethren in the Special Court for Sierra Leone (SCSL) *Charles Taylor* case, in which he was an alternate judge, of not properly engaging in serious deliberations in the case. After the summary of the judgement was read, quite unexpectedly, Judge Sow proceeded to criticize the deliberative process in *Taylor*, casting a shadow of bias on his fellow judges and calling into question the integrity of the SCSL:

The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and, pursuant to the Rules, when there are no serious deliberations, the only place left for me is the courtroom. I won't get — because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof, the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.³⁹

After this comment, the SCSL Plenary met to consider what if any action should be taken against Judge Sow. The Plenary found that Justice Sow's behavior in court "amount[ed] to misconduct rendering him unfit to sit as an Alternative Judge of the Special Court," directing him under Rule 24(iii) "to refrain from further sitting in the proceedings pending a decision from the appointing authority."⁴⁰ The Plenary also found that Justice Sow's future should be decided under Rule 15*bis* (B).⁴¹

The Sow dilemma gave the Defence a potential opening for disqualification of the judges involved in dealing with Judge Sow's disciplinary matter. The Defence moved to disqualify the Appeals Chamber, asserting an unreasonable appearance of bias on the ground that "a reasonable observer, properly informed, would apprehend bias on the part of the Judges of the Appeal Chamber, because they have already made an adverse finding in the plenary and therefore pre-judged a critical aspect of the credibility of a source of evidence which is

³⁹ *Prosecutor v. Taylor*, SCSL-03-01-A, Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012, para. 9.

⁴⁰ *Prosecutor v. Taylor*, SCSL-03-01-A, Trial Transcript, 16 May 2012, p. 49681.

⁴¹ Rule 15*bis*(B) of the SCSL Rules of Procedure and Evidence states:

Should the Council of Judges determine that:

(i) the allegation is of a serious nature, and

(ii) there appears to be a substantial basis for such allegation,

it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, make a recommendation to the body which appointed the Judge.

fundamental to the Grounds of Appeal.”⁴² The Defence asserted that Judge Sow’s statement contained direct evidence of grave breaches of trial procedure in relation to the proceedings against Charles Taylor—a fundamental basis for grounds of appeal.⁴³

Judge Sow’s statement was transcribed by court reporters and appeared on the LiveNote contemporaneous transcript. The official transcript of the sitting does not include Judge Sow’s statement.⁴⁴ The Taylor Defence considered it a reasonable inference that SCSL court reporters were told to remove the statement prior to publication, or that it was deliberately removed from the official record by an organ or official of the court empowered to give such an order.⁴⁵ The Defence also asserted that the six judges who voted in plenary against Judge Sow were the six judges of the Appeals Chamber.⁴⁶ According to the Defence:

Judges that have already made an adverse finding on a critical aspect of the credibility of a source of evidence during the trial process should not again consider the credibility of that source of evidence in the same proceeding during the appellate process, *as this gives rise to a reasonable apprehension of bias from the perspective of a properly informed observer.*⁴⁷

The Appeals Chamber effectively pre-judging an aspect of a ground for an appeal — the professional credibility of Judge Sow — would not be viewed by a reasonable observer, properly informed, as free from bias. In deciding on the Defence’s request, the Appeals Chamber considered the Plenary Resolution. It found that it did not involve, or could not reasonably be perceived as involving matters related to Charles Taylor’s guilt or innocence; it only went to Judge Sow’s conduct.⁴⁸ The Appeals Chamber held that “sanctioning judicial misconduct in a trial does not constitute nor give rise to the appearance of prejudgment of the guilt or innocence of the respective accused.”⁴⁹ As for Judge Sow appearing as a witness in Charles Taylor’s appeal, the Appeals Chamber found that it was not pre-judging Judge Sow’s credibility as a witness.⁵⁰ If the same Appeals Chamber had found Judge Sow not to be credible in his assertion relating to the Trial Chamber (as this would justify his statement), how could it find him credible on an appeal – appearing as a witness – and testifying about his

⁴² *Prosecutor v. Taylor*, SCSL-03-01-A, Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012, para. 3.

⁴³ *Id.*, para. 10.

⁴⁴ *Id.*, para. 11.

⁴⁵ *Id.*,

⁴⁶ *Id.*, para. 14.

⁴⁷ *Id.*, para. 16 (emphasis added).

⁴⁸ *Prosecutor v. Taylor*, SCSL-2003-01-A, Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 13 September 2012, paras. 29–30.

⁴⁹ *Id.*, para. 30.

⁵⁰ *Id.*, para. 32.

conduct during the trial proceedings? Strange. Ultimately, the Appeals Chamber found itself free from bias, and the appearance of bias.⁵¹

Judge Sow's statement involved serious allegations against the credibility of the SCSL. If these allegations were true, what options did he really have? In blowing the proverbial whistle, did Judge Sow bring the SCSL's credibility into disrepute — an action which, if done by Defence counsel, may be sanctionable by the tribunal,⁵² or did he act appropriately under the circumstances for which he should be commended? While no code of judicial ethics exists for the SCSL, by analogy, counsel are bound by the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone. Article 5(iii) states: "Counsel shall act with integrity to ensure that his actions do not bring the administration of justice into disrepute."⁵³ The ICTY, which also lacks a code of judicial ethics, has a similar rule regarding counsel.⁵⁴ The ICC and ECCC both have judicial ethics codes for judges. The ICC's code explicitly states that: "While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court."⁵⁵ The SCSL Plenary obviously was not pleased, finding Judge Sow to have engaged in misconduct rendering him unfit to sit as an Alternate Judge.⁵⁶

Bangalore Principles of Judicial Conduct

With *Harhoff's folly* and *Sow's dilemma* as a backdrop, I thought it would be good to reflect a bit on the guidance provided by the Bangalore Principles of Judicial Conduct. Since time did not permit an in depth analysis, I focused on a passage from the preface to the commentary on the Bangalore Principles. Inspirational as much as aspirational, the simple concepts expressed in the few lines below captured the essence for holding symposiums on judicial ethics.

⁵¹ *Id.*, para. 34.

⁵² Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, adopted 14 May 2005, Article 5(iii).

⁵³ *Id.*

⁵⁴ Code of Professional Conduct for Counsel Appearing before the International Tribunal (ICTY), IT/125 Rev. 3, as amended 22 July 2009, Article 3(V): "Counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute."

⁵⁵ ICC Code of Judicial Ethics, ICC-BD-02-01-05, Article 9. *See also* ECCC Code of Judicial Ethics, 5 September 2008, Article 7: "While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the ECCC."

⁵⁶ *Prosecutor v. Taylor*, SCSL-2003-01-T, Sentencing Hearing Transcript, 16 May 2012, at 2.

A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under the law.

These observations apply both domestically within the context of each nation State and globally, viewing the global judiciary as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted.⁵⁷

Having highlighted the role judges and the judiciary play (or are expected to play) in advancing the rule of law, and with a solid framework on *Furundžija* principles, it was time to delve into some examples of potential bias to see the practical applications of *Furundžija*.

III. APPLICATION OF THE *FURUNDŽIJA* PRINCIPLE—SITUATIONS OF BIAS

A. *Ex parte* Communications

ECCC Case 002, Ieng Sary's motion to Disqualify Judge Silvia Cartwright

I first discussed the issue of *ex parte* communications on the part of the judge, which in most cases, is to the detriment to the Defence. I chose an example from the ECCC, where the Defence learned that one of the sitting Judges, Judge Silvia Cartwright, was participating in meetings with the International Co-Prosecutor Andrew Cayley and the ECCC Deputy Director of Administration. No one from any of the Defence teams were invited and neither was the head of the ECCC Defence Support Section (DSS). Obviously, these meetings were of concern to the Defence once they were learned about. They certainly amounted to *ex parte* communications. But as I noted earlier, when in doubt or not in possession of sufficient information showing bias, best to move incrementally. So, after all sorts of efforts to get the participants to these private meetings to come clean, the Defence filed a request for investigation into these *ex parte* communications.⁵⁸ The Trial Chamber declined to investigate, justifying the meetings as necessary for the coordination of the UN component of the ECCC.⁵⁹ Having no choice, the Defence appealed, seeking Judge Cartwright's

⁵⁷ Preface to "Commentary on the Bangalore Principles of Judicial Conduct", The Judicial Integrity Group, March 2007.

⁵⁸ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, IENG Sary's Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3.

⁵⁹ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5.

disqualification on the grounds that the meetings had no express legal basis. Since Prosecutor Cayley would continue to appear before Judge Cartwright, these *ex parte* communications violated applicable ethics standards.⁶⁰ The Supreme Court Chamber of the ECCC ultimately dismissed⁶¹ the appeal but found that:

[A]bsent any institutional basis either in the ECCC founding documents or the Internal Rules such meetings could be perceived as being related to a case or cases in which the attending judge has concern. **As such they may create the appearance of asymmetrical access enjoyed by the prosecutor and the trial judge.** Therefore, in order to avoid such appearance and giving rise to disqualification motions it would seem advisable to reconsider the make-up of any meetings that trial judges wish to have with the prosecutors by allowing the participation of the Defence Support Section or members of the defence teams, as appropriate.⁶²

Two days after the appeal decision, it came to light that Judge Cartwright was continuing to have *ex parte* communications. Completely disregarding the Supreme Court Chamber, Judge Cartwright sent Prosecutor Cayley what was supposed to be a private e-mail, a message on matters seemingly related to the case.⁶³ Judge Cartwright inadvertently sent the e-mail to the Case File distribution list, including the IENG Sary Defence.⁶⁴ The e-mail stated: “*Of Course I was only trying to see the lighter side. As you know, Andrew, I am seriously considering my own position. I shall not make a hasty ydecision [sic]. Silvia.*”⁶⁵ This prompted another submission for the disqualification of Judge Cartwright because “the nature of Judge Cartwright’s association with International Co-Prosecutor Cayley shows actual bias or, at a minimum, the appearance of bias.”⁶⁶ The Defence argued that Judge Cartwright knew that *ex parte* communications with a prosecutor could give rise to applications for her

⁶⁰ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, IENG Sary’s Request for Investigation Concerning Ex Parte Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3, paras. 29–39.

⁶¹ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC/SC(12), Decision on IENG Sary’s Appeal against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012. The Supreme Court Chamber characterized the motion under Rule 35 (Interference with the Administration of Justice), as opposed to Rule 34 (Recusal and Disqualification). The standard for Rule 35 requires a knowing and willful interference with the administration of justice. This is a higher standard than the *Furundžija* (appearance of bias) required by Rule 34.

⁶² *Id.*, para. 24 (emphasis added).

⁶³ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, IENG Sary’s Rule 34 Application for Disqualification of Judge Silvia Cartwright, or in the alternative, Request for Instruction and Order to Cease and Desist from *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications, 27 April 2012, para. 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, para. 7.

disqualification, and disregarded the guidance of the Supreme Court Chamber.⁶⁷

Under ECCC Internal Rule 34(2):

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.⁶⁸

The ECCC has adopted the *Furundžija* standard.⁶⁹ Under this standard, the Defence argued that “Judge Cartwright’s relationship with International Co-Prosecutor Cayley developed such that they shared information *ex parte* regarding Case 002 jurisprudence.” With Judge Cartwright’s failure to disclose the nature of her participation in the meetings, Judge Cartwright’s conduct would suggest that it could give rise, at a minimum, to the appearance of bias.⁷⁰

On the second challenge (after becoming aware of Judge Cartwright’s e-mail), the Trial Chamber took the view that the meetings served an administrative purpose, as they “were connected with non-judicial, managerial, and administrative issues affecting the international component of the ECCC rather than the substance of the proceedings.”⁷¹ The Trial Chamber reasoned this on the basis of the email communications mentioned above. The Trial Chamber considered that the non-judicial, managerial and administrative nature of the meetings did not give rise to any sanctions or disqualification, “neither, ipso facto, [did] the continuing communication between the participants in the meetings establish such grounds.”⁷² The Trial Chamber noted that no parties to proceedings are permitted to communicate directly with judges about matters that relate to the substance of judicial proceedings, and that the Defence did not offer evidence to “suggest that this practice is applied inconsistently.”⁷³ The Chamber also denied the disclosure request, stating that that it had no power to make such an order.⁷⁴

⁶⁷ *Id.*, para. 10.

⁶⁸ ECCC Internal Rule 34(2).

⁶⁹ *See, e.g., Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 01), Decision on 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.

⁷⁰ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, IENG Sary’s Rule 34 Application for Disqualification of Judge Silvia Cartwright, or in the alternative, Request for Instruction and Order to Cease and Desist from *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications, 27 April 2012, para. 11.

⁷¹ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC-TC, Decision on IENG Sary’s Application for Disqualification of Judge Cartwright, 4 June 2012, para. 15.

⁷² *Id.*, para. 17.

⁷³ *Id.*, para. 18.

⁷⁴ *Id.*, para. 21.

B. Actual Bias

ECCC Case 002, Application for Disqualification of Judge Marcel Lemonde

In Case 002, an eye-witness, Mr. Wayne Bastin, a former Chief of Intelligence and Analysis Unit of the Office of the Co-Investigating Judges (“OCIJ”), informed a member of the IENG Sary Defence that Judge Marcel Lemonde in a meeting with OCIJ top investigators noted that he would prefer that they “find more inculpatory evidence than exculpatory evidence.”⁷⁵ Judge Lemonde in his written response to the IENG Sary Defence’s application to disqualify him stated that he could not recall the incident, but if he did say the words attributed to him, they were made in jest.⁷⁶ Judge Lemonde agreed that the *Furundžija* standard applied, but argued that the words should not have been taken as instructions, and that a fair-minded observer would have noticed that the meeting was “a relaxed, informal, and lighthearted one.”⁷⁷ He also asserted that he was speaking in English at the time, which is neither his first nor working language, and that “no-one took any such remarks seriously.”⁷⁸

The IENG Sary Defence argued that Judge Lemonde effectively instructed his senior international investigators — who worked under his direction and authority⁷⁹ — to conduct a resulted-targeted investigation designed, inescapably, to benefit the prosecution while manifestly trampling over the rights of the accused.⁸⁰ The statement made by Judge Lemonde, if followed through, would have seriously prejudiced the Charged Persons’ right to a fair trial. In the ECCC system, designed after the French civil law judicial system, the Co-Investigating Judges are in charge of collecting evidence, screening for exculpatory or inculpatory evidence, and ascertaining the truth.⁸¹ The IENG Sary Defence had its hands tied, and as such, was at the mercy of the Co-Investigating Judges. On the one hand, the Defence is not permitted to search for exculpatory evidence, since this is the job of the Co-Investigating Judges. On the other hand, Judge Lemonde had instructed the OCIJ staff to search for only inculpatory evidence. This should have been sufficient to establish actual bias

⁷⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC), IENG Sary’s Application to Disqualify Judge Marcel Lemonde & Related Request for a Public Hearing, 29 October 2009, paras. 1, 2.

⁷⁶ *Case of NUON Chea et al.*, 002-09-10-2009-ECCC-OCIJ/PTC(01), Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan, 9 November 2009, para. 8.

⁷⁷ *Id.*, para. 28.

⁷⁸ *Id.*

⁷⁹ ECCC Internal Rule 14(5).

⁸⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), IENG Sary’s Application to Disqualify Judge Marcel Lemonde & Related Request for a Public Hearing, 29 October 2009, para. 23.

⁸¹ ECCC Internal Rule 55(5).

under *Furundžija*.

Additionally, Judge Lemonde's behavior would have lead a reasonable observer to perceive bias, as required by *Furundžija*. How would a "reasonable observer," reasonably informed, not apprehend at least the appearance of bias in this case, let alone any actual bias on the part of Judge Lemonde? The ECCC Pre-Trial Chamber dismissed the application on the grounds that the Defence provided insufficient evidence to make a finding for bias.⁸² The Pre-Trial Chamber considered that the evidence (the notarized statement signed by Mr. Bastin which the Chamber considered "incorrect") was insufficient and not probative as no witnesses verified the identity of Mr. Bastin.⁸³ The Pre-Trial Chamber noted that Mr. Bastin said he took "brief dot point notes," which were not produced and that Mr. Bastin's statement provided no context of the conversation where Judge Lemonde uttered the statement.⁸⁴ Additionally, the Chamber reasoned that the context of the meeting, a private meeting with OCIJ staff, and the fact that Judge Lemonde was speaking English (not his working language), showed that the words could not be interpreted as "having their full meaning in English."⁸⁵ The Chamber also took Judge Lemonde's word that the statements were made in jest.⁸⁶ Without any mention of *Furundžija* or any supporting authority, the Chamber considered the evidence supporting the application "not very strong."⁸⁷ In dismissing the application the Chamber reasoned that:

The Pre-Trial Chamber notes that the Co-Investigating Judges are more than two years into their judicial investigation of Case No. 002. By ordering the Provisional Detention of the Charged Person, Judge Lemonde has already found pursuant to Internal Rule 63(3)(a) that 'there is well founded reason to believe that the [Charged Person] may have committed the crime or crimes specified in the Introductory or Supplementary Submission.' The Charged Person is, of course, entitled to the presumption of innocence and to an impartial judicial investigation. The nature of a judicial investigation is that it is an ongoing process of obtaining and evaluating evidence, with a conclusion being reached to either indict or dismiss in respect of matters charged. It is noted that the Co-Investigating Judges had announced on 27 May 2009 that they planned to finish the investigations by the end of the year which means that they were at the time closing to a conclusion. By finally forming an opinion on the investigations it is not likely and cannot be expected that the Co-Investigating Judges do not have a preference as to the nature of evidence to be found, as they must have an idea by now of the

⁸² *Case of NUON Chea et al.*, 002/09-10-2009-ECCC/PTC(01), Decision on IENG Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, para. 20.

⁸³ *Id.*

⁸⁴ *Id.*, para. 21.

⁸⁵ *Id.*, para. 22.

⁸⁶ *Id.*, para. 23.

⁸⁷ *Id.*

conclusions they might reach based on the evidence collected.⁸⁸

Interestingly, the Chamber noted that an expression of “preference” by an investigating Judge to his or her staff should be distinguished from an explicit instruction or direction to search for only inculpatory evidence and to exclude exculpatory evidence, and Judge Lemonde’s statement did not amount to an “instruction.”⁸⁹ In other words, the Pre-Trial Chamber suggested that an *independent* Co-Investigating Judge can express “preference” to exclude exculpatory evidence to his staff (who will most likely follow that “preference”)!

C. A Judge’s Ethical Obligation to Disclose

Next, I discussed a Judge’s ethical obligation to disclose. Judges must disclose facts that may affect (or perceive to affect) their impartiality; facts that could lead a reasonable, informed observer to objectively apprehend bias.

ICTR Prosecutor v. Karemera, Disqualification of Judge Vaz

In the ICTR case *Karemera*, the Defence requested that Judge Vaz recuse herself because of her alleged cohabitation with Ms. Dior Fall, one of the trial attorneys for the prosecution during the case.⁹⁰ Although Judge Vaz ultimately withdrew, the Appeals Chamber noted the improper conduct and held that the Judge should have disclosed the facts of her accommodation prior to the Defence’s objection:

The particular circumstances involved here include, in addition to the admitted association and cohabitation, the fact that Judge Vaz did not disclose these facts until Defence counsel expressly raised this matter in court and that she withdrew from the case after Defence lodged applications for her disqualification on this basis and before the Bureau decided the disqualification motions. The Appeals Chamber finds that these circumstances could well lead a reasonable, informed observer to objectively apprehend bias. The Appeals Chamber emphasizes that this is not a finding of actual bias on the part of Judge Vaz, but rather a finding, made in the interests of justice, that the circumstances of the case gave rise to an appearance of bias.⁹¹

⁸⁸ *Id.*, para. 24.

⁸⁹ *Id.*, para. 25.

⁹⁰ See *Prosecutor v. Karemera et al*, ICTR-98-44-AR15bis, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material, 22 October 2004 para. 2.

⁹¹ *Id.*, para. 67.

SCSL Prosecutor v. Sesay: Disqualification of Judge Robertson

In the *Sesay* case before the SCSL, the Defence had applied for disqualification seeking Judge Robertson's permanent removal from the Special Court on the basis of comments Judge Robertson had made concerning the Revolutionary United Front (RUF) in his book *Crimes Against Humanity* published before his appointment to the Special Court.⁹² In his book, Judge Robertson had accused the RUF of committing various international crimes and atrocities, and had named Charles Taylor as the RUF's sponsor.⁹³ One would have thought that Judge Robertson, an eminent human rights barrister, would realize the obvious and recuse himself, or at the very least bring the matter to the attention of the Defence. Curiously, he did not; hubris of him to think that he could sit in judgment over those he had pre-judged. In considering the application, the Appeals Chamber noted "[t]he crucial and decisive question is whether an independent bystander, so to speak, or the reasonable man, reading the passages will have a legitimate reason to fear that Judge Robertson lacks impartiality. In other words, whether one can apprehend bias."⁹⁴ In this case, Appeals Chamber presiding Judge King had "no doubt that a reasonable man will apprehend bias, let alone an accused person" satisfying the *Furundžija* test for bias.⁹⁵ In disqualifying Judge Robertson, the Appeal Chamber quoted Lord Hewart C.J. in *R. v. Sussex Justices, Ex parte McCarthy*: "Justice must not only be done, but should manifestly and undoubtedly be seen to be done."⁹⁶

SCSL Prosecutor v. Norman: Attempted Recusal of Judge Winter from Deliberating on the Preliminary Motion concerning the Recruitment of Child Soldiers

A similar instance occurred in the *Norman* case before the SCSL. In *Norman*, the Defence moved to recuse Judge Winter from hearing a motion on the illegality of the recruitment of child soldiers.⁹⁷ This request was based primarily on the fact that the Appeals Chamber had received an *amicus curiae* brief from UNICEF, of which Judge Winter had prior association and was acknowledged to have had assisted with UNICEF publications on the issue of child soldier recruitment.⁹⁸ When investigated by the Defence, Judge Winter declined to provide

⁹² *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Defence Motion Seeking the Disqualification of Judge Robertson from the Appeals Chamber, 28 January 2008, para. 2.

⁹³ *Id.*, paras. 2, 4.

⁹⁴ *Id.*, para. 15.

⁹⁵ *Id.*

⁹⁶ *Id.*, para. 16.

⁹⁷ *Prosecutor v. Norman, et al.*, SCSL-2004-14PT, Motion to Recuse Judge Winter from Deliberating in the Preliminary Motion of the Recruitment of Child Soldiers, 24 March 2004.

⁹⁸ *Prosecutor v. Norman, et al.*, SCSL-2004-14PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004.

information about her relationship with UNICEF.⁹⁹ Elaborating on the *Furundžija* test, the Appeals Chamber held that:

While it is not necessary that such an interest be of financial or pecuniary nature, it must be that the judge in question ‘is so closely associated [...] that he can properly be said to have an interest in the outcome of the proceedings.’ Such a personal interest of particular concern is different from a personal interest in the subject matter of the case. The fact that there may be some history of professional association, however limited, is not alone sufficient to meet the threshold.¹⁰⁰

The Defence argued that it was clear that Judge Winter remained firmly committed to her views expressed in the report. However, the Appeal Chamber dismissed the motion, holding that “the fact that Justice Winter may have expressed an opinion which is unfavorable to the Defence is not sufficient ground for bias.”¹⁰¹

ICTY Prosecutor v. Prlić, Prlić’s Motion to Disqualify Judge Prandler

In the ICTY *Prlić* case, the Prlić Defence moved for the disqualification of Judge Arpad Prandler “on the basis of an alleged appearance of bias resulting from Judge Prandler’s previous association with Victor Andreev, the Head of the United Nations Civil Affairs in Bosnia and Herzegovina.”¹⁰² According to the Prlić Defence, Judge Prandler had first “an ethical obligation to disclose—promptly and with details—his previous association with Andreev” and also “the opportunity to reveal his association with Andreev, for example, when the Prosecution introduced UN documents in which Andreev’s name appeared.”¹⁰³ Judge Prandler only revealed his knowledge of Andreev, without providing discernable information, after he stated that he found the Accused Petkovic’s testimony concerning Andreev disquieting.¹⁰⁴ It was revealed that Andreev had been a key character in the Mladić Diaries, in which the Prlić Defence was able to surmise “Andreev’s dark character and questionable pro-Bosnian Serb / anti-Bosnian Croat activities.”¹⁰⁵ The Prlić Defence had first filed a Request for Clarification seeking full disclosure of Judge Prandler’s association with

⁹⁹ *Id.*, para. 5.

¹⁰⁰ *Id.*, para. 28.

¹⁰¹ *Id.*, para. 31.

¹⁰² *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision of the President on Jadranko Prlić’s Motion to Disqualify Judge Arpad Prandler, 16 September 2010, para. 1.

¹⁰³ *Prosecutor v. Prlić et al.*, IT-04-74-T, Jadranko Prlić’s Motion for Disqualification of Judge Prandler, 16 September 2010, para. 14.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, para. 16.

Andreev, which was denied by the Trial Chamber.¹⁰⁶ The Prlić Defence appealed the decision, arguing that Judge Prandler, due to his association with Andreev may give undue weight to unreliable evidence because of its generation by or association with Andreev. In his Decision, the President of the Tribunal Judge Patrick Robinson held that the:

[T]he general practice of the Tribunal in respect of the procedure for adjudicating disqualification motions under Rule 15 of the Rules has been for the moving party to apply to the Presiding Judge of the Chamber to which the case is assigned, rather than the Presiding Judge of the specific case. The Presiding Judge of the Chamber, not the Presiding Judge of the specific case, then confers with the Judge in question and reports to the President.¹⁰⁷

The Prlić Defence then re-filed the Disqualification Motion before the Presiding Judge of Trial Chamber III, Judge Kwon. Pursuant to Rule 15(B)(i), Judge Kwon investigated the concerns raised in the Disqualification Motion. He denied the motion, and sent his Report to the President of the Tribunal, Judge Robinson.¹⁰⁸ Judge Robinson issued a Decision on the merits and held that the Defence teams (the Praljak Defence joined in the motion) “have not established any actual bias or the appearance of bias on the part of Judge Prandler and have not rebutted the strong presumption of [Judge Prandler’s] impartiality.”¹⁰⁹ President Robison also held that there was no need to appoint a three-Judge panel pursuant to Rule 15(B)(ii), which states that “[f]ollowing the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application.”¹¹⁰

D. Actual Bias and Improper Conduct

ICTY Prosecutor v. Blagojević, Blagojević’s Motion to Disqualify the Trial Chamber (Judges Schomburg, Mumba and Agius)

Showing actual bias is difficult, especially when the impugned conduct is subject to interpretation. Occasionally, however, a case comes along where the facts, as interpreted through a judicial finding, arguably demonstrate the actual bias claimed. As an example, I

¹⁰⁶ *Prosecutor v. Prlić et al.*, IT-04-74-T, Jadranko Prlić’s Request for Clarification and Full Disclosure of Judge Prandler’s Association with UN Civil Affairs Advisor in BiH & Request for a Public Hearing, Victor Andreev, 20 July 2010.

¹⁰⁷ *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision of the President on Jadranko Prlić’s Motion to Disqualify Judge Arpad Prandler, 16 September 2010, para. 6.

¹⁰⁸ *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision of the President on Jadranko Prlić’s Motion to Disqualify Judge Prandler, 4 October 2010, paras. 4, 5

¹⁰⁹ *Id.*, para. 30.

¹¹⁰ *Id.*

discussed the *Blagojević* case in which the Trial Chamber refused to apply the precedent from the Appeals Chamber in order to demonstrate actual bias. In *Blagojević*, the Trial Chamber refused to accept a guarantee from the Republika Srpska, one of the federal entities in the state of Bosnia and Herzegovina, although the Trial Chamber had accepted guarantees from the Federation of Bosnia and Herzegovina (FBiH), the other federal entity within Bosnia and Herzegovina.¹¹¹ The Trial Chamber considered that it would be acting *ultra vires* if it were to base itself on guarantees offered by the Republika Srpska, a federal entity, despite the fact that it had accepted such guarantees in *Jokić* from the FBiH.¹¹² On appeal, the Appeals Chamber found that:

[T]he Trial Chamber was bound to accept and to apply the decision of the Appeals Chamber in *Jokic* which provides that, as a matter of law and for the purpose of the International Tribunal, an undertaking by Republika Srpska qualifies for acceptance, whether or not it is a sovereign state as defined under public international law. The Appeals Chamber hereby reiterates that there is nothing in either the Tribunal's Statute or the Rules of Procedure and Evidence which limits the identity of the body giving an undertaking to a state as recognised by public international law, and therefore sees no cogent reason to depart from its previous jurisprudence.¹¹³

On remand, the Trial Chamber again did not consider the guarantees as instructed to do so by the Appeals Chamber. This matter was once again before the Appeals Chamber, which found that:

The Trial Chamber was invited to clarify the issue raised *proprio motu*. That invitation was intended to give to the Trial Chamber the opportunity to confirm that it *had* taken the guarantee into account, and to explain that the absence of any express reference in the Impugned Decision to having done so was no more than an oversight. The Trial Chamber did not respond to that invitation, which leads to the inference that it was unable to give such a confirmation. **The Appeals Chamber is satisfied from this and all circumstances that the Trial Chamber did not comply with the directions to take the Republika Srpska guarantees into account in its reconsideration of Blagojević's application for provisional release.** Notwithstanding the submission made by Blagojević that the Impugned Decision 'seems to suggest a reluctance by the Trial Chamber to accept and apply the decision of the Appeals Chamber in *Jokic*', it is unnecessary for the purposes of this appeal to determine why the Trial Chamber failed to comply with that direction. It is sufficient to say that the failure of the Trial Chamber to comply

¹¹¹ Compare *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Decision on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release, 22 July 2002 with *Prosecutor v. Jokić*, IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 29 August 2003.

¹¹² *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Decision on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release, 22 July 2002, para. 50.

¹¹³ *Prosecutor v. Blagojević et al.*, IT-02-60-AR65, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 October 2002, para. 6 (emphasis in original).

with the direction has led to an unfortunate and wholly unnecessary delay in reaching a proper conclusion in relation to the liberty of Blagojević.¹¹⁴

With a clear finding that the Trial Chamber was refusing — in this instance — to apply the law as instructed by the Appeals Chamber, the Defence moved to disqualify the Trial Chamber on the basis of actual bias: if a trial judge was reluctant to apply the ICTY jurisprudence during the pre-trial stage of the proceedings, how could he be expected to do so during the trial. There was also the issue of accepting guarantees from the Bosniak (Muslim)/Croat entity, while rejecting to even consider a similar guarantee from the Serbian entity.¹¹⁵

The disqualification was denied. The Bureau¹¹⁶ found that there is “a high threshold to reach in order to rebut the presumption of impartiality”¹¹⁷ and that the “Applicant ha[d] failed to rebut that presumption.”¹¹⁸ The Bureau found that “even when a Trial Chamber disregards an Appeals Chamber’s Decision, it would take a more extended pattern of decisions uniformly favouring one party before the Bureau could find that a reasonable observer could reasonably apprehend bias against the other party.”¹¹⁹ Go figure!

E. Corruption, Impartiality and Fitness to Sit as Judge

ECCC Case 002, Ieng Sary’s Motion to Disqualify Judge Nil Nonn

In 2002, Amanda Pike, a documentary filmmaker, traveled to Cambodia and produced the documentary “Cambodia: Pol Pot’s Shadow.”¹²⁰ While filming the documentary, Ms. Pike interviewed Judge Nil Nonn, the then President of the Provincial Court of Battambang. This interview served as a basis for her article “Battambang: The Judge.” In this article, Ms. Pike reported:

¹¹⁴ *Prosecutor v. Blagojević et al.*, IT-60-AR65.4, Decision on Provision Release Application by Blagojević, 17 February 2003, para. 14 (emphasis in bold added).

¹¹⁵ *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Vidoje Blagojević’s Motion to Disqualify the Trial Chamber (Judges Schomburg, Mumba and Agius) on the Grounds of Actual Bias and an Unacceptable Appearance of Bias & Request for This Matter to be Referred to the Bureau for its Determination, 26 February 2003. See also *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Vidoje Blagojević’s Reply to Prosecution’s Response to Vidoje Blagojević’s Motion to Disqualify the Trial Chamber, 17 March 2003, para. 12(e).

¹¹⁶ The Bureau is an administrative body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. See ICTY Rules of Procedure and Evidence, Rule 23.

¹¹⁷ *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Bureau Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 19 March 2003, para. 13.

¹¹⁸ *Id.*, para. 14.

¹¹⁹ *Id.*, para. 15.

¹²⁰ Amanda Pike, *Cambodia: Pol Pot’s Shadow*, International Reporting Project, Paul H. Nitze School of International Studies, 5 June 2009 (2002 Fellowship) available at <http://internationalreportingproject.org/stories/view/cambodia-pol-pots-shadow>.

We talk with Judge Nil, who says that he's upset by people's lack of faith in the justice system. He laments that he often has to defend his profession to his friends. He admits that, yes, he does take bribes—of course—but only after a case is over. After all, he earns only \$30 a month, not nearly enough to provide for his family. What else, he asks with that toothy grin, is he supposed to do?¹²¹

Judge Nil Nonn, when interviewed in 2006 by the Cambodia Daily, denied that he had ever taken bribes from the public or participated in the interview.¹²² He stated “however, if *after* a trial people feel grateful to me and give me something, that's normal I don't refuse it. . . . I've settled a case for them and people feel grateful. Living conditions these days are difficult for me. But if you are talking about pressuring people for bribes—no.”¹²³

Having learned of this article, the IENG Sary Defence first took steps to obtain more information. First, the IENG Sary Defence attempted to locate Ms. Pike and obtain the video footage from her interview with Judge Nil Nonn and Judge Nil Nonn's release form to be filmed. Ms. Pike responded that she would not release the material voluntarily on “journalistic grounds.”¹²⁴ Similarly, the IENG Sary Defence wrote to Mr. Welsh at the Cambodia Daily who also declined to provide information.¹²⁵ Shortly thereafter, the IENG Sary Defence filed a motion to the Trial Chamber seeking to disqualify Judge Nil Nonn on the basis of corruption and a related request to investigate the action.¹²⁶

I used this case as an example to illustrate the different customs and expectations of judges, based in part of their existing legal / judicial environment, a form of cultural relativism. However, Justice Michael Kirby, former Justice of the High Court of Australia reminds us otherwise: “the law may differ from country to country. But the expectation of an uncorrupted judge, is or ought to be universal.”¹²⁷ Judge Nonn's practice of accepting “gratuities” from grateful litigants after trials demonstrates a failure to act independently, impartially, and with integrity. Who is more likely to provide a better gratuity—the poor farmer—or a wealthy company seeking to capitalize on the farmer's land? This conduct prevents a judge from

¹²¹ *Id.* This video also aired on PBS Frontline in 2002, PBS FRONTLINE/WORLD, October 2002, available at <http://www.pbs.org/frontlineworld/stories/cambodia/index.html>.

¹²² James Welsh & Prak Chan Thul, *Filmmaker: KR Judge Says He Accepted Cash*, CAMBODIA DAILY, 10–11 June 2006.

¹²³ *Id.*

¹²⁴ *Case of NUON Chea et al.*, 0002/19-09-2007-ECCC/TC, IENG Sary's Application to Disqualify Judge Nil Nonn due to His Purported Admission that He Has Accepted Bribes & Request for a Public Hearing or in the Alternative for Leave to Reply to Any Submissions Presented by Judge Nil Nonn in Response to this Application, 14 January 2011, para. 10.

¹²⁵ *Id.*, para. 11.

¹²⁶ *Id.*, para. 12.

¹²⁷ Michael Kirby, *Tackling Judicial Corruption Globally*, Living Ethics, ST. JAMES ETHICS CENTRE, available at <http://www.hcourt.gov.au/speeches/kirby/jkirbyLstjames.htm> (last visited 15 February 2014).

acting independently and impartially in his judicial affairs. I argued that tolerating a judge to remain on the bench who has a sustained history of effectively taking bribes is unquestionably a form of corruption.¹²⁸

As noted earlier, the starting point for a challenge at the ECCC is Internal Rule 34(2). An application for disqualification of a Judge may be filed 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.”¹²⁹ Again, we see the ECCC applying the *Furundžija* test regarding actual bias or the appearance of bias: “the circumstances would lead a reasonable observer, properly informed, to apprehend bias.”¹³⁰ Also noteworthy is the agreement between the Royal Cambodian Government and the United Nations requiring that “[t]he judges *shall* be persons of high moral character, impartiality and integrity . . . They *shall be independent* in the performance of their functions and *shall not* accept or seek instructions from any government or any other source.”¹³¹ Simple and appropriate. Judges at the ECCC must not only be independent and impartial, but must also *appear to be* independent and impartial to an objective observer. These rules coincide with international standards as expressed in the ECCC Code of Judicial Ethics, which mirrors the ICC Code of Judicial Ethics.¹³²

The ECCC Trial Chamber found that since there were no accusations of bias in *the* pending case before the tribunal, there was *no risk* of misconduct *arising in the present case*.¹³³ The Trial Chamber construed Internal Rule 34 in a way that “disqualification pertains to bias against a particular accused *in relation to a particular case*, and cannot be used to lodge a

¹²⁸ *Case of NUON Chea et al.*, 0002/19-09-2007-ECCC/TC, IENG Sary’s Application to Disqualify Judge Nil Nonn due to His Purported Admission that He Has Accepted Bribes & Request for a Public Hearing or in the Alternative for Leave to Reply to Any Submissions Presented by Judge Nil Nonn in Response to this Application, 14 January 2011, para. 28.

¹²⁹ ECCC Internal Rule 34.

¹³⁰ *Case of NUON Chea et al.*, 002-19-09-2007/ECC/TC, Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, para. 6.

¹³¹ 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, Phnom Penh, 6 June 2003, Article 3 (emphasis added).

¹³² ECCC Code of Judicial Ethics, 5 Sept. 2008, Article 7: “While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the ECCC.” ICC Code of Judicial Ethics, ICC-BD-02-01-05, Article 9: “While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court.”

¹³³ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, para. 17.

general complaint about the fitness of an individual to serve as judge.”¹³⁴ However, the Trial Chamber noted, a *pattern of improper conduct*, may call into question a person’s qualifications to act as judge at the ECCC.¹³⁵ The Trial Chamber dismissed the request stating that:

The Application neither alleges, nor seeks to establish, actual bias on the part of Nil Nonn in relation to the case pending before the Trial Chamber. As the Application itself acknowledges, no risk of misconduct arises in the present case. There can accordingly be no apprehension of bias by an objective observer informed of all relevant circumstances insofar as they pertain to Case 002.¹³⁶

The Chamber distinguished a disqualification of a judge—in a particular case—to the removal of a judge for fitness to serve as judge.¹³⁷ The Chamber held that at the ECCC, the mechanisms to determine whether a person is fit to serve as a Judge are found within domestic law and decided in national law.¹³⁸ Yet, application of the *Čelebići* Decision, discussed below, would support the notion that questions relating to the *fitness* of an individual Judge can be decided by the ECCC at its Plenary.

ECCC Case 002: Attempted Disqualification of Judge Ney Thol

Judge Ney Thol joined the Cambodian army in Takeo Province shortly after the fall of Democratic Kampuchea in 1979. He was then transferred to the Military of National Defence in Phnom Penh where he ultimately gained the rank of General. Judge Ney Thol was appointed to the Royal Cambodian Armed Forces (RCAF) Military Court in 1987, where he chaired that tribunal while simultaneously serving as a member of the Cambodian People’s Party (CPP) central committee.¹³⁹ By 1998, the RCAF and predecessor forces had fought against the Khmer Rouge for nearly twenty years. While serving on the RCAF Military Court, Judge Ney Thol had convicted officials for crimes committed during the conflict, and even presided over a judicial investigation of Kaing Guek Eav (Duch), an accused in Case 001 at the ECCC. Judge Ney Thol, a serving RCAF officer, still remained subject to military discipline, assessment, and executive command. Judge Ney Thol had also participated in

¹³⁴ *Id.*, para. 8.

¹³⁵ *Id.*, para. 9.

¹³⁶ *Id.*, para. 17.

¹³⁷ *Id.*, para. 11.

¹³⁸ *Id.*, para. 9.

¹³⁹ See ECCC Website, Profile of Judge Ney Thol, available at <http://www.eccc.gov.kh/en/persons/judge-ney-thol> (last visited 9 February 2014).

highly political cases¹⁴⁰ while serving on the RCAF Military Court including the (indefinite and heavily criticized) pre-trial detention of Duch, an accused in Case 001.¹⁴¹

At the ECCC, the Judges shall “have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law including international humanitarian law and human rights.”¹⁴² The ECCC Agreement and ECCC Law provide that all judges “shall be independent in their performance of their functions and shall not accept or seek instructions from the Government or any other source.”¹⁴³ This principle of independence is codified in several human rights documents¹⁴⁴ and is regarded by the UN Rights Committee as “an absolute right that may suffer no exceptions.”¹⁴⁵

The NUON Chea Defence team challenged Judge Ney Thol’s fitness to serve as judge at the tribunal on grounds of his lack of independence and impartiality,¹⁴⁶ and argued that the presence of a serving member of the military as a judge on a civilian tribunal may cast doubt on the court’s independence and impartiality.¹⁴⁷ A judge who remains subject to military discipline and assessment, who must take orders from the executive, is no doubt influenced by outside bodies. Under the *Furundžija* test for bias, actual bias must exist or an unacceptable appearance of bias, where “the circumstances would lead a reasonable observer, properly informed reasonably to apprehend bias.”¹⁴⁸ In this case, it was argued that Judge Ney Thol’s position as an officer to the RCAF would certainly amount to an “association which may affect his impartiality” under ECCC Internal Rule 34(2), discussed above.¹⁴⁹ Given Judge Ney Thol’s service in the military, membership with the CPP, and participation in political trials, surely a reasonable observer, properly informed, would have apprehended bias.

¹⁴⁰ Judge Ney Thol’s Military Court had found convictions in the Trial of Cheam Chaney and Trial of Norodom Ranariddh which had been highly political, and even criticized by Amnesty International as “grossly unfair” and “keeping in trend of political cases.” See Amnesty International, Kingdom of Cambodia: Human Rights at stake, March 1998, at 3 discussed thoroughly in *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), (Nuon Chea’s) Urgent Application for Disqualification of Judge Ney Thol, 28 January 2008, paras. 29–36.

¹⁴¹ Duch was arrested 10 May 1999—no trial was ever conducted before the RCAF Military Court until Duch was transferred to the jurisdiction of the ECCC in 2007. The indefinite detention of Duch at the RCAF was heavily criticized.

¹⁴² ECCC Law Article 10. See also ECCC Agreement, Articles. 3(3) and 3(4).

¹⁴³ ECCC Law Article 10; ECCC Agreement, Articles. 3(3) and 3(4).

¹⁴⁴ See ICCPR, Article 14(1); European Convention on Human Rights, Article 6(1); the American Convention on Human Rights, Article 8(1); and the African Charter of Human and Peoples’ Rights, Article 7(1).

¹⁴⁵ *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 October 1992.

¹⁴⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), (Nuon Chea’s) Urgent Application for Disqualification of Judge Ney Thol, 002-19/09-2007-ECCC-PTC, 28 January 2008.

¹⁴⁷ *Id.*, para. 12.

¹⁴⁸ *Furundžija* Appeal Decision, para. 189.

¹⁴⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), (Nuon Chea’s) Urgent Application for Disqualification of Judge Ney Thol, 002-19/09-2007-ECCC-PTC, 28 January 2008, para. 24.

Scholars, experts, and the UN Secretary General’s Special Rapporteur in Cambodia have noted that the Cambodian judiciary has had systematic problems with impartiality and independence and a long-standing policy of using the judiciary to eliminate political opposition.¹⁵⁰ Judge Ney Thol’s questionable conduct on the Military Court shows that he “has shown a willingness to improperly utilize his judicial power in service of the CPP’s agenda.”¹⁵¹

The Pre-Trial Chamber disagreed, ultimately finding no actual bias or appearance of bias on the part of Judge Ney Thol. The Pre-Trial Chamber considered that Judge Ney Thol did not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of an RCAF officer, but in his personal capacity (completely ignoring the realities and politics of his appointment) and held that the conclusions drawn from his position do not meet the required threshold to rebut the presumption of impartiality.¹⁵² As for his participation with the Military Court in highly political cases, the Pre-Trial Chamber noted that “the mere fact a judge was a member of a political party does not give rise to the necessary inference that his decisions are politically motivated or influenced.”¹⁵³ The Pre-Trial Chamber considered that when a Judge takes an oath of office, it is *assumed* that he or she can cleanse their minds of personal beliefs and predispositions.¹⁵⁴

F. Remedies: Judicial vs. Administrative

After discussing the above scenarios and ethical considerations concerning judges, I discussed the distinction between judicial remedy (such as the *Prlić* case dealing with Judge Prandler) and administrative remedy (such as ECCC Case 002, dealing with Judge Nil Nonn).

A judicial remedy is to move for disqualification of a judge in a specific case. An administrative remedy deals with conduct or situations, which are incompatible with the discharge of judicial functions. In other words, it is an administrative determination as to whether an individual is fit to be a Judge. Judges are expected to “be persons of high moral

¹⁵⁰ Report of the International Federation of Human Rights, Threats to Freedom of Expression and Association in Cambodia, 2 February 2006, at 10. Report of the Secretary General on Khmer Rouge Trials, A/57/769, 31 March 2003, paras. 28–29; Open Letter to the UN Secretary General from the Asian Human Rights Commission, Cambodia: Khmer-Rouge Trial—A request to advance judicial independence in Cambodia, 26 May 2006.

¹⁵¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), Public Decision on the Co-Lawyer’s 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, para. 27.

¹⁵² *Id.*, paras. 24, 26.

¹⁵³ *Id.*, para. 28.

¹⁵⁴ *Id.*,

character, impartiality and integrity.¹⁵⁵ The *Čelebići* decision distinguishes between administrative determination as to whether a person is qualified to act as a Judge; and disqualification, which pertains to the judge's impartiality with respect to a particular case.¹⁵⁶ However, "there may be overlap between the two issues."¹⁵⁷

Those two remedies are also distinguishable regarding the procedural mechanism—to which authority you are supposed to apply. Regarding disqualification, "any party may apply to the Presiding Judge of a Chamber for disqualification and withdrawal of a Judge of that Chamber from trial or appeal upon the above grounds."¹⁵⁸ As for the administrative remedy, it was held in the *Čelebići* Decision that:

In case of doubt or dispute on the question whether a Judge meets the requirements at issue ... it is for the President to seek to resolve the matter in conference with the Judge. Either at the request of the Judge concerned or *proprio motu*, the President may submit the question to the plenary assembly of the Judges, which, in the exercise of its administrative functions, passes on the matter.¹⁵⁹

G. Staff Members

Following the above discussion on judges, I then moved onto discuss instances bias raised concerning judicial staff. The question is whether Chamber's staff members are subjected to the same rules as Judges and therefore subject to disqualification. The answer is no, Rule 15(A) ICTY Rules of Procedure and Evidence applies only to Judges. Noteworthy, there is no explicit code of conduct for Chambers or Prosecution staff members even though they carry out highly sensitive functions and, in many instances, are, or are presumed to be, agents of the judges and prosecutors whom they serve. Presumably, under their contractual obligations they are to conduct themselves in an ethical manner, though query whether that is enough.

¹⁵⁵ ICTY Statute, Article 13.

¹⁵⁶ *Id.*, para. 7.

¹⁵⁷ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 October 1999, paras. 6–10 ("Čelebići Decision").

¹⁵⁸ ICTY Rules of Procedure and Evidence, Rule 15(B)(i).

¹⁵⁹ Čelebići Decision, para. 7 (emphasis in original).

ICTY Case Against Senior Legal Officer Florence Hartmann

In the *Hartmann*¹⁶⁰ case before the ICTY, in which a Senior Legal Officer allegedly had *ex parte* communications with the *amicus curiae*—who was acting on behalf of the Prosecutor—regarding the provision of confidential materials to the Defence. The Defence alleged that the Senior Legal Officer had provided assistance and advice of an unspecified sort to the *amicus curiae*, which amounted to direct and *ex parte* participation in the investigation and preparation of the case against Ms. Hartmann. The Trial Chamber held that:

Rule 15 is very clear in its application solely to judges of the Tribunal. It does not contemplate disqualification of chambers staff, nor is the contemplated in the Tribunal’s jurisprudence on this issue.¹⁶¹

ECCC Case 002: OCIJ Staff Boyle and Heder

Under the ECCC Internal Rules, the OCIJ is an *independent* office within the ECCC,¹⁶² and must carry out investigative functions *impartially*.¹⁶³ In the investigative phase, the Co-Investigating Judges, and staff members carrying out their functions, are responsible for the entirety of the investigations including searching for exculpatory evidence. Any lack of independence of impartiality could have a severe impact on the proceedings.

In Case 002, regarding *Boyle* and *Heder*—respectively a legal officer and an investigator in the OCIJ—the facts had produced what appeared to be “a reasonable apprehension of bias.”¹⁶⁴ David Boyle “had authored numerous articles concerning the ECCC”¹⁶⁵ and commented on “its establishment, to the nature of the Khmer Rouge, to historical events of the relevant period, and to the individuals expected to be held responsible for the alleged crimes.”¹⁶⁶ In these writings, Mr. Boyle had offered his opinions and conclusions, which gave the impression that he harbored prejudgments—actual bias. Mr. Boyle had also made the following comment at a conference in Phnom Penh concerning the validity and application of the Royal Amnesty and Pardon issued to the accused Ieng Sary:

¹⁶⁰ *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.

¹⁶¹ *Id.*, para. 54.

¹⁶² ECCC Internal Rule 14(1).

¹⁶³ ECCC Internal Rule 55(5).

¹⁶⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ/PTC, Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009.

¹⁶⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ/PTC, 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, para. 4.

¹⁶⁶ *Id.*

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 [Supreme Council of Magistracy] 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.¹⁶⁷

The Defence sought to have further information about Mr. Boyle's writings and statements "on this myriad of legal issues faced by the ECCC and directly affecting Mr. Ieng Sary."¹⁶⁸ The OCIJ was not forthcoming with the request. Instead of providing the information requested, the OCIJ merely asserted (without supporting authority) that "there does not appear to be any legal basis for such repeated demands."¹⁶⁹

Stephen Heder worked for the Office of the Co-Prosecutors ("OCP") before he joined the OCIJ.¹⁷⁰ He had extensive involvement in compiling information for the drafting of the Introductory Submission in Cases 001 and 002. It was believed at the time that he was still employed as a consultant to the OCP, providing assistance and legal advice.¹⁷¹ The Defence asked the OCIJ for more information about Mr. Heder's prior employment at the OCP. The OCIJ defensively responded that Mr. Heder's prior work for the OCP "[did] not raise any problem regarding the independence and impartiality of the Co-Investigative Judges, and in no way prejudices the progress of ongoing judicial investigations."¹⁷² No information was provided concerning the nature of Mr. Heder's work for the OCP and the OCIJ, and his role in the drafting of the Introductory Submission (IS).¹⁷³

¹⁶⁷ 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*, 3. B. David Boyle, *The Legal Framework of the Khmer Rouge Tribunal*, p. 18 (emphasis added).

¹⁶⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ/PTC, 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, para. 4.

¹⁶⁹ *Id.*, para. 5.

¹⁷⁰ *Id.*, para. 2.

¹⁷¹ *Case of NUON Chea et al.*, 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. 4.

¹⁷² *Id.*, paras. 2-3.

¹⁷³ *Id.*

In 2008, it came to the attention of the Defence that Mr. Heder submitted a book proposal titled “*Genocide and Auto-Genocide in Cambodia: Communism, Nationalism, and Murder, 1975-1978.*”¹⁷⁴ 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 with the OCIJ.¹⁷⁵ The qualification of “intelligence officer” suggested that there may be a lack of independence and impartiality, as intelligence officers take commands from state governments. Given his American nationality, the Defence drew an inference that he was employed with the United States Central Intelligence Agency (“CIA”). In addition to the US’s involvement in the region, and extensive bombings, the US maintained a strong interest in minimizing its role in the bombings and intelligence operatives in the region.¹⁷⁶ If, as an OCIJ investigator, Mr. Heder had been employed as an intelligence agent, and thus took instructions from a state government, this would certainly affect his impartiality and independence. Having heard of this information, the Defence requested more information concerning Mr. Heder’s prior employment as an intelligence agent as well as “anything else that might be relevant to the issues of Mr. Heder’s fitness and to be fair and impartial in carrying out his functions as an investigator.”¹⁷⁷ Again, the OCIJ was defensive, submitting a late response claiming a lack of a legal basis for the request, and stating that it had no knowledge of any information that might support the allegations.¹⁷⁸

Pursuant to Rule 34(5), the Ieng Sary Defence requested to disqualify Mr. Heder from all analytical or investigative tasks on Case File 002 and Mr. Boyle from all legal, analytical or investigative tasks on Case File 002,¹⁷⁹ on the grounds that the judicial obligation of impartiality “must equally apply to staff within the OCIJ which are either assisting with these functions or conducting them on behalf of the OCIJ.”¹⁸⁰ The ECCC Pre-Trial Chamber held 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”¹⁸¹ and that

¹⁷⁴ *Id.*, para. 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*, para. 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, 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, para. 9.

¹⁷⁹ *Id.*, para. 66.

¹⁸⁰ *Id.*, para. 10.

¹⁸¹ *Case of NUON Chea et al.*, 002/09-19-2007-ECCC/OCIJ, Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, para. 13.

“these grounds of admissibility are exclusive and clearly refer only to specific judges.”¹⁸² The Pre-Trial Chamber added 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.”¹⁸³

ICC Staff: Prosecutor v. Thomas Lubanga Dyilo, Senior Legal Advisor Olásolo

In the *Olásolo* matter in the *Lubanga* case at the ICC, the Prosecutor had filed an application requesting that the Senior Legal Advisor of the Pre-Trial Division, who had previously worked at the Office of the Prosecutor, should be prevented from rendering advice in *Prosecutor v. Lubanga Dyilo*, and that he should be separated as well from the case while the Prosecutor’s application is pending.¹⁸⁴ The Pre-Trial Chamber did not consider itself the appropriate organ of the Court to handle the matter raised in the application.¹⁸⁵ These cases illustrate that staff members are not subject to the same rules as judges regarding disqualifications.

H. The Obligations of Defence Counsel in Exercising Due Diligence

Lastly, I discussed obligations that also lie with Defence counsel. Indeed, Defence counsel have to be diligent to raise disqualifications early in the proceedings and to the right authority. I put the accent on how important is to make the record. I used the *Čelebići* case as an example in which the issue was whether a Judge was fit to be a Judge.

ICTY Prosecutor v. Delalić et al. (Čelebići), The Case of the sleeping Judge, and the Defence’s failure to raise

In *Čelebići*, Judge Karibi-Whyte was sleeping during substantial portions the trial proceedings.¹⁸⁶ Defence counsel for Landžo did not formally raise this issue before the Trial Chamber but filed this issue as a ground of appeal.¹⁸⁷ Counsel for Landžo explained the failure to raise this issue during trial proceedings stating that she had approached “this

¹⁸² *Id.*, para. 14

¹⁸³ *Id.*, para. 15.

¹⁸⁴ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case, 27 October 2006.

¹⁸⁵ *Id.*

¹⁸⁶ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment of the Appeals Chamber, 20 February 2001, paras. 214–26.

¹⁸⁷ *Id.*, para. 642.

sensitive issue in the most diplomatic way possible.”¹⁸⁸ Indeed, Counsel for Landžo had first raised the issue with the Registrar and President of the ICTY Judge Cassese rather than in court:

Judge Karibi-Whyte along with the other two Judges was the fact finder in the trial. He would be determining the guilt and/or innocence, and he would be determining the amount of sentence to be imposed. Direct confrontation with the fact finder at this point in the trial would have benefited my client. Approaching the Registry and the President of the Tribunal regarding these issues was the direction that I considered most prudent at this juncture in the trial.¹⁸⁹

Then, Counsel for Landžo attempted to resign under protest because of “the sleeping of the Judge and the total disrespect by the Presiding Judge for all those attempting to perform their duties during the trial.”¹⁹⁰ The Appeals Chamber noted her course of actions:

She says that she met with the Registrar, who persuaded her not to resign and who arranged a meeting with President Cassese. President Cassese had assured her that he ‘would attend to the matter’. She had thereafter continued to discuss the ‘continuing problem’ with the Senior Legal Officer of the Trial Chamber.¹⁹¹

Counsel argued that to make a complaint to the Trial Chamber itself would have been “inappropriate and futile,” and argued that in pursuing this alternative course, that she acted “in the highest traditions of the Bar.”¹⁹² The Appeals Chamber firmly disagreed. The record had not been made when necessary, that is to say during the Trial proceedings when the facts effectively occurred and the legal issue arose. The Appeals Chamber stated “the matter *must* be raised with the court at the time the problem is perceived in order to enable the problem to be remedied.”¹⁹³ The Appeals Chamber was uncharitable in its findings, with little acknowledgement of the sincere, albeit ineffectual, efforts of Defence counsel to raise a sensitive matter using an approach that at least in a national court would have been deemed measured, if not laudable:

The Appeals Chamber does not agree. Such an approach fails to recognise that raising the issue before the Trial Chamber is indispensable to the grant of fair and appropriate relief. Moreover, it clearly could be anticipated that, by taking her

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*, para. 643, quoting Affidavit of Cynthia McMurrey Sinatra, sworn 20 Apr 2000 at 1, annexure to Appellant Esad Landžo’s List of Witnesses on Appeal, Submission of Witness Statements and Motion for Issuance of *Subpoena Ad Testificandum*, 15 May 2000 (“Affidavit of 20 April 2000”). Affidavit of 20 April 2000, at 1–2. The document in fact entitled “Resignation Under Protest” is described in the affidavit as a Motion for Withdrawal.

¹⁹¹ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment of the Appeals Chamber, 20 February 2001, para. 643.

¹⁹² *Id.*, para. 644.

¹⁹³ *Id.*

complaint to the President, it would necessarily be made known to Judge Karibi-Whyte. The issue was, indeed, made known to him. The ‘highest traditions of the Bar’ require counsel to be considerably more robust on behalf of their client in such circumstances as these than counsel for Landžo was in this case. Co-counsel for Landžo on the appeal referred – for a somewhat different purpose – to his need in the present case to make his submissions on this and other grounds of appeal ‘in a somewhat more direct manner to the court – respectful, but direct’, which he proceeded to do in a robust, but entirely appropriate, manner. Any counsel of experience will have had the embarrassing duty at some stage of his or her career of saying something unpleasant to a judge. Counsel for Landžo herself did not flinch from making very serious (although completely baseless) allegations of impropriety against the Appeals Chamber concerning the compilation of the Extracts Tapes in a filing prior to the hearing of the appeal.¹⁹⁴

IV. CONCLUSION

The lecture focused on judicial ethics from the defence perspective. One may have high expectations of international “professional” judges in rendering international criminal justice. The common perception is that, if you place the word “international” in front of something, it is held to a higher standard. However, the actual standard of impartiality and fairness in the administration of justice in the international context can be quite low when compared to the administration of justice in national jurisdictions. Full impartiality and integrity from the judges in international criminal tribunals, particularly when many of them lacked any judicial experience before being sworn in as judges, should not be accepted as an article of faith. Vigilance is required. In ensuring the Suspect or Accused’s fair trial rights, Defence lawyers must make applications for disqualifications when necessary. The examples shown were a mere sampling. Perhaps there is a real need for a detailed code of ethics for judges and prosecutors appearing before international tribunals. Additionally, there definitely seems to be a need for the adoption of a judicial training program for all judges to undergo before being sworn in (and deemed independent and thus not subject to any sort of training). This may have some added residual value, such as bringing greater uniformity and consistency to the trial proceedings, criteria indispensable for any judiciary, though often lacking in international criminal tribunals.

The application of these ethical principles center around the *Furundžija* test: whether a reasonable observer, properly informed would apprehend bias. Not every dubious association, communication, or conduct will call for the disqualification of a judge. For instance, it probably was not appropriate to seek Judge Eboe-Osuji’s disqualification solely

¹⁹⁴ *Id.*, para. 645.

for the basis of his nationality. A reasonable observer, reasonably informed, would not likely come to the conclusion that Judge Eboe-Osuji would be biased solely on his common nationality with the victims. When confronted with a potential case of judicial bias, counsel should seek more information concerning the circumstances. Going “nuclear” with a disqualification motion should not be the first option. You must be able to show that the conduct or pattern of conduct produces an unreasonable appearance of bias. That said, counsel should never shy away from making an application for disqualification when the available facts would lead a reasonable observer, properly informed, to apprehend bias. And a record must be made if error is to be preserved for appellate review. This is not only for the client to which counsel has an abiding duty of due diligence, but also for the integrity of the tribunal and the maintenance of fair trial rights and the proper administration of justice for all.

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 - Article 34
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