

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);

BEING SEIZED of the Defence’s “Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge the Independence of Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing,” filed on 20 October 2009 pursuant to Rule 34 of the Internal Rules and notified on 28 October 2009 (“Motion”);

NOTING the Memorandum of Pre-Trial Chamber President Prak Kimsan of 28 October 2009 to the Judicial Administration Committee (“JAC”), advising of the appointment of the Pre-Trial Chamber international reserve judge to the Chamber for the purpose of deciding the Motion, and requesting the JAC to appoint, pursuant to Internal Rule 34(4), an additional international judge for this purpose;

FURTHER NOTING the decision of the JAC of 30 October 2009, appointing international Trial Chamber Judge Jean-Marc Lavergne to the Pre-Trial Chamber for the purpose of deciding the Motion;

HAVING RECEIVED the confidential submissions of Judges Rowan Downing and Katinka Lahuis, pursuant to Rule 34(7), on 6 November 2009;

CONSIDERING the Co-Prosecutors’ “Response to Ieng Sary’s Applications for ‘Appropriate Measures’ Concerning the International Judges of the Pre-Trial Chamber,” filed on 5 November 2009 (“Response”).

I. INTRODUCTION

1. On the basis of media statements by the Prime Minister of the Kingdom of Cambodia alleging that “some foreign judges [of the ECCC] have received orders from their governments”¹, the Motion requests the Pre-Trial Chamber to “use its inherent discretionary powers” to take “all necessary and reasonable measures to clarify and/or verify the alleged conduct of Judges Katinka Lahuis and Rowan Downing.”² Although filed pursuant to Rule 34³, the Motion does not seek the disqualification of Judges Downing and Lahuis, but rather, other unspecified measures. In addition, it requests an expedited decision on the Motion following a public oral hearing, and a stay of all other pending matters before the Chamber in the interim.⁴ In response, the Co-Prosecutors contend that the Motion is inadmissible, as well as being devoid of merit and unsupported by evidence.⁵

¹ Motion, para. 9.

² *Ibid.*, p. 15.

³ *Ibid.*, p. 1.

⁴ *Id.*

⁵ Response, paras. 24-25.



II. CONSIDERATIONS

a. Request for a public hearing and a stay of proceedings

2. Internal Rule 34(7) indicates that applications for disqualification, along with submissions envisaged under this sub-rule, shall be considered by the Chamber Judges, who shall hand down a written decision. The procedure prescribed in Internal Rule 34(7) thus envisages a written decision by the Chamber, based on the application for disqualification and the submissions by the Judge. It does not envisage a hearing.⁶ The Pre-Trial Chamber has previously found that where it has sufficient information to decide on the application, and it is in the interests of justice to proceed expeditiously to consider the matter, it may do so without holding a public hearing.⁷ Other international tribunals also routinely decide similar applications on the basis of written proceedings alone. The Chamber considers it to be in the interests of justice to proceed expeditiously and to decide the Motion without holding a public hearing. Transparency of proceedings will be ensured by the re-classification of all filings in relation to this Motion as public.

3. Pursuant to Internal Rule 34(5), disqualification applications do not stay proceedings. A judge may, however, step down voluntarily. In this regard, the Chamber notes that while Judges Downing and Lahuis voluntarily recused themselves from deciding this Motion and were replaced as provided for in Internal Rule 34, they did not agree that the Pre-Trial Chamber should determine no other matters until this Motion was decided.⁸

b. Other relief requested in the Motion

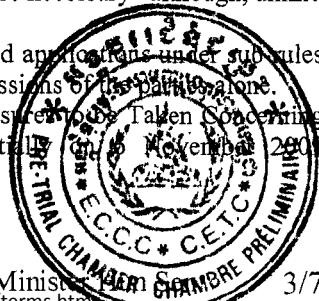
4. Internal Rule 34(2) provides that “[a]ny party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.” In accordance with Internal Rule 34(3), such applications “shall clearly indicate the grounds and shall provide supporting evidence.”

5. The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated not only where a Judge is actually biased, but also where

⁶ Internal Rule 34(8) provides that such applications “may be heard by remote means where necessary” although, unlike Internal Rule 77(3)(b), does not require the Chamber to consider the views of the parties.

⁷ *Ney Thol* Decision, para. 8. Cf. Internal Rule 77(3)(b), which, in relation to appeals and applications under subrules 73(a)-(c), empowers the Chamber to decide applications on the basis of the written submissions of the parties alone.

⁸ Response of Judges Lahuis and Downing to Ieng Sary’s Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge, filed confidentially (“Submissions of Judges Katinka Lahuis and Rowan Downing”), para. 2.



there is an appearance of bias.⁹ An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁰

6. The reasonable observer in this test must be "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold".¹¹ As has been noted in previous ECCC jurisprudence, the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment.¹²

7. The moving party bears the burden of displacing that presumption, which imposes a high threshold.¹³ The reason for this high threshold is that while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias.¹⁴ The decisive question is whether a perception of lack of impartiality is objectively justified.¹⁵ A mere feeling or suspicion of bias by the accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.¹⁶

⁹ *Prosecutor v. Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, paras. 181-88 ("Furundžija Appeal Chamber Judgment").

¹⁰ *Ibid.*, para. 189.

¹¹ *Ibid.*, para. 190.

¹² *Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, 4 February 2008 ("Ney Thol Decision"), C11/29, citing *Furundžija* Appeal Chamber Judgment, para. 196, as well as Article 3.3 of the 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 ("the judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for their appointment to judicial offices. They shall be independent in the performance of the functions and shall not accept or seek instructions from any Government or any other source") and Article 10 new of the ECCC Law ("the Judges of the Extraordinary Chambers shall be appointed from among the currently practising Judges or are additionally appointed in accordance with the existing procedures for appointment of Judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law [...]. Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source").

¹³ *Ney Thol* Decision, para. 15.

¹⁴ *Prosecutor v. Delalić et al.*, Appeal Chamber Judgement, 20 February 2001, Case No. IT-96-21-A, no. 507 ("Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour").

¹⁵ *Furundžija* Appeal Chamber Judgment, para. 185.

¹⁶ *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Burton, Sam and Joensen (Bureau), Case No. ICTR-98-44-T, 7 March 2008, para. 5.

8. A charge of partiality must be supported by a factual basis. The mere fact that a judge has been subjected to press criticism does not require the judge's disqualification.¹⁷ Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, disqualification applications have typically ignored "rumours, innuendos, and erroneous information published as fact in the newspapers and threats or other attempts to intimidate the judge."¹⁸ Other matters which are ordinarily insufficient to require recusal are "speculation, beliefs, conclusions, suspicions, opinion, and similar non-factual matters", as well as "reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading."¹⁹

9. Where allegations of bias are made on the basis of a Judge's decisions, it is insufficient merely to allege error, if any, on a point of law. What must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.²⁰

10. On the basis of press articles reporting statements by the Cambodian Prime Minister, the Motion requests the Chamber to undertake unspecified but "appropriate" measures, in order "to clarify or verify the conduct of Judges Katinka Lahuis and Rowan Downing".²¹ The remedy envisaged in Internal Rule 34, upon which the Motion is based, is judicial disqualification, which requires the moving party to demonstrate that the judge in question possesses an objective appearance of bias. It follows that the Pre-Trial Chamber is not required to act where this burden is not met.²² The Chamber has no jurisdiction under the Internal Rules to undertake such a general inquiry, and no power to order an investigation on any allegations of partiality or bias which are not supported by sufficient evidence. To find otherwise would displace the heavy evidentiary burden upon the applicant necessary to rebut the presumption of impartiality. The Motion's request for "appropriate measures" is accordingly denied.

11. If considered as an application for disqualification of the two international Pre-Trial Chamber Judges, the Motion suffers from a number of defects of form and substance. The Motion makes reference to a speech made by the Cambodian Prime Minister alleging intervention by foreign

¹⁷ *People of the State of Illinois v. Alton Coleman* 168 Ill. 2d 509 (1995).

¹⁸ *In re United States of America* 666 F.2d 690 (1st Circuit, 1981).

¹⁹ *Nichols v. Alley* 71 F.3d 347 (10th Cir. 1995).

²⁰ *Prosecutor v. Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 17B (Belarus), Case No. IT-02-60, 19 March 2003, para. 14.

²¹ Motion, p. 1.

²² *Ney Thol* Decision, para. 28 ("A party challenging the judge's impartiality *must demonstrate that the judge entertains a personal interest in, or a particular concern for, any other parties*"') (emphasis added).



governments in relation to all international judges of the ECCC, but does not attribute specific conduct to Judges Downing and Lahuis.²³ Even if accepting the passages cited in the Motion as an accurate record of the Prime Minister's speech, they do not amount to adequate and reliable evidence to show that these two judges are objectively or subjectively biased.

12. In applying the test to determine whether the circumstances would lead "a reasonable observer properly informed"²⁴ to reasonably apprehend bias, the Chamber finds that such a reasonable and properly informed observer would take into account the international Pre-Trial Chamber Judges' oath of office and the qualifications for their appointment, their response to the Motion, the response of the United Nations to the Prime Minister's allegations at the time, the factual underpinnings of these allegations, and the context in which they were made.

13. Contrary to what is alleged in the Motion²⁵, the United Nations publically refuted the allegations of the Prime Minister as reported in the media soon after their issuance.²⁶ The Chamber further notes that both international judges swore an oath on 3 July 2006 not to accept or seek instructions from any government or any other source.²⁷ In their submissions, both Judges state that they have acted in accordance with this oath while working as judges in the ECCC and have never sought or accepted guidance from any government.²⁸ As a reasonable and properly informed observer would consider whether these allegations are substantiated, it is also relevant to note that the ECCC has at no stage received any information from the Royal Government of Cambodia which would substantiate alleged interventions by foreign governments to the international Judges of the Pre-Trial Chamber or which could otherwise suggest a lack of judicial independence.²⁹

14. Finally, and as the Motion acknowledges, the Prime Minister's statements were in response to the dissenting opinion by the two international Pre-Trial Chamber judges, which had the effect of

²³ Motion, paras. 8-9.

²⁴ *Ney Thol* Decision, para. 21, citing *Furunāzija* Appeal Chamber Judgment, para. 190. (*Cf.* Motion, para. 24 (equating a 'reasonable and informed observer' instead with 'the average Cambodian', who, on the basis of the Prime Minister's statements, is likely to 'reasonably apprehend bias' on the part of the Pre-Trial Chamber international judges due to the Prime Minister's status in the community)).

²⁵ Motion, para. 24.

²⁶ On 6 November 2009, the Deputy Director of Administration formally advised the Pre-Trial Chamber that immediately following the remarks of the Prime Minister, he released the following statement to the media: "It is a clearly established legal standard that courts do not seek approval or advice on their work from the Executive Branch. I expect International Judges to operate independently of any executive body – and I have no reason to believe that they don't." ("Memorandum of Deputy Director of Administration to Pre-Trial Chamber President of 6 November 2009"). See also Cambodia Daily, 22 October 2009, p. 31.

²⁷ *Ney Thol* Decision, para. 18 (noting that on 7 May 2006, all Judges of the Pre-Trial Chamber of the ECCC were appointed by Royal Decree and subsequently officially sworn in during an official ceremony).

²⁸ Submissions of Judges Katinka Lahuis and Rowan Downing", para. 9.

²⁹ See Memorandum of Deputy Director of Administration to Pre-Trial President of 6 November 2009 ("The ECCC has not received, officially or unofficially, any material supporting the allegations made in the media").

allowing the investigation to continue against additional suspects before the ECCC.³⁰ Beyond speculation that the international Pre-Trial Judges departed from the majority following advice from their governments to do so, the Motion makes no attempt to show that this decision was, or would reasonably be perceived as, unrelated to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.

15. The Chamber finds that the Motion does not show that Judges Downing or Lahuis acted upon the instruction of any government or that they were politically motivated. There could be no apprehension of a lack of judicial independence by an objective observer informed of all relevant circumstances of the matters put before the Pre-Trial Chamber.

For the foregoing reasons, the Pre-Trial Chamber decides unanimously that:

- 1). The request for a public hearing on the Motion and for a stay of proceedings is denied;
- 2). The Motion is inadmissible and unfounded; and
- 3). The Court Management Section shall re-classify as public all documents filed confidentially in relation to this Motion.

Pursuant to Internal Rule 34(8), this decision is not open to appeal.

GIVEN BY the Pre-Trial Chamber,

Phnom Penh, 30 November 2009. *Ch.*

Pre-Trial Chamber

Mumba
Florence MUMBA

Thol
NEY Thol

Jean-Marc
Jean-Marc LAVERGNE

President

Huot
HUOT



PRAK KIM SAN

³⁰ Motion, para. 8; *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71* (public redacted version), 18 August 2009.