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Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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

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Case File N° 002/09-10-2009-ECCC/PTC(01)

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

Date: **9 December 2009**

PUBLIC
DECISION ON IENG SARY'S APPLICATION TO DISQUALIFY CO-INVESTIGATING JUDGE MARCEL LEMONDE

Co-Prosecutors

CHEA Leang
Andrew CAYLEY
William SMITH
YET Chakriya
SENG Bunkheang
Anees AHMED

Charged Person

IENG Sary

Co-Investigating Judge

Marcel LEMONDE

Co-Lawyers for the Charged Person

ANG Udom
Michael G. KARNAVAS

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

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), is seized of an "Application to Disqualify Co-Investigating Judge Marcel Lemonde and a Request for Public Hearing" ("the Application") filed by the Co-Lawyers for Ieng Sary ("the Charged Person").

I. INTRODUCTION

1. The Co-Lawyers for the Charged Person on 9 October 2009 filed the Application.[1]

2. Judge Lemonde on 22 October 2009 filed a request for an extension of time to respond to the Application.[2] The Co-Lawyers for the Charged Person filed no response to this request for an extension of time.

3. The Co-Prosecutors on 5 November 2009 filed a "Preliminary Response" to the Application,[3] requesting that the Pre-Trial Chamber grant them at least fifteen days to respond to any written submissions presented by Judge Lemonde in response to the Application. The Pre-Trial Chamber on 23 November 2009 ruled part of the Co-Prosecutors' "Preliminary Response" inadmissible and otherwise denied their requests.[4]

4. Judge Lemonde presented his written submissions pursuant to Internal Rule 34(7)[5] on 5 November 2009, in accordance with Article 8 of Practice Direction ECCC/01/2007/Rev.4.

II. SUMMARY OF SUBMISSIONS

5. The Application seeks the disqualification of Judge Lemonde based on words he is said to have spoken at a meeting in August 2009 with a number of staff members of the Office of the Co-Investigating Judges ("OCIJ"). It is alleged that Judge Lemonde stated "I would prefer that we find

[1] "Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing", 9 October 2009, 002/9-10-2009-ECCC/PTC(01) doc. no. 1 (the "Application").
[2] "Request for Extension of Time to Respond to the Applications for Disqualification", 002/9-10-2009-ECCC/PTC(01) doc. no. 2.
[3] "Co-Prosecutors' Joint Preliminary Response to Ieng Sary and Khieu Samphan's Applications for the Disqualification of the International Co-Investigating Judge", 002/9-10-2009-ECCC/PTC(01) doc. no. 3.
[4] "Decision on the Co-Proescutors' Joint Preliminary Response to Ieng Sary and Khieu Samphan's Applications for the Disqualification of the International Co-Investigating Judge", 002/9-10-2009-ECCC/PTC(01) doc. no. 6.
[5] "Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan", 5 November 2009, doc. no. 4.

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more inculpatory evidence than exculpatory evidence". Mr Wayne Bastin, a former Chief of the Intelligence and Analysis Unit of the OCIJ, on 8 October 2009 provided a three page statement setting out an account of this meeting, to the Co-Lawyers for the Charged Person. The statement annexed to the Application contains a declaration, apparently signed by Mr Bastin and witnessed at an Australian police station, that "I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false declaration in the circumstances is liable to the penalties of perjury".

6. The Co-Lawyers for the Charged Person submit that the words of Judge Lemonde quoted in the statement of Mr Bastin, indicate actual bias on the part of Judge Lemonde, and give rise also to an appearance of bias. They request a public oral hearing of the Application "with each of those present during the private meeting with Judge Marcel LEMONDE to be summoned to testify under oath".[6]

7. Judge Lemonde in his Response states that he does not remember saying the words attributed to him, and that if he did say them it would only have been "in jest, as would have been obvious to everyone present".[7] Judge Lemonde submits that the Application establishes neither actual bias nor the appearance of bias, and that accordingly the Application should be dismissed.[8]

8. Judge Lemonde annexes to his Response a signed "Witness Statement" setting out his own recollections of the August 2009 meeting.[9]

III. ADMISSIBILITY OF THE APPLICATION

9. The jurisdiction of the Pre-Trial Chamber concerning the Application is defined by Internal Rule 34(2), which provides:

[6] Application, prayer for relief, para 30 ff.
[7] "Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan", 5 November 2009, doc. no. 4, para. 8.
[8] "Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan", 5 November 2009, doc. no. 4, para. 9.
[9] "Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan – Annex A", 5 November 2009, doc. no. 4.1.

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"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."

10. Internal Rule 34(5) provides in relevant part that "[a]n application for disqualification of a Co-Investigating Judge shall be submitted to the Pre-Trial Chamber". These provisions together mean that the Pre-Trial Chamber has jurisdiction to consider the Application.

11. The obligations of a party filing an application for disqualification of a judge are set out in Internal Rule 34(3):

"A party who files an application for disqualification of a judge shall clearly indicate the grounds and shall provide supporting evidence. The application shall be filed as soon as the party becomes aware of the grounds in question."

12. The Co-Lawyers for the Charged Person state that the information contained in Mr Bastin's statement came to their attention in early October 2009.[10] Mr Bastin's signed statement annexed to the Application is dated 8 October 2009. The Pre-Trial Chamber finds that the Application, filed on 9 October 2009, is timely within the provisions of Internal Rule 34(3).

13. Internal Rule 34(7) sets out the procedure to be followed upon receipt of an application for disqualification of a judge:

"The Judge shall be entitled to present written submissions to the Chamber within 10 (ten) days of his or her receipt of the application, through its President. The application for disqualification of the Judge, along with the submissions by the Judge, shall be considered by the Chamber Judges, who shall vote on the matter, and hand down a written decision in the absence of the judge in question and the applicant."

14. No provision is made for an oral hearing, or a written reply, in Internal Rule 34(7).[11] All supporting evidence relied on by the applicant must be filed with the application for disqualification, as required by Internal Rule 34(3).

[10] Application, para. 4.
[11] "Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing", 002/20-10-2009-ECCC/OCIJ (PTC 3), 30 November 2009, para. 2.

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15. The Pre-Trial Chamber has previously held that in an application for disqualification of a judge, "the burden of proof lies entirely with the applicant".[12] The impartiality of a judge is to be presumed until there is proof to the contrary. Evidence to displace the presumption must be adduced at the time of the application. The Application is therefore inadmissible in so far as it requests an oral hearing.

IV. CONSIDERATION OF THE APPLICATION

16. The Pre-Trial Chamber, in its previous decision concerning an application for disqualification of Judge Ney Thol,[13] has set out the law applicable in cases of disqualification. The test for bias to be applied is that provided in Internal Rule 34(2), which refers both to actual bias and to apprehended bias.[14]

17. Paragraphs 15–21 of the Pre-Trial Chamber's reasons in the *Ney Thol* decision (footnotes omitted) are as follows:

> *15. "The Pre-Trial Chamber notes that "the starting point for any determination of a claim [of bias] is that "there is a presumption of impartiality which attaches to a Judge". "This presumption derives from their oath to office and the qualifications for their appointment [...], and places a high burden on the party moving for the disqualification to displace that presumption".*
>
> *16. The Pre-Trial Chamber considers that this presumption of impartiality applies to the Judges of the ECCC. 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 Agreement") provides:*
>
> > *The Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for ... appointment to judicial offices. They*

[12] "Decision on the Co-Proescutors' Joint Preliminary Response to Ieng Sary and Khieu Samphan's Applications for the Disqualification of the International Co-Investigating Judge", 002/9-10-2009-ECCC/PTC(01) doc. no. 6.
[13] "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", Case No. 002/19-09-2007-ECCC/OCIJ/PTC/01, 4 February 2008, C11/29, paras 12-21. See also the Application, para. 14.
[14] See para. 10 above.

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shall be independent in the performance of the[ir] functions and shall not accept or seek instructions from any Government or any other source.

By Article 7.2 of the Agreement this provision applies equally to the judges of the Pre-Trial Chamber.

17. Article 10 new of the ECCC Law provides that "the [j]udges of the Extraordinary Chambers shall be appointed from among the currently practising [j]udges or are additionally appointed in accordance with the existing procedures for appointment of [j]udges; all of whom 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 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."

18. On 7 May 2006, the Judges of the Pre-Trial Chamber of the ECCC, including Judge Ney Thol, were appointed by Royal Decree and subsequently officially sworn in during an official ceremony.

19. It is for the applicant to adduce sufficient evidence to satisfy the Pre-Trial Chamber that the Judge in question can be objectively perceived to be biased. There is a high threshold to reach in order to rebut the presumption of impartiality.

20. The jurisprudence of the international tribunals is consistent in the test for bias applied here. The Appeals Chamber of the ICTY has held in the case of Furundzija *that:*

A Judge is not impartial if it is shown that actual bias exists.

There is an appearance of bias if:

- *A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or*
- *The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*

This jurisprudence is applied generally by international tribunals.

21. 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 part of the background and [apprised] also of the fact that impartiality is one of the duties that Judges swear to uphold".

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18. The *Code of Judicial Ethics* of the ECCC provides further guidance in this area. Article 2.1 states that "Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions".[15] Article 7.1 states that "Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality".

19. Article 2.2 of the *Bangalore Principles of Judicial Conduct* states that a judge "shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary".[16] The commentary to this article goes on to say that "a judge should avoid deliberate use of words or conduct which could reasonably give rise to a perception of an absence of impartiality" and that "remarks which the judge may consider to be 'harmless banter' may diminish the judge's perceived impartiality".[17]

20. All evidence relied on by the applicant is to be provided upon the filing of an application for disqualification. The evidence offered by the Co-Lawyers for the Charged Person in support of the Application consists of a three page "statement" signed by Mr Bastin and apparently witnessed by a person at an Australian police station. The Pre-Trial Chamber notes that the Co-Lawyers refer to a notarized statement of Mr. Bastin which is apparently not correct.[18] It is further noted that no verification of the identity of Mr. Bastin has been made by the witness being present while the statement was given. These circumstances influence the value of the presented evidence.

21. The Pre-Trial Chamber observes that of the OCIJ staff said to have been present at the August 2009 meeting, only Mr Bastin has given any account of his recollections. Mr Bastin in his statement says during the meeting he took "brief dot point notes" which remain in his possession. These

[15] *Code of Judicial Ethics*, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008.
[16] Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, the Hague, 25-26 November 2002. For the application of the Bangalore Principles in the Special Court for Sierra Leone, see "Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT", *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, Trial Chamber, 11 May 2004, para. 38.
[17] Commentary on the Bangalore Principles of Judicial Conduct, Judicial Integrity Group, March 2007, para. 65.
[18] Application, para. 4.

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contemporaneous notes have not been produced. No explanation has been given for this, or for the absence of statements by any other witnesses who could provide corroboration. Further, Mr Bastin's statement provides no context of the conversation in which the words of Judge Lemonde are said to have been uttered.

22. The physical context in which Judge Lemonde is said to have uttered the words attributed to him, a private meeting held with OCIJ staff, renders them less indicative of partiality or the appearance thereof than the same words spoken by a judge in a public area. The Pre-Trial Chamber further notes that at this meeting Judge Lemonde is said to have spoken in English, which is not his first or working language, as is evidenced by his request for the application to be translated into French from English and the provision of all documents from the Office of the Co-Investigating Judges under his hand in French. The words allegedly being spoken can therefore not be interpreted as having their full meaning in English.

23. Considering all these circumstances the Pre-Trial Chamber finds the evidence supporting the application is not very strong. The evidence is even further weakened if the words were said in jest and this would have been obvious to all present at the meeting, as submitted by Judge Lemonde. This possibility is obviously not excluded by the evidence provided.

24. 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 coming close 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 the evidence

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to be found, as they must have an idea by now of the conclusions they might reach based on all the evidence collected.

25. An expression of such a preference by an Investigating Judge to his or her staff must further be distinguished from an explicit instruction or direction to judicial investigators to search only for inculpatory evidence and exclude exculpatory evidence from the investigation. The Pre-Trial Chamber finds that the words attributed to Judge Lemonde by the Co-Lawyers do not amount to such an instruction or direction as asserted by the Co-Lawyers.[19]

26. For the reasons expressed, the Charged Person has not discharged the burden of proof placed upon him.

V. CONCLUSION

The Pre-Trial Chamber decides unanimously that:

1. The request of the Co-Lawyers for the Charged Person for an oral hearing is inadmissible, for the reasons given in paragraphs 9 to 15 above; and
2. The Application is otherwise dismissed.

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

Phnom Penh, 09 December 2009

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuth** **PRAK Kimsan**

[19] Application, para. 23.

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