



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

Royaume du Cambodge
ព្រះរាជាណាចក្រកម្ពុជា
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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.

Case File N° 002/13-10-2009-ECCC/PTC (02)

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

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Date: 14 December 2009

PUBLIC
DECISION ON KHIEU SAMPHAN'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

KHIEU Samphan

Co-Investigating Judge

Marcel LEMONDE

Co-Lawyers for the Defence

SA Sovan
Jacques VERGE



002/13-10-2009-ECCC/PTC (02)

N/លេខ: -7-

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” (“the Application”) filed by the Co-Lawyers for Khieu Samphan (“the Charged Person”) on 13 October 2009.¹

I. INTRODUCTION

1. The Co-Lawyers for the Charged Person on 13 October 2009 filed the Application.
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 a response not objecting to this request.³
3. The Co-Prosecutors on 5 November 2009 filed a “Preliminary Response” to the Application,⁴ 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.⁵

¹ Application to Disqualify Co-Investigating Judge Marcel Lemonde, 13 October 2009, (“the Application”) 002/13-10-2009-ECCC/PTC(02) doc. no. 1.

² “Request for Extension of Time to Respond to the Applications for Disqualification”, 002/13-10-2009-ECCC/PTC(02) doc. No. 2.

³ “Observations on Judge Lemonde’s Request for Extension of Time to Respond to the Applications for Disqualification”, 002/13-10-2009-ECCC/PTC(02), 30 October 2009, doc. no. 3.

⁴ “Co-Prosecutors’ Joint Preliminary Response to Ieng Sary and Khieu Samphan’s Applications for the Disqualification of the International Co-Investigating Judge”, 002/13-10-2009-ECCC/PTC(02) doc. No. 4.

⁵ “Decision on the Co-Prosecutors’ Joint Preliminary Response to Ieng Sary and Khieu Samphan’s Applications for the Disqualification of the International Co-Investigating Judge”, 002/13-10-2009-ECCC/PTC(02) doc. No. 6.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



4. Judge Lemonde presented his written submissions pursuant to Internal Rule 34(7)⁶ 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 to join the application of Ieng Sary to disqualify Judge Lemonde based on words Judge Lemonde is said to have spoken at a meeting in August 2009 with a number of staff members of the Office of the Co-Investigating Judge (“OCIJ”). It is alleged that Judge Lemonde stated “I would prefer that we find 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 statement setting out an account of this meeting to the Co-Lawyers for Ieng Sary. The Co-Lawyers for the Charged Person on 9 October 2009 learned of the statement through the Co-Lawyers for Ieng Sary and through the media.⁷
6. The Co-Lawyers for the Charged Person submit that “the statements reported by Mr BASTIN fit into a pattern of public statements that Mr Marcel LEMONDE has made over the course of the judicial investigation”.⁸ The Co-Lawyers refer to a number of verbal statements taken by the media from Judge Lemonde which date from May 2007 to May 2009.
7. The Co-Lawyers further submit the following three examples in relation to Judge Lemonde’s alleged conduct as a judge which they assert disclose a biased attitude on his part⁹: 1) the lack of a response by the Co-Investigating Judges to Ieng Sary’s Third Request for Investigative Action which sought clarification about the strategy, methodology and law applied in ascertaining the truth. The Co-Lawyers suggest that

⁶ “Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan”, 002/13-10-2009-ECCC/PTC(02), 5 November 2009, doc. no. 5.

⁷ Application paras. 14-18.

⁸ Application, para. 14.

⁹ Application, paras. 15-18.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



002/13-10-2009-ECCC/PTC (02)

N/លេខ: -7-

such response, if given, would be a safeguard against arbitrary decisions during the investigation; 2) the lack of a decision or clarification on the “status of the mode of liability resulting from participation in a joint criminal enterprise”. The Co-Lawyers suggest that the “fact that the situation has remained vague for more than one year gives cause for doubt about the reasons behind such a delay”; 3) the decision rejecting the Defence request to search for potentially exculpatory material in the Shared Material Drive in which it is stated that “the logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness”. The Defence suggests that such statement “negates the Co-Investigating Judges’ impartiality”.

8. The Application further seeks the release of the Charged Person “immediately and without condition, pending a decision on this application”.¹⁰
9. Judge Lemonde in his Response states that he does not remember saying the words attributed to him by Mr Bastin and that if he did say them it would only have been in jest as would have been obvious to all present.¹¹ Judge Lemonde argues that the Application establishes neither actual bias nor the appearance of bias and that accordingly the Application should be dismissed.¹²
10. Judge Lemonde annexes to his Response a signed “Witness Statement” setting out his own recollections of the August 2009 meeting.¹³
11. Judge Lemonde submits that the Application was not filed as promptly as required by Rule 34(3), and is therefore inadmissible in so far as it relates to media statements

¹⁰ Application, last sentence.

¹¹ “Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan”, 002/13-10-2009-ECCC/PTC(02), 5 November 2009, doc. no. 5, para. 8.

¹² “Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan”, 002/13-10-2009-ECCC/PTC(02), 5 November 2009, doc. no. 5, para. 9.

¹³ “Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan – Annex A”, 002/13-10-2009-ECCC/PTC(02), 5 November 2009, doc. no. 5.1.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



made by him.¹⁴ Even if it were admissible, this part of the Application is ill-founded, he submits. The Judge further submits that he responded to numerous questions from journalists in order to respond to the criticism directed towards the ECCC and the demand for public information. He further explains that the text of the published interviews sometimes did not match what he had said due to the fact that journalists, not being jurists, had difficulty understanding what he said.¹⁵

12. Further, Judge Lemonde responds to the Co-Lawyers allegations in relation to his conduct as a judge. In response to the two first examples, he submits that the Office of the Co-Investigating Judges are working on these applications which call for a response that is “far from simple” and that “to see in the absence of an immediate response a desire to nullify the rights of the defence on the part of the Co-Investigating Judges is completely misconceived and untenable”.¹⁶ In response to the third example the Judge submits that as the decision on appeal against the quoted decision is still pending it is difficult to comment upon the applicants’ assertions.¹⁷

III. ADMISSIBILITY OF THE APPLICATION

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

“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.”

14. 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.

¹⁴ The Judge’s Response, paras. 32 and 33.

¹⁵ The Judge’s Response, para. 9.

¹⁶ The Judge’s Response, para 37.

¹⁷ The Judge’s Response, para. 38.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



15. 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.”

16. The Co-Lawyers for the Charged Person state they were informed of the statement of Mr Bastin on 9 October 2009. The Application, filed on 13 October 2009, is timely pursuant to Rule 34(3) in so far as it relates to the Bastin statement.

17. The Pre-Trial Chamber observes that in relation to the Judge’s media statements, the Co-Lawyers submit that such statements had given rise to an apprehension of bias for a long time but were not sufficient to displace the presumption of impartiality that attaches to a Judge. They explain that now they possess irrefutable proof¹⁸ that these statements “were borne of real and recognized bias”.¹⁹

18. As far as admissibility of this part of the Application is concerned, the Pre-Trial Chamber observes the following:

19. Internal Rule 34(3) provides:

“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.”

20. The Pre-Trial Chamber notes that the quotations of the Judge’s press statements are submitted by the Co-Lawyers as evidence by which they intend to further elaborate or support the new “irrefutable proof”, asserted to come from the statement from

¹⁸ The Co-Lawyers do not clearly indicate what it is that constitutes this “irrefutable proof”, however, from the context of their Application, it is understood that they refer to the statement given by Wayne Bastin

¹⁹ Application, paras. 38 and 39.



002/13-10-2009-ECCC/PTC (02)

N/៧៧៩: -7-

Wayne Bastin. Without reaching any conclusion on the evidence, the Pre-Trial Chamber finds that a party may present past apparently disparate evidence which is seen as contextually relevant for the first time as a result of more recent events. In order to fall within the purview of Internal Rule 34(3) they present such evidence as soon as the context becomes apparent to them as founding or supporting a ground which they advance.

21. In relation to the Co-Lawyers request for hearing, the Pre-Trial Chamber observes that 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.”

22. No provision is made for an oral hearing, or a written reply, in Internal Rule 34(7).²⁰ All supporting evidence relied on by the applicant must be filed with the application for disqualification, as required by Internal Rule 34(3).

23. 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”.²¹ 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.

²⁰ See “*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.

²¹ “*Decision on the 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(02) doc. No. 6.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



IV. CONSIDERATION OF THE APPLICATION

24. The Pre-Trial Chamber has set out the law relating to disqualification of judges in its decision concerning an application for disqualification of Judge Ney Thol. 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.²²

25. 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 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*

²² See para. 13 above.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



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

26. 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

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



impartiality in the discharge of their judicial functions”.²³ 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”.

27. 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”.²⁴ 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”.²⁵

28. All evidence relied on by the applicant is to be provided upon the filing of an application for disqualification. The “statement” of Mr Bastin is the only account of the August 2009 meeting other than Judge Lemonde’s statement. The Pre-Trial Chamber has received no evidence from other witnesses of their recollections. Mr Bastin’s contemporaneous notes from the meeting are not produced.

29. 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

²³ *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.

²⁴ 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.

²⁵ Commentary on the Bangalore Principles of Judicial Conduct, Judicial Integrity Group, March 2004, para. 65.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



by the evidence provided. Further, Judge Lemonde was speaking in English, which is neither his first nor his working language.

30. In respect of the evidentiary value of the Judge's press statements referred to by the Co-Lawyers, the Pre-Trial Chamber notes that the statements of Judge Lemonde as quoted by the press do not amount to reliable evidence. The Co-Lawyers have put before the Pre-Trial Chamber reports from journalists based on what they have understood the Judge was saying and not authoritative statements by the Co-Investigating Judges themselves. In making this finding the Pre-Trial Chamber has taken in consideration that Judge Lemonde in his Response to the Application has submitted:

“sometimes I had surprises when I read the text of the published interviews, the journalists not being jurists and sometimes having difficulty in distinguishing between certain related concepts (procedure, trial, judgment, closed hearings, remittal orders, etc.)”.²⁶

31. In relation to the examples submitted by the Co-Lawyers on Judge Lemonde's conduct as a judge, the Pre-Trial Chamber observes the following:

32. Internal Rule 34(2) provides:

“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.”

33. As far as the two first examples are concerned, the Pre-Trial Chamber does not find these convincing evidence that would prove bias on the part of Judge Lemonde. The Defence suggests but does not show prejudice. The Pre-Trial Chamber notes that the conduct of a judge is driven by the rules and the circumstances of a case and that

²⁶ The Judge's Response, Annex A, para. 9.



“many factors affect the timing of decisions”.²⁷ The Pre-Trial Chamber, in agreement with Judge Lemonde’s response, observes that the issues raised by the Defence in these requests are of a serious and complex nature and require time and effort to be addressed, which is allowed under the Internal Rules.²⁸

34. In relation to the third example, the Pre-Trial Chamber observes that it “has the duty to examine the content of the judicial decisions cited as evidence of bias” and that “the purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test”. The Pre-Trial Chamber further observes that “error, if any, on a point of law is insufficient: 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”.²⁹

35. The Pre-Trial Chamber further notes that a judge’s work is to render decisions, and unavoidably one of the parties may not be satisfied. This does not, by itself, raise grounds for disqualification³⁰ but rather for appeals or for exhaustion of other existing legal remedies during the pre-trial, trial and appellate stage of the proceedings.

36. For all these reasons the Pre-Trial Chamber finds that the Charged Person has failed to discharge the burden of proof placed upon him. The Application including the request for release will therefore be dismissed.

²⁷*Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Motion for Disqualification of Judges” (Bureau), 28 May 2007, para. 15; *Karemura et al.*, ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para 27.

²⁸ Internal Rule 55(10).

²⁹*Prosecutor v. Arsene Shalom Ntahobali*, ICTR-97-21-T, “Decision on Motion for Disqualification of judges” (Bureau), 7 March 2006, para. 12; *CF., Seromba*, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para 12.

³⁰*Prosecutor v. Arsene Shalom Ntahobali*, ICTR-97-21-T, “Decision on Motion for Disqualification of judges” (Bureau), 7 March 2006 para. 11; *Blagojevic et al*, ICTY-02-60-T, “Decision on Blagojevic Application Pursuant to Rule 15 (B)”, 19 March 2003, para 14.

Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde



THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

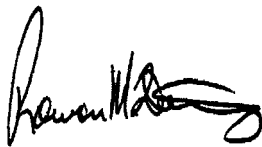
1. The request of the Co-Lawyers for the Charged Person for an oral hearing is inadmissible, for the reasons given in paragraphs 21 to 23 above; and
2. The Application is otherwise dismissed.

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

Phnom Penh, 14 December 2009 *Rath*

Pre-Trial Chamber

President



Rowan DOWNING



NEY Thol



Katinka LAHUIS



HUOT *Rath* Kimsan