



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

សល់/No: -8-

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° 002/07-12-2009-ECCC/PTC (05)

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

Date: 15 June 2010

PUBLIC

DECISION ON IENG SARY'S AND ON IENG THIRITH APPLICATIONS UNDER RULE 34 TO DISQUALIFY JUDGE MARCEL LEMONDE

Co-Prosecutors

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

Charged Persons

IENG Sary
IENG Thirith
NUON Chea

Co-Investigating Judge

Marcel LEMONDE
YOU Bun Leng

Co-Lawyers for the Charged Persons

ANG Udom
Michael G. KARNAVAS
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ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de réception):
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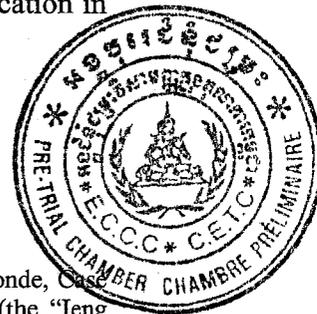
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of two applications seeking the disqualification of one of the Co-Investigating Judges, Judge Lemonde.

I. PROCEDURAL BACKGROUND

1. On 7 December 2009, the Co-Lawyers for the Charged Person Ieng Thirith filed a request for disqualification of Judge Lemonde entitled “Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde” (the “Ieng Thirith Application”).¹ On 11 December 2009, the Co-Lawyers for the Charged Person Ieng Sary filed “Ieng Sary’s Second Rule 34 Application to Disqualify Judge Marcel Lemonde and Joinder to Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde & Request for public hearing” (the “Ieng Sary Application”).² On 22 December 2009, the Co-Lawyers for the Charged Person Nuon Chea notified the intention of their client to join Ieng Thirith Application (the “Nuon Chea Notice of Joinder”).³
2. On 15 December 2009, Judge Lemonde requested an extension of time to respond to Ieng Sary Application until 10 days after the notification of the Application in



¹ Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde, Case No. 002/07-12-2009-ECCC/PTC(05), 7 December 2009, Doc. No.1, ERN0041010-0041026 (the “Ieng Thirith Application”).

² Ieng Sary’s Second Rule 34 Application to Disqualify Judge Marcel Lemonde and Joinder to Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, Case No. 002/11-12-2009-ECCC/PTC(07), 11 December 2009, Doc. No.1, ERN00414160-00414179 (the “Ieng Sary Application”).

³ Notice of Joinder to “Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde”, 22 December 2009, Doc. No. 3, ERN00416694-00416696 (the “Nuon Chea Notice of Joinder”).

the French language.⁴ Judge Lemonde filed a similar request with regard to the Ieng Thirith Application on the same day.⁵

3. The Co-Lawyers for the Charged Person Ieng Sary filed a supplement to their application on 18 December 2009, to which they attached Mr Bastin's handwritten notes.⁶
4. On 23 December 2009, the Co-Prosecutors filed a combined response to the Ieng Thirith and Ieng Sary Applications.⁷
5. By letter dated 4 January 2010, Judge Lemonde notified the Pre-Trial Chamber that he took cognisance of, 1) the Ieng Sary Application and its Supplement, 2) the Ieng Thirith Application, 3) the notice of joinder from the Co-Lawyers of Nuon Chea and 4) an application made by the Co-Lawyers of Ieng Sary under Internal Rule 35.⁸ Judge Lemonde responded partly by reference to matters contained in a recent order of the Co-Investigating Judges.⁹
6. On 5 January 2010, the Co-Lawyers for the Charged Person Ieng Thirith filed a Supplementary Submission¹⁰ and, on 15 January 2010, they filed a Request for Disclosure of Documents which was granted by the Pre-Trial Chamber.¹¹

⁴ Notice of Languages for Filing and Receiving Documents and Request for Extension of Time to Respond to the Applications, 15 December 2009, notified on 17 December 2009, Doc. No. 2, ERN00416692-00416693.

⁵ Notice of Languages for Filing and Receiving Documents and Request for Extension of Time to Respond to the Applications, 15 December 2009, notified on 17 December 2009, Doc. No. 2, ERN00416692-00416693.

⁶ Supplement to Ieng Sary's Second Rule 34 Application to Disqualify Judge Marcel Lemonde, 18 December 2009, Doc. No. 3, ERN00417255-00417256 (the "Ieng Sary Supplementary Submission").

⁷ Co-Prosecutors' Combined Response to Ieng Sary and Ieng Thirith's Applications for the Disqualification of the International Co-Investigating Judge, 23 December 2009, Doc. No. 4, ERN00416875-00416888 (the "Co-Prosecutors' Combined Response").

⁸ Letter, 4 January 2010, received on 6 January 2010, ERN00423699-00423700, Doc. No. 5.

⁹ Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, 31 December 2009 (notified on 4 January 2010), Doc. No. 5.1, ERN00422607-00422618 [Doc. no. D263/1 in Case File No. 002/19-09-2007-ECCC/OCLI].

¹⁰ Supplementary Submission to Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemond, 5 January 2010, Doc. No. 6, ERN00423558-00423562 (the "Ieng Thirith Supplementary Submission").



II. SUMMARY OF SUBMISSIONS

7. The Co-Lawyers of Ieng Thirith base their application on the statements of Mr Bastin, former staff member of the OCIJ, provided on 8 October 2009 and 2 December 2009. The arguments raised in the three applications, can be summarized as follows:

- a. “Judge Lemonde has explicitly expressed a bias towards the discovery of inculpatory evidence over exculpatory evidence in the investigation”;¹²
- b. By informally receiving a document from a member of the Office of the Co-Prosecutors (“OCP”), “Judge Lemonde has failed to maintain a separation of power between prosecuting and adjudicating units”;¹³
- c. Judge Lemonde should be disqualified because of “his erroneous statement as to the law in the ‘Order on the Request for Investigative Action to seek exculpatory evidence in the Shared Material Drive’” (“SMD”);¹⁴
- d. Judge Lemonde should be disqualified because of “his reluctance to properly characterize material which is exculpatory in the order on Extension of Provisional Detention”;¹⁵
- e. Judge Lemonde’s partiality towards the case for the Prosecution is further exemplified by his comments to the press;¹⁶
- f. Judge Lemonde is “responsible for a policy which has developed within the OCIJ, of withholding or attempting to withhold information from the ‘national’, ‘Cambodian side’ of the OCIJ including Judge You Bunleng”

¹¹ Request for Disclosure of Documents Referred to in Judge Lemonde’s Response to Ieng Thirith Defence Application for Disqualification of International Co-Investigating Judge Marcel Lemonde, 002/07-12-2009-ECCC-PTC(05), 15 January 2010. This request was dealt with on 19 January 2010 by way of an email of the Greffier from the Pre-Trial Chamber communicated to the case file officer of the ECCC, requesting that the Co-Lawyers in Case 002 be granted the requested access.

¹² Ieng Thirith Application, paras. 2 and 11 (a).

¹³ Ieng Thirith Application, paras. 3 and 11 (e).

¹⁴ Ieng Thirith Application, para. 4 (i).

¹⁵ Ieng Thirith Application, para. 4 (ii).

¹⁶ Ieng Thirith Application, para. 4 (iii).



which represents a “violation of the principle of the mutuality of decision making”;¹⁷

- g. Judge Lemonde’s lack of integrity is demonstrated by the fact that he sanctioned the “use of covert recording of interviews conducted with sensitive witness and permitted them to be filmed surreptitiously”;¹⁸
 - h. Judge Lemonde’s lack of integrity is further exemplified by the fact that he “directed a subordinate, Mr Bastin, to alter the evaluation report he had prepared on another team member so as to improve that team member’s chance of having his contract renewed”;¹⁹
 - i. In September 2009, Judge Lemonde “attempted to restrict access to the sensitive ‘Insider Witness Programme’ to members of the ‘international side’ of the OCIJ”;²⁰
8. The Co-Lawyers for Ieng Thirith submit that the cumulative effect of these matters are of sufficient gravity to have compromised the fairness of the proceedings and to have affected the Charged Person’s right to a fair and impartial investigation.²¹
9. In their supplementary submission, the Co-Lawyers for Ieng Thirith referred to the Pre-Trial Chamber’s previous decision on Rule 34 applications and, in particular, to the fact that the Chamber was “influenced in reaching its conclusions by the failure of the defence of Ieng Sary to obtain statements from other persons who, it was contended, have knowledge of the events which are the subject of complaint.”²² The Co-Lawyers submit that it would be inappropriate to interview members of the OCIJ to obtain statements, although the Co-Lawyers also stress that they would do it, if needed, but seek directions of the Pre-Trial Chamber in that respect.

¹⁷ Ieng Thirith Application, paras. 5 and 11 (d).

¹⁸ Ieng Thirith Application, paras. 6 and 11 (b)-(c).

¹⁹ Ieng Thirith Application, paras. 6 and 11 (g).

²⁰ Ieng Thirith Application, para. 11 (f).

²¹ Ieng Thirith Application, para. 7.

²² Ieng Thirith Supplementary Submission, para. 8.



10. The following documents were provided with the Ieng Thirith Supplementary Submission:²³
- a. A declaration made by a member of the Victoria police in Australia attesting that Mr Bastin is the author of the statements provided and verifying that he also is the author of the “dot-notes”;
 - b. Mr Bastin’s dot-notes taken during the meeting of August 2009;
 - c. An explanation of the dot-notes provided by Mr Bastin.
11. The Co-Lawyers request that these documents be accepted and that the Pre-Trial Chamber adjourn the consideration of the Ieng Thirith Application until the following matters, arising from the Pre-Trial Chamber’s decisions of 9 and 14 December 2009, are clarified:²⁴
- a. Whether further information is required in respect of the issue of identification of Mr Bastin;
 - b. Whether it is permitted for members of the OCIJ to be approached and asked to provide statements.
12. The Co-Lawyers for Ieng Sary state that they join the Ieng Thirith Application “thus incorporating all legal and factual arguments therein.” The Ieng Sary Application put forward the following additional arguments, also based on the statement of Mr Bastin which, according to them, reveals a “cluster of judicial misconduct and investigatory irregularities attributed to Judge Lemonde:”
- a. There were methodological problems related to witness statements and summaries given in that the datacoder or analyst within the OCIJ do not have access to the audio recording of witness interviews, thus being

²³ Ieng Thirith Supplementary Submission, para. 7 and Doc. No. 6.1 (ERN00414215-00414215), Doc. No. 6.2 (ERN00414213-00414218) and Doc. No. 6.3 (ERN00417259-00417261).

²⁴ Respectively, Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Case No. 002/09-10-2009-ECCC/PTC(01), Doc. No. 7, ERN00407716-00407724, (the “First Ieng Sary Decision on Rule 34 Application”) and Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, Case No. 002/13-10-2009-ECCC/PTC(02), Doc. No. 7, ERN00414098-00414110 (the “Khieu Samphan Decision on Rule 34 Application”).



unable to verify the accuracy of the written record which they then translate and summarise, all without having any translation or legal qualifications;²⁵

- b. Judge Lemonde ordered that “all OCIJ staff have access to an insider witness database, which should have been handled only by those employees who had proper training and experience.”²⁶

13. The Co-Lawyers for Ieng Sary submit that the second application under Rule 34 is necessary given that Mr Bastin supplied the Defence with an additional statement on 2 December 2009, namely after the notification of the Pre-Trial Chamber decision on their first application.²⁷ The Ieng Sary Application lists “newly discovered facts” but primarily focus its argumentation on the alleged *ex parte* communication between the OCIJ and OCP late 2008.²⁸

14. In their supplementary submission, Co-Lawyers for Ieng Sary also supply Mr Bastin’s handwritten notes and request that these be considered along with the material provided with their application.²⁹

15. The Co-Lawyers for Nuon Chea adopt, in its entirety, the Ieng Thirith Application. They supplement the argumentation concerning the allegations of partiality towards the international side of the OCIJ by noting that Judge Lemonde appears to be acting unilaterally in respect of the OCIJ’s efforts to obtain the testimonies of [REDACTED].³⁰ The Co-Lawyers also request that the individuals present at the meeting in August 2009 as well as all members of the French film crew, be examined by the Pre-Trial Chamber at an oral hearing.³¹ They further request that the Pre-Trial Chamber obtains a copy of the written agreement

²⁵ Ieng Sary Application, para. 1 - (a).

²⁶ Ieng Sary Application, para. 1 - (d).

²⁷ Ieng Sary Application, p. 1.

²⁸ Ieng Sary Application, paras. 13-25.

²⁹ Ieng Sary Supplementary Submission, para. 7.

³⁰ Nuon Chea Notice of Joinder, par. 2. *C.f. infra* also par. 7 - (f).

³¹ Nuon Chea Notice of Joinder, par. 3. *C.f. infra* also par. 7 - (g).



between the French film crew and the OCIJ orders the seizure of all video/audio recording produced pursuant to this agreement in order to “assist the PTC in its determination of the Application.”³²

16. All three Charged Persons have explicitly³³ or implicitly³⁴ made a request for a public hearing in relation to their applications.

17. In response, the Co-Prosecutors submit, with respect to each allegation, that:

- a. The alleged investigatory irregularities stemming from the lack of linguistic capacities does not justify the Judge’s disqualification since it does not show actual or apparent bias in the conduct of the International Co-Investigating Judges;³⁵
- b. The factual support for the allegation of the existence of an *ex parte* communication between the OCIJ and the OCP is materially non-existent;³⁶
- c. The joint public statement of the Co-Investigating Judges pertaining to the filming of the confidential part of judicial investigation by a French crew clearly show that, contrary to the allegations raised in the Ieng Sary Application and in the Ieng Thirith Application, there does not seem to be a disagreement between the international and the national investigating judge;³⁷
- d. The submission, according to which the International Co-Investigating Judge should be disqualified because access to a sensitive witness database was granted to untrained staff, does not demonstrate any subjective or objective bias;³⁸
- e. With respect to the alleged attempt to influence a contractor’s evaluation report, the Co-Lawyers for the Charged persons do not establish objective

³² Nuon Chea Notice of Joinder, para. 4.

³³ Ieng Sary Application, par. 26-32; Ieng Thirith Application, paras. 55-56.

³⁴ Nuon Chea Notice of Joinder, para. 3.

³⁵ Co-Prosecutors Response, paras. 19-20.

³⁶ Co-Prosecutors Response, paras. 21-23.

³⁷ Co-Prosecutors Response, paras. 24-27.

³⁸ Co-Prosecutors Response, paras. 28-29.



or subjective bias on the part of the International Co-Investigating Judge who exercised his right and duty as the second reporting officer of the contractor to provide his assessment of the contractor's performance;³⁹

- f. Concerning the alleged withholding of information from the "Cambodian side" of the OCIJ, the applicants do not show how this amounts to an actual or apparent bias in favour of the OCP and the national Judge has, thus far, never expressed any grievance of such a nature;⁴⁰
- g. The allegation based on Judge Lemonde's erroneous statement as to the law in the 'Order on the Request for Investigative Action to seek exculpatory evidence in the Shared Material Drive'⁴¹ and on his reluctance to properly characterize material which is exculpatory in the Order on Extension of Provisional Detention⁴² should be dismissed: these decisions do not demonstrate any objective or subjective bias and even if erroneous, these decisions are, or were, subject to appeal, where the issue of bias was not raised. In any event, the purpose of reviewing judicial decisions in the context of allegations of bias is not to detect any errors but to determine whether such error demonstrates that the judge is actually or apparently biased; the applicants fail to establish how the decisions have resulted in any actual or apparent bias inviting disqualification.⁴³
- h. The applicants' argument based on press statements alleged to demonstrate the existence of the pro-Prosecution bias of Judge Lemonde have been previously litigated and determined by the Pre-Trial Chamber in its decision of 14 December 2009.

18. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the applications because they cite scant evidence to reverse the presumption of impartiality attached to a judge and repeat arguments that have already been raised and rejected by the Pre-Trial Chamber. The Co-Prosecutors further submit that the

³⁹ Co-Prosecutors Response, paras. 30-32.

⁴⁰ Co-Prosecutors Response, paras. 33-35.

⁴¹ Ieng Thirith Application, para. 4 (i).

⁴² Ieng Thirith Application, para. 4 (ii).

⁴³ Co-Prosecutors Response, paras. 36-39.



applications raise speculative suggestions regarding the lack of communication between the ‘international and Cambodian sides’ of the OCIJ,” which would, in any event, be subject to the dispute settlement mechanism under Rule 72.⁴⁴

19. According to the Co-Prosecutors, an oral hearing on this matter is not warranted.⁴⁵
20. The Pre-Trial Chamber considers that the Co-Prosecutors have no standing as of right in respect of this kind of application. If the Pre-Trial Chamber considers the Co-Prosecutors may be an interested party, they may participate or they may be otherwise called upon to assist by commenting or filing submissions in cases where the Chamber feels it appropriate to have views expressed. The Pre-Trial Chamber finds that in the present case, it may be assisted by the Co-Prosecutors and therefore accepts the Response.

III. ADMISSIBILITY OF THE APPLICATIONS

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

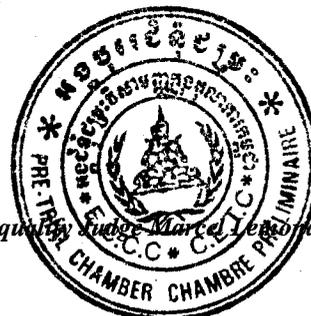
“Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.”

22. 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”. Considering these provisions together, the Pre-Trial Chamber finds it has jurisdiction to consider the Application.

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

⁴⁴ Co-Prosecutors Response, para. 2.

⁴⁵ Co-Prosecutors Response, paras. 3-9.



“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.”

24. The statement on which the applications are based was supplied to the applicants by Mr Bastin on 2 December 2009 (“Second Bastin Statement”). The Co-Lawyers for Ieng Thirith submit that they immediately commenced working on their application as soon as they received the Second Bastin Statement.⁴⁶ The Co-Lawyers for Ieng Sary submit that they first attempted to alert the Pre-Trial Chamber to the additional facts adduced by Mr. Bastin on 7 December 2009.⁴⁷
25. The Ieng Thirith Application was filed on 7 December 2009 and the Ieng Sary Application on 11 December 2009. The Nuon Chea Notice of Joinder was filed on 22 December 2009. The Pre-Trial Chamber considers that the Co-Lawyers for the charged persons took action as soon as they became aware of one of the grounds for the applications. Accordingly the Ieng Thirith Application, the Ieng Sary Application and the Nuon Chea Notice of Joinder are timely pursuant to Internal Rule 34(3). As no Closing Order has yet been made, these applications are also timely pursuant to Internal Rule 34(4)(a).

IV. CONSIDERATION OF THE APPLICATIONS

a. Ieng Thirith’s request for adjournment of the consideration of the application

26. The Co-Lawyers for Ieng Thirith request that the Pre-Trial Chamber adjourn the consideration of their application until they receive clarification as to whether further information is required in respect of the issue of identification of Mr Bastin and whether it is permitted for members of the OCIJ to be approached to provide statements in relation to the application.

⁴⁶ Ieng Thirith Application, para. 17.

⁴⁷ Ieng Sary Application, p. 1.



27. Pursuant to Internal Rule 34(3), a party who files an application for disqualification of a judge shall provide supporting evidence. A charge of partiality must be supported by factual basis and it is for the applicant to provide the relevant supporting material. The Co-Lawyers are concerned that the Ieng Thirith Application be dismissed “on the grounds that there are deemed to be procedural insufficiencies or a lack of corroborating evidence when it can readily be obtained”.⁴⁸
28. Previously the Pre-Trial Chamber found the evidence produced insufficient for various reasons. It is for applicants to decide which course of action to follow to obtain the evidence that can “readily be obtained” to support an application and draw conclusions from the Pre-Trial decisions to provide the required evidence to the Pre-Trial Chamber. The request is therefore dismissed.

b. Request for a public hearing

29. The Co-Lawyers for Ieng Thirith submit that an oral hearing will provide the parties with the opportunity to respond to the facts as alleged in the application and will ensure transparency of the proceedings.⁴⁹
30. In the Ieng Sary Application, the Co-Lawyers put forward that “a public oral hearing, with the testimony of all persons involved, is necessary in order to allow the public to scrutinize this issue and in order to protect the integrity and fairness of the proceedings.” According to them, Internal Rule 34(3) does not state that all supporting evidence must be filed at the same time as the application and the fact that Internal Rule 34(7) does not expressly provide for an oral hearing does not mean that the possibility of an oral hearing is precluded by the Rules.⁵⁰ Given that the Pre-Trial Chamber had previously considered that the evidence supporting a previous application based on Internal Rule 34 was not “very strong” when

⁴⁸ Ieng Thirith Supplementary Submission, para. 6.

⁴⁹ Ieng Thirith Application, paras. 55-56.

⁵⁰ Ieng Sary Application, para. 26.



considering the first statement provided by Mr. Bastin which was the only evidence adduced, the Co-Lawyers for Ieng Sary contend that an oral hearing is “absolutely warranted.”⁵¹

31. In the Nuon Chea Notice of Joinder, the Co-Lawyers request that certain individuals be examined by the Pre-Trial Chamber at an oral hearing since their “testimony is crucial for a proper evaluation of the issues raised in the Application.”⁵²

32. Previously the Pre-Trial Chamber has found that the procedure prescribed in Internal Rule 34(7) envisages a written decision by the Chamber and not a hearing.⁵³ Further, as required by Internal Rule 34(3), all supporting evidence must be filed *with* the application for disqualification and the burden of proof to displace the presumption of impartiality of a Judge lies entirely on the applicant and evidence to be adduced *at the time* of the application.⁵⁴

33. The Pre-Trial Chamber also previously held that where it has sufficient information to decide on the application and it is in the interests of justice to proceed expeditiously it may consider the matter without holding a public hearing.⁵⁵



⁵¹ Ieng Sary Application, para. 27.

⁵² Nuon Chea Notice of Joinder, para. 3.

⁵³ Decision on Ieng Sary's Request for Appropriate Measures concerning Certain Statements by Prime Minister Hun Sen challenging the Independence of Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, 30 November 2009, Case No. 002/20-10-2009-ECCC(PTC03), Doc. No. 5, ERN00404595-00404601, para. 2 (“PTC03 Disqualification Decision”).

⁵⁴ Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, Case No. 002/13-10-2009-ECCC/PTC(02), Doc. No. 7, ERN00414098-00414110, para. 22.

⁵⁵ Decision on the Co-Lawyers' Urgent Application for the 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 (the “Ney Thol Decision”), para. 8. *Cf.* Internal Rule 77(3)(b), which, in relation to appeals and applications under sub-rules 73(a)-(c), empowers the Chamber to decide applications on the basis of the written submissions of the parties alone.

34. As previously found, the Pre-Trial Chamber finds that transparency of proceedings will be ensured by the re-classification of all filings in relation to the applications as public.⁵⁶
35. Contrary to the Co-Lawyers' assertions, supporting evidence must be provided at the same time as the application. They have the burden to prove the alleged lack of impartiality. It is not for a judicial body seized of an application to investigate on behalf of the applicant by way of a public hearing or ensure sufficiency of the evidence presented in support of an application filed by a party through a hearing. As it is not for the Pre-Trial Chamber to conduct the case for the applicants, the request for an oral hearing is dismissed

c. Requests for disqualification

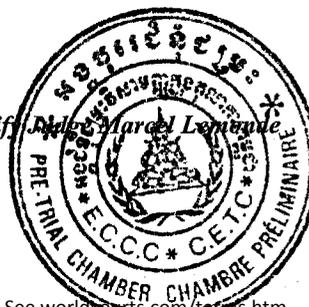
36. The Pre-Trial Chamber has set out the law relating to disqualification of judges in its decision concerning an application for disqualification of Judge Ney Thol ("Ney Thol decision").⁵⁷ The test for bias to be applied is that provided in Internal Rule 34(2), which refers both to actual bias and to apprehended bias.
37. 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

⁵⁶ PTC03 Disqualification Decision, para. 2.

⁵⁷ Cf. *Ney Thol* Decision.



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 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:



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- *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".

38. 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".⁵⁸ 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".⁵⁹ The Code of Judicial Ethics of the International Criminal Court contains identical provisions.⁶⁰

39. 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".⁶¹ 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"

⁵⁸ *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, Article 2(1).

⁵⁹ *Code of Judicial Ethics*, Article 7(1).

⁶⁰ *Code of Judicial Ethics of the International Criminal Court*, Articles 4.1 and 9.1 (ICC-BO/D2-01-05).

⁶¹ 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.

Decision on Ieng Sary's and Ieng Thirith Applications to Disqualify Judge Marc



and that “remarks which the judge may consider to be ‘harmless banter’ may diminish the judge’s perceived impartiality”.⁶²

1. The alleged bias towards the discovery of inculpatory evidence over exculpatory evidence: the August 2009 meeting

40. The Pre-Trial Chamber has already ruled on similar allegations based on a statement of Mr Bastin dated 8 October 2009 and found that the evidence provided on this point was insufficient.⁶³ The Ieng Thirith Application, in which this allegation of partiality is reiterated, is also based on a second, more detailed statement of Mr Bastin dated 2 December 2009.

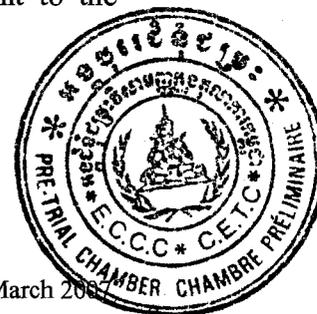
41. The Co-Lawyers of Ieng Thirith state that both of Mr Bastin’s statements form “the primary evidential basis” upon which they base their application.⁶⁴ The Second Bastin Statement does not provide any information regarding the August 2009 meeting. The dot-notes made by Mr. Bastin appear to be the basis on which his initial statement of October 2009 was prepared. The only account of the events that took place during the meeting is provided in Mr Bastin’s first statement, other than the recollection of Judge Lemonde. This account was considered as insufficient evidence by the Pre-Trial Chamber in its previous decisions. The evidence adduced in the Ieng Thirith Application does not provide any further factual basis necessary to reverse the presumption of impartiality which attaches to Judge Lemonde. This produced evidence can therefore not amount to the alleged bias or appearance of bias of Mr. Lemonde

2. The alleged ex parte communication between OCP and OCIJ

⁶² Commentary on the Bangalore Principles of Judicial Conduct, the Judicial Integrity Group, March 2002, para. 65.

⁶³ Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, 002/09-10-2009-ECCC/PTC(01), Doc. No. 7. See also, Public Redacted Decision on Nuon Chea’s Application for Disqualification of Judge Marcel Lemonde, 002/29-10-2009-ECCC/PTC(04), dated 23 March 2010, para. 19 (“Nuon chea Disqualification Decision”).

⁶⁴ Ieng Thirith Application, para. 11.



42. Following the 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. The Second Bastin Statement and its contemporary dot-notes are the only evidence adduced by the Co-Lawyers in support of their request for disqualification of Judge Lemonde on that point.
43. The party alleging existence of bias under Internal Rule 34 bears the burden of displacing that presumption, which imposes a high threshold, by presenting sufficient evidence to support their claim. The Second Bastin Statement presents very serious allegations against Mr. Lemonde. This statement is, however, the only evidence adduced in the Ieng Thirith Application and the Ieng Sary Application to support the allegations of bias against the Charged Persons under Internal Rule 34. None of the individuals alleged to be present during this meeting, or involved directly or indirectly with the events, provide for supporting evidence.
44. The Pre-Trial Chamber rejects the submissions of the Co-Lawyers for Ieng Sary when they contend that Internal Rule 34(3) does not state that all supporting evidence must be filed by the moving party at the time of the application. An applicant may very well bring further evidence before the Pre-Trial Chamber in support of their application if the said evidence became available after filing the application. There are no provisions in the Internal Rules providing the basis of a right for the Pre-Trial Chamber to undertake an inquiry in respect of an application under Internal Rule 34. Contrary to the right of inquiry provided for in Internal Rule 35.2. Rule 34(3) prescribes that a party shall provide supporting evidence, preferably all evidence available, for the determination of the motion. The allegation of *ex parte* communication between the OCIJ and the OCP lacks factual basis to reverse the presumption of impartiality which attaches to Judge Lemonde. The evidence provided therefore does not amount to the alleged bias or appearance of bias of Mr. Lemonde.



3. *The erroneous statement regarding the law in the SMD decision*

45. The Pre-Trial Chamber previously found that where allegations of bias are made on the basis of a Judge's decision, 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.⁶⁵
46. The Pre-Trial Chamber found in its decision ("the SMD Decision") that the Co-Investigating Judges committed an error of law by incorrectly interpreting their obligation in respect of seeking for exculpatory evidence.⁶⁶ The applicant is now relying on this finding to allege bias on the part of Judge Lemonde, given that the incorrect interpretation by the Co-Investigative Judges of their obligations "shows that the OCIJ is not looking fairly and equally for inculpatory and exculpatory evidence, and thus reinforces the statement made by Judge Lemonde at the meeting in early August 2009."⁶⁷
47. The Pre-Trial Chamber finds that the error of law made by the Co-Investigating Judges does not in itself contribute to the allegation of bias or appearance of bias of Mr Lemonde being one of the judges who made the error.
48. The Pre-Trial Chamber further finds that the Co-Lawyers fail to demonstrate that the Co-Investigating Judges' ruling in the contested order, in particular the role played by Judge Lemonde in such a ruling, is, or would reasonably be perceived as attributable to a pre-disposition against the applicant and not genuinely related

⁶⁵ PTC03 Disqualification Decision, para. 9.

⁶⁶ Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 002/19-09-2007-ECCC/OCIJ (PTC24), 18 November 2009, para. 38.

⁶⁷ Ieng Thirith Application, para. 31.



to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.⁶⁸

4. The reluctance to characterize exculpatory material in the order for extension of detention

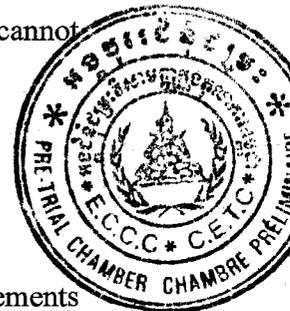
49. The Co-Lawyers for Ieng Thirith included this allegation in the section of their application pertaining to the SMD Decision mentioned above, and merely referred to a paragraph in the contentious order on detention. According to them, “Judge Lemonde’s reluctance to properly characterize material which is exculpatory in the recent Detention Order extending the Charged Person’s detention for yet another year is further evidence of his inbuilt partiality towards the successful conviction of the Charged Person.”⁶⁹

50. The Pre-Trial Chamber notes that the order on detention was under appeal at the time of the Ieng Thirith application. In this appeal, the Co-lawyers for Ieng Thirith raised similar allegations. The Pre-Trial Chamber refers to its findings in the decision on provisional detention in that respect, dismissing this allegation.⁷⁰

As the facts were found incorrect the Pre-Trial Chamber finds that this cannot contribute to the allegation of bias or appearance of bias.

5. The comments to the press

51. The Pre-Trial Chamber held in a previous disqualification decision that statements of a person as quoted by the press do not amount to reliable evidence.⁷¹ In the absence of any other evidence pertaining to this issue, the Pre-Trial Chamber



⁶⁸ Decision on Nuon Chea’s Application for Disqualification of Judge Marcel Lemonde, 23 March 2010, 002-29-10-2009-ECCC/PTC(04), Doc. No. 4, para. 23

⁶⁹ Ieng Thirith Application, par. 32.

⁷⁰ Public Redacted Decision on Ieng Thirith’s Appeal against Order on Extension of Provisional Detention, 30 April 2010, 002/19-09-2007-ECCC/OIJ(PTC33), C20/9/15, para. 23.

⁷¹ Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case No. 002/13-10-2009-ECCC/PTC (02), 14 December 2009, Doc. No. 7, para. 30.

consider that the Co-Lawyers of Ieng Thirith have not demonstrated the alleged bias or appearance of bias on this point.

6. Alteration of the evaluation report of a staff member

52. The Pre-Trial Chamber finds that the Judge' expression of his opinion with respect to the evaluation of a staff member cannot be construed by an informed person, who has knowledge of all of the relevant circumstances, as the existence of bias which shall lead to the disqualification of this Judge, unless evidence is adduced to show that this fact is related to the case and affects the defence's rights to a fair trial.

53. What emerges from the Second Bastin Statement is that Judge Lemonde expressed different views from those provided by Mr Bastin on the issue of the evaluation of a staff member. As the Pre-Trial Chamber upheld in its present and previous decisions, the threshold to reverse the presumption of impartiality is high and in this case, it cannot be overturned merely by alleging a difference of opinion as a basis for disqualification. The Pre-Trial Chamber finds that the Co-Lawyers for the Charged Persons did not demonstrate the existence of any objective or subjective bias against the Charged Persons from Judge Lemonde.

7. Methodology problems relating to witness statements and summaries

54. Concerning this allegation raised in the Ieng Sary Application, the Pre-Trial Chamber notes that the Co-Lawyers have raised issues of "investigatory irregularities" attributed to Judge Lemonde, stemming from a method of work they consider might lead to inaccurate written records of interview that are analysed by members of the staff of OCIJ who, it is also alleged, lack the professional competence to do so.



55. The Pre-Trial Chamber further observes that the Co-Lawyers do not provide any arguments in their application in support of this allegation, merely relying on the facts related in the Second Bastin Statement,⁷² to argue simply that the statement “reveals a cluster of judicial misconduct and investigatory irregularities.”⁷³
56. The Pre-Trial Chamber considers that this allegation lacks factual basis. The Co-Lawyers did not demonstrate the existence of an either objective or subjective bias which requires that the presumption of impartiality attached to the Judge should be reversed.

8. *Access to the “Insider Witness Programme”*

57. In the Ieng Sary Application, the Co-Lawyers rely on the Second Bastin Statement to support their allegation of judicial misconduct of Judge Lemonde when he “ordered that all OCIJ staff have access to an insider witness database, which should have been handled only by those employees who had proper training and experience.”⁷⁴ The Ieng Sary Application does not provide any further argument in support of this allegation. The Pre-Trial Chamber notes that in the Ieng Thirith Application, it is alleged that “Judge Lemonde attempted to restrict access to the sensitive ‘Insider Witness Programme’ to members of the ‘international side’ of the OCIJ.”⁷⁵ Both the Ieng Thirith Application and the Ieng Sary Application rely on the same facts related in the Second Bastin Statement.⁷⁶
58. The Pre-Trial Chambers notes that the Co-Lawyers for Ieng Sary seem to reproach Judge Lemonde for having ordered that this database be accessible to more individuals than the “specially trained team of investigators” for whom this database was originally established, whereas the Co-Lawyers for Ieng Thirith seem to reproach Judge Lemonde for having restricted access to this database to

⁷² Second Bastin Statement, p. 2-3

⁷³ Ieng Sary Application, par. 1.

⁷⁴ Ieng Sary Application, par. 1 d).

⁷⁵ Ieng Thirith Application, par. 11 f).

⁷⁶ Second Bastin Statement, pp. 8-10.



the “international side” of the OCIJ. The Pre-Trial Chamber further observes that in the Second Bastin Statement, it is said that both the national Co-Investigating Judge and his legal advisor had been given access to this database since 2007.⁷⁷

59. Besides the fact that the Ieng Sary Application joined the Ieng Thirith Application but raises contradictory argument on that point, the Pre-Trial Chamber does not see how the policy regarding access to an internal database of the OCIJ could exemplify the existence of objective or subjective bias against the Charged Persons. Again, the Co-Lawyers criticized the policy followed by the international Co-Investigating Judge and his decisions related to the OCIJ, without providing any factual basis to substantiate that the presumption of impartiality attached to the Judge shall be reversed given the existence of an objective or perceived bias against the Charged Persons.

9. Interviews with and filming of sensitive witnesses and allegation of partiality towards the ‘International side’ of the OCIJ (information being withheld from the national side)

60. The Co-Lawyers for Ieng Thirith rely on the Second Bastin Statement to submit that, 1) Judge Lemonde has “actively attempted to withhold information from the national side of the OCIJ so that only the ‘international side’ had access to it”,⁷⁸ and 2) Judge Lemonde lacked integrity by permitting a film crew to “surreptitiously film and record a potential insider witness being interviewed.”⁷⁹

61. The Co-Lawyers for Ieng Sary also rely on this part of the Second Bastin Statement to illustrate the lack of integrity of Judge Lemonde in letting a French film crew having access to information related to the investigations, the S-21 Chart.⁸⁰

⁷⁷ Second Bastin Statement, p. 10.

⁷⁸ Ieng Thirith Application, par. 38-45.

⁷⁹ Ieng Thirith Application, par. 46-50. According to the Co-Lawyers for Ieng Thirith, Judge Lemonde has allowed a French film crew to accompany the OCIJ investigators on a mission to record a potential insider witnesses being interview, without Judge You Bunleng’s consent or him being informed.

⁸⁰ Ieng Sary Application, para. 1 c).



62. The Pre-Trial Chamber notes that the Second Bastin Statement relayed information received by Mr Bastin, often representing hearsay upon hearsay, of events that supports the Ieng Sary Application as well as the Ieng Thirith Application to disqualify Judge Lemonde.
63. The Pre-Trial Chamber recalls that “matters which are ordinarily insufficient to require recusal are ‘speculation, beliefs, conclusions, suspicions, opinion, and similar non-factual matters’.”⁸¹ Judicial disqualification requires the moving party to demonstrate that the judge concerned possesses an objective bias or that there is an appearance of bias. As stated above, the threshold to reverse the presumption of impartiality of a Judge is high and it follows that the Pre-Trial Chamber is not required to act when the burden of proof is not met.⁸² The Pre-Trial Chamber finds that the Second Bastin Statement does not provide sufficient factual basis to reverse the presumption of impartiality of Judge Lemonde. Furthermore, the joint public statement of the Co-Investigating Judges show that there did not seem to be a disagreement between them, as alleged by the Co-Lawyers for the Charged Persons.⁸³ The Pre-Trial Chamber further finds that even when the evidence would be found sufficient the allegation made does not contribute to the allegation of bias or appearance of bias.
64. On the arguments put forward by the Co-Lawyers for Nuon Chea in support of the allegation of partiality of Judge Lemonde where he “seems to be acting unilaterally with respect to the OCIJ’s efforts to obtain [REDACTED] the [REDACTED] the Pre-Trial Chamber notes that this argument has been dismissed in a previous

⁸¹ PTC03 Disqualification Decision, par. 8.

⁸² PTC03 Disqualification Decision, par. 10.

⁸³ OCIJ statement on Reconstruction Recording,

http://www.eccc.gov.kh/english/cabinet/press/60/Press_release_OCIJ_reconstruction_recording.pdf, 3 March 2008.



decision.⁸⁴ The Pre-Trial Chamber notes that no new additional arguments in respect of this have been raised.

65. With respect to the request to obtain a copy of the written agreement between the French film crew and the OCIJ as well as to seize all video/audio recording produced pursuant to this agreement in order to “assist the PTC in its determination of the Application”, the Pre-Trial Chamber refers to its previous finding on this matter in this decision.⁸⁵

66. As the Pre-Trial Chamber has found that each matter presented to be a basis for the alleged bias or appearance of bias does not individually support such allegation, then it follows that they do not collectively demonstrate bias or a perception of bias.

Other matters

67. The Pre-Trial Chamber notes that it has addressed only matters raised in the Applications which could be considered as being the basis of allegations of bias or the appearance of bias. The Pre-Trial Chamber has not considered submissions irrelevant to these considerations.

⁸⁴ Nuon chea Disqualification Decision, para. 22.

⁸⁵ Cf. *infra*, paras. 29-35.



THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

1. The Applications are admissible;
2. The Applications are dismissed

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

Phnom Penh, 15 June 2010 ^{CR}

Pre-Trial Chamber



Rowan DOWNING



NEY Thol



Katinka LAHUIS



HUOT Vuthy



PRAK Kimsan

