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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RESPONSE TO IENG SARY'S REQUEST FOR APPROPRIATE MEASURES TO BE TAKEN CONCERNING CERTAIN STATEMENTS BY PRIME MINISTER HUN SEN WHICH CHALLENGE THE INDEPENDENCE OF PRE-TRIAL CHAMBER JUDGES KATINKA LAHUIS AND ROWAN DOWNING

Filed by:

Judges LAHUIS and DOWNING

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We, Katinka Lahuis and Rowan Downing, judges of the Pre-Trial Chamber, hereby present our written submissions pursuant to Internal Rule 34.7 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (the ECCC) in respect of the application of Mr. Ieng Sary dated 20 October 2009 and filed on that day, but notified to us through the President of the Pre-Trial Chamber on 28 October 2009 pursuant to Internal Rule 34.7 (the Application).

SUMMARY OF ARGUMENTS

1. We join issue with the Application for the following reasons.

   a. The Application is inadmissible, as it requests relief not within the ambit of Internal Rule 34. The Pre-Trial Chamber has no "inherent discretionary powers in taking all necessary and reasonable measures to clarify and/or verify the alleged conduct of Judges Katinka LAHUIS and Rowan DOWNING".

   b. The Application, in any event, fails to disclose any bias, perceived or otherwise according to the test to be applied.

   c. The necessity of a hearing.

2. We agree with the request that the matter be expedited but not that the Pre-Trial Chamber should determine no other matters until this matter is determined. We recused ourselves from dealing with the Application and have been replaced as provided for in Internal Rule 34. We note that according to Internal Rule 34.9 any act of us in other cases shall be deemed to be valid.

ARGUMENTS

A. The Application is inadmissible.

3. Internal Rule 34 provides and clearly defines the powers of the ECCC. The only application that is valid is one for disqualification as defined in Internal Rule 34.2. in the following terms:

> "2. Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias."

4. Internal Rule 34.3 specifically provides:

> "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."

5. Internal Rule 34 provides that it is the duty of the applicant to make out the grounds for disqualification and that evidence shall be provided supporting the application. The Pre-Trial Chamber has no jurisdiction under the Internal Rules to undertake a general inquiry, as is requested in the relief sought. Where the Pre-Trial Chamber and the parties are specifically directed by the Internal Rules to the task to be undertaken there is no room for the consideration of an inherent jurisdiction. It is not for the Pre-Trial Chamber to undertake an investigation, as is suggested. The application should therefore be declared inadmissible.

B. The Application fails to disclose any bias, perceived or otherwise according to the test to be applied.

6. The Pre-Trial Chamber, in the matter of Co-*Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, PTC 01, 4 February 2008 (the *Ney Thol* decision), adopted the reasoning in *Prosecutor v. Furundžija*, IT-95-17/1-A, 'Judgment', Appeals Chamber, 21 July 2000, para. 196; *Prosecutor v. Norman*, SCSL-2004-14-PT, 'Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers', Appeals Chamber, 28 May 2004, para. 25; *Prosecutor v. Karemera*,

Rwamajuba, Ngirumpatse, Nzirorera, ICTR-98-44-T, 'Decision on Motion by Karemera for Disqualification of Trial Judges', 17 May 2004, para. 10.

At paragraph 15 of the *Ney Thol* decision the Pre-Trial Chamber observed:

> "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".

The Pre-Trial Chamber went on to observe in the *Ney Thol* decision:

> "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 their appointment to judicial offices. They shall be independent in the performance of the functions and shall not accept or seek instructions from any Government or any other source.
>
> 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 Judges of the Extraordinary Chambers shall be appointed from among the currently practising Judges or are additionally appointed in accordance with the existing procedures for appointment of Judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, 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.[1]

19. It is for the Appellant 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.[2]

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 appraised

[1] Royal Decree of 07 May 2006, NS/RKT/0506/214.
[2] *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgment", Appeals Chamber, 21 July 2000, para. 189.

> also of the fact that impartiality is one of the duties that Judges swear to uphold".[3]

The appropriate test to be applied

7. The Charged Person asserts an incorrect test. He suggests a test based upon the domestic law of the United States of America in *Sentis Group, Inc v. Shell Oil Co.*, 559 F.3d 888, 907 (8th Cir. 2009) and being "recusal or reassignment is appropriate where 'impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case'".[4]

8. This test is then transposed or developed to be a reference to the "average Cambodian", with no reference to the knowledge a reasonable observer may have of the case. Rather, "knowledge" is substituted with the notion of "Prime Minister Hun Sen is widely respected by the average Cambodian. Consequently, when Prime Minister Hun Sen recently called into question the independence of the international Judges of the Pre-Trial Chamber at the ECCC – based on their decision causing the opening of Case 003 – in a public, televised speech to the people of Cambodia, this would lead the average Cambodian – "the reasonable person" – to reasonably apprehend bias." Thus the test developed in the Application loses any quality of the reasonable observer who must be "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold".[5] This is replaced by the notion that the unsubstantiated views of a respected person are to be applied to the average Cambodian. This is not the test followed and applied by the Pre-Trial Chamber and is not that which is set out in the case of *Sentis Group, Inc v. Shell Oil Co.*, even if it were relevant to this case.

The evidentiary burden

[3] *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgment", Appeals Chamber, 21 July 2000, para. 190.
[4] See para. 23 of the Application.
[5] See para 6 above.

9. We, Judges Lahuis and Downing, took an oath on 3 July 2006 not to accept or seek instructions from any government or any other source. We have acted in accordance with this oath working as judges in the ECCC and have never sought or accepted guidance from any government.

10. Internal Rule 34 (3) provides that an Application for disqualification "shall clearly indicate the grounds and shall provide supporting evidence". We note that the Application requests not our disqualification but instead an investigation of the matter. Apparently the Applicant is of the opinion that such evidence he provided in this Application is not sufficient to lead to the conclusion that we are biased, perceived or otherwise. With this opinion we agree.

11. Even if the Pre-Trial Chamber accepts the Application as being admissible it should be rejected as far it is to be read as a request for disqualification as the evidence provided is not sufficient to support the conclusion of being biased perceived or otherwise.

C. Hearing.

12. In the *Ney Thol* decision the Pre-Trial Chamber has found that it had sufficient information to decide on the application and it was considered in the interests of justice to proceed expeditiously to consider the matter without holding a public hearing. In Internal Rule 34 (7) it is prescribed that 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. We note that this role does not provide for a hearing. If any more information from us is required we will provide this to the Pre-Trial Chamber in the way it will be directed.

CONCLUSION

13. The Application should be declared inadmissible, as it is not an application falling within the jurisdiction of the Pre-Trial Chamber. In the alternative, it should be dismissed on

its merits, as the Applicant has failed to provide the proper test in respect of the perception of bias and has failed to:

(a) apply the proper test;

(b) provide evidence which would rebut the presumption of impartiality; and

(c) would support the asserted perception of bias.

Dated 1 November 2009

Katinka Lahuis

Rowan Downing QC

Signed with our electronic signature on our request given respectively in Amen, The Netherlands and Melbourne, Australia