

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATIONS FOR
"APPROPRIATE MEASURES" CONCERNING THE INTERNATIONAL JUDGES
OF THE PRE-TRIAL CHAMBER**

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I. INTRODUCTION

1. Citing a statement of the Prime Minister of Cambodia that “some foreign judges [...] have received orders from their governments”,¹ IENG Sary requests that the Pre-Trial Chamber take “appropriate measures”² to “clarify and/or verify”³ the alleged conduct of the two incumbent International Judges of the Pre-Trial Chamber.
2. IENG Sary’s Application has been purportedly filed under Internal Rule 34 (“Rules”), although it does not seek the sole relief permissible under that Rule, *i.e.* the disqualification of a judge. What the Application seeks, however, *i.e.* certain unspecified “appropriate measures”, is not permitted under that Rule 34 or indeed under any other Rule. Even if the Application is considered as an application for the disqualification of the two Judges, it is deficient in form and devoid of merit and material content. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber summarily dismiss the Application.

II. PRELIMINARY SUBMISSIONS

Recusal of the International Judges is not Required

3. Under Rule 34(6), sitting judges whose disqualification is sought should be replaced for the purposes of the consideration of the application for disqualification. However, since the current Application does not seek a disqualification of the two International Judges, neither law nor logic requires that those Judges should be excluded from the consideration of this Application. A sole reference to Rule without seeking the relief permitted under it, cannot qualify the Application as validly filed under Rule 34. The substance and reasoning of an application is more relevant for the consideration of a judicial body rather than the Application’s title or nomenclature.

¹ *Case of IENG Sary*, Ieng Sary’s Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen Which Challenge the Independence of the Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, Case File No. 002/20-10-2009-ECCC-PTC (3), ERN 00390853-0039086, 20 October 2009, p. 4 [*hereinafter* Application].

² Application, p. 1.

³ Application, p. 15.

4. The Co-Prosecutors, therefore, invite the Pre-Trial Chamber to hold that the Application, though purportedly moved under Rule, is not validly filed under that Rule and, as such, the recusal of the two Judges, mandatory if the Application was validly filed, is not required.

Public Hearing is not Required

5. The Applicant seeks a public oral hearing of this Appeal as, according to him, it “involves the fundamental fair trial right to be tried by an independent and impartial tribunal”.⁴
6. The right to a hearing does not necessarily involve an oral hearing; it may include a reasoned and public determination on written pleadings alone.⁵ If the parties are given ample opportunity to put forward their case in writing and to comment on the submissions of the other parties, a judicial chamber may find that the requirements of fairness are complied with and an oral hearing is not required.⁶
7. While issues in this Application may be important, a disposal of the Application on written pleadings alone cannot be any less public or transparent, if the filings and the decision of the Pre-Trial Chamber are made available to the public. It has been the practice of the Pre-Trial Chamber to place all the party filings concerning applications and the decisions thereupon on the ECCC website. The Pre-Trial Chamber rarely departs from this practice unless the interests of the parties (particularly, the defendant) are affected.⁷ International tribunals—trying cases of a similar magnitude and complexity as this Court—regularly decide motions and appeals on written pleadings alone.
8. A clear and consistent practice has emerged regarding the Pre-Trial Chamber’s decisions to hold oral hearings. The Chamber has orally heard all but one of the detention appeals⁸ and such appeals that may lead to the termination of proceedings and the consequential release of

⁴ Application, para. 30.

⁵ *Jussila v. Finland*, Judgment, Appeal No. 73053/01, Grand Chamber of the European Court of Human Rights, 23 November 2006, para. 41.

⁶ *Vilho Eskelinen et al v. Finland*, Judgment, Appeal No. 63235/00, Grand Chamber of the European Court of Human Rights, 19 April 2007, para. 74.

⁷ *Case of IENG Sary*, Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: Ieng Sary’s Appeal Regarding Appointment of an Expert, 24 July 2008. A189/1/6, para. 4.

⁸ The Pre-Trial Chamber orally heard five original detention appeals of all the five detainees of this Court. Thereafter, it concluded detention extension appeal hearings of IENG Thirith, IENG Sary and KHIEU Samphan. By agreement of the parties, the detention extension appeal of NUON Chea was determined on written pleadings alone.

a defendant.⁹ In sum, the liberty of a defendant has been the paramount consideration in the Chamber's determination on whether or not to hold a public hearing.¹⁰ This Application does not fall under these categories.

9. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber determine this Application on written submissions alone. This should indeed be the only appropriate mode of determination as the Co-Prosecutors are seeking a summary dismissal of the Application.

III. LAW ON CONFLICT OF INTEREST

Independence and Impartiality of Judges

10. Article 128 of the Constitution of Cambodia mandates an independent and impartial judiciary. This fundamental concept is reflected in the founding documents of this Court—the Agreement and the ECCC Law—which provide that all ECCC judges shall be independent in the performance of their functions and shall not accept or seek instructions from any source.¹¹ Substantively identical guarantees are contained in the International Covenant on Civil and Political Rights (“ICCPR”),¹² the European Convention on Human Rights (“ECHR”),¹³ the Inter-American Convention on Human Rights (“IACHR”),¹⁴ and the African Charter on Human and Peoples’ Rights (“ACHPR”).¹⁵ The United Nations Human Rights Committee has stated that the guarantee of independence and impartiality of judiciary “is an absolute right that may suffer no exception.”¹⁶
11. The perceived independence and impartiality of international courts and tribunals are important elements in their quest for legitimacy in the eyes of the parties, other potential

⁹ *Case of KHIEU Samphan*, Decision on Khieu Samphan's Request for a Public Hearing, 4 November 2008, A190/1/8, para. 8. This reflects the purpose of Rule 77(6) that public hearings may be held “in particular, where the case may be brought to an end by the [Pre-Trial Chamber's] decision”.

¹⁰ *Case of KHIEU Samphan*, Decision on the Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13.

¹¹ Agreement, art. 3(3); ECCC Law, art. 10(new).

¹² ICCPR, art. 14(1).

¹³ ECHR, art. 6(1).

¹⁴ IACHR, art. 8(1).

¹⁵ ACHPR, art. 7(1).

¹⁶ *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 Oct 1992.

litigants, and the international community at large.¹⁷ The notions of independence and impartiality are indispensable to the long-term attractiveness of international adjudication and its credibility as a depoliticized alternative to political dispute resolution.¹⁸ The consensual basis of many international adjudicatory processes and the weakness of their enforcement mechanisms lend support for resorting to the strictest standards of independence and impartiality in order to build confidence in the work of the international judiciary and to facilitate voluntary compliance with its decisions.¹⁹ Hybrid courts, such as this one, bear the additional burden of setting examples for the domestic courts to follow.²⁰

12. Under international jurisprudence, a presumption of impartiality attaches to judges.²¹ This presumption derives from the judges' oath of office and the qualifications for their appointment. This presumption applies to the judges of this Court by virtue of Article 3.3 of the Agreement.²² It places a high burden on the applicant to displace that presumption²³ and to adduce sufficient evidence to establish that the judge-in-question can be objectively perceived to be biased.²⁴ In the absence of the evidence to the contrary, it must be assumed that the judges "can disabuse their minds of any irrelevant personal beliefs or predispositions."²⁵

¹⁷ Yuval Shany & Sigall Horowitz, Judicial Independence in The Hague and Freetown, *Leiden Journal of International Law*, 21 (2008), p. 120 (quoting T. Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals', (2005) 99 *AJIL* 359, at 359–60 [hereinafter Shany & Horowitz]).

¹⁸ Shany & Horowitz, p. 120 (quoting L. R. Helfer and A. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', (2005) 93 *California Law Review* 899; L. R. Helfer and A. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, at 312–15; R. Keohane *et al.*, 'Legalized Dispute Resolution: Interstate and Transnational', (2000) 54 *International Organization* 457, at 459–62).

¹⁹ Shany & Horowitz, p. 120 (quoting D. Shelton, 'Legal Norms for Independence and Accountability of International Tribunals', (2003) 2 *Law and Practice of International Courts and Tribunals* 27).

²⁰ Shany & Horowitz, p. 120 (quoting N. K. Stafford, 'A Model War Crimes Court: Sierra Leone', (2003) 10 *ILSA Journal of International & Comparative Law* 117, 133; D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future', (2007) 43 *Stanford Journal of International Law* 1, at 37).

²¹ *Case of NUON Chea*, Public 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 File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ERN 00160734 – 00160742, C11/29, 4 Feb 2008, para. 15 [hereinafter Judge Ney Thol Decision].

²² Judge Ney Thol Decision, para. 16.

²³ Judge Ney Thol Decision, para. 15.

²⁴ Judge Ney Thol Decision, para. 19. *Prosecutor v. Furundzija*, Judgment, Case No. IT-95.17/1-A, ICY Appeals Chamber, 21 Jul 2000, para. 196 [hereinafter Furundzija Judgment].

²⁵ Furundzija Judgment, para. 196.

13. A judge's views or inclinations of a general nature should be distinguished from an inclination to implement those views as a judge in a particular case.²⁶ Judges have personal convictions.²⁷ Absolute neutrality can hardly, if ever, be achieved.²⁸ Even political sympathies do not, of themselves, imply a lack of impartiality.²⁹
14. Rule 34(2), providing the mechanism for disqualification of ECCC judges, is, in substance and in spirit, no different from similar rules applicable at the various International Criminal like those for the former Yugoslavia ("ICTY"),³⁰ Rwanda ("ICTR"),³¹ Sierra Leone ("SCSL")³², the International Criminal Court ("ICC")³³ and the International Court of Justice ("ICJ").³⁴ The settled jurisprudence of these courts is consistent with the test of bias applied before this Court.³⁵ In *Furundzija*, the ICTY held that a judge should not only be subjectively free from bias but that there should also be nothing in the surrounding circumstances that objectively give rise to an appearance of bias. Therefore, a judge will be considered to lack independence and impartiality (and, therefore, be subject to disqualification) if either "actual bias exists" ("subjective test") or there is an "unacceptable appearance of bias" ("objective test").³⁶
15. Quoting *Furundzija* with approval, the Pre-Trial Chamber of this Court has held that there is an unacceptable appearance of bias if: (i) a judge is a party to a case, or has a financial or proprietary interest in the outcome of a case, or if his or her 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 a case is automatic; or (ii) the

²⁶ *Furundzija* Judgment, para. 200.

²⁷ *Furundzija* Judgment, para. 203.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ ICTY Rules of Procedure and Evidence, rule 15(A).

³¹ ICTR Rules of Procedure and Evidence, rule 15(A).

³² SCSL Rules of Procedure and Evidence, rule 15(A).

³³ ICC Rules of Procedure and Evidence, rule 34(1).

³⁴ Statute of the ICJ, art. 17(2).

³⁵ Judge Ney Thol Decision, para. 20.

³⁶ *Furundzija* Judgment, para. 189-190.

circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³⁷

16. A reasonable observer, in this context, must be an informed person, with the knowledge of all the relevant circumstances, including the tradition of integrity and impartiality that form a part of the background, and appraised of the fact that impartiality is one of the duties that the judges swear to uphold.³⁸
17. Specifically, in *Furundzija*, the ICTY denied a request for disqualification of a judge on the ground that she sat in judgement in a case that could advance a legal and political agenda that she helped create while being a member of a United Nations Commission before joining that Tribunal.³⁹ In *Akayesu*, the ICTR rejected the claim that political pressures destroyed that Tribunal's independence and impartiality. The defendant had contended that remarks made by judges in "public and in private" coupled with "pressures and special arrangements" tended to show partiality against him. The Tribunal noted that the defendant had the burden to establish its lack of impartiality or independence by "adequate and reliable evidence" and that he could not meet this burden only by bald allegations of bias and selective prosecution.⁴⁰ Similarly, the ICJ denied a request by Israel to preclude a judge from sitting in the *Wall Case* on the ground of the judge's prior involvement in the Palestine-Israel dispute as an Egyptian diplomat and the views expressed by him in an interview. The Court held that on those facts it could not hold that the judge had "previously taken part in the case" in any capacity.⁴¹

IV. ARGUMENT

Relief Sought in the Application cannot be Granted Under Rule 34

18. The Application seeks the relief of "appropriate measures" to clarify and/or verify the alleged conduct of the two International Judges. This relief is not permissible either under Rule 34, under which the Application is moved, or under any other Internal Rule. The sole relief

³⁷ Judge Ney Thol Decision, para. 20.

³⁸ Judge Ney Thol Decision, para. 21.

³⁹ *Furundzija* Judgement, para. 215.

⁴⁰ *Prosecutor v. Akayesu*, Judgment of the Appeals Chamber, Case No. ICTR-96-4, 1 Jun 2001, para. 90.

⁴¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 June 2004 (2004) ICJ Rep 3.

permissible under Rule 34 is the disqualification of a judge. The Applicant has not sought this relief.

19. The Application urges the Pre-Trial Chamber to “use its inherent discretionary powers”⁴² to take these “appropriate measures”. Neither does the Application specify these “appropriate measures” nor does it make any submission on the legal source from which the Pre-Trial Chamber derives these inherent powers.
20. The Pre-Trial Chamber, in the past, has rejected an application by the Co-Charged Person NUON Chea seeking personal and professional background information about the Judges.⁴³ The Chamber held that neither the Rules nor the Cambodian or international legal practice provided for the provision of any information.⁴⁴ The current Application is of the same nature as it also seeks clarifications and verifications from the Pre-Trial Chamber.⁴⁵ The Application should, therefore, be dismissed as inadmissible.

Application, as a Request for Disqualification, is Deficient in Form and Content

21. An application for disqualification of a Judge of the Pre-Trial Chamber should satisfy all the following requirements. It should (1) identify a case in which a Judge has a personal or financial interest, or (2) concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively, give rise to an appearance of bias,⁴⁶ (3) indicate grounds for disqualification, and, most importantly, (4) provide supporting evidence.⁴⁷
22. The Application satisfies none of these requirements. In particular, (1) it, on its own showing, is not a request for disqualification,⁴⁸ (2) it does not identify a case in which one or both the Judges has a personal or financial interest (Indeed, it cites none.), (3) it does not identify a case concerning which one or both the Judges have, or have had, any association which

⁴² Application, p. 15.

⁴³ *Case of NUON Chea*, Disclosure of Credentials, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00156722, C11/13, 19 Dec 2007.

⁴⁴ *Case of NUON Chea*, Request for Resumes of PTC Judges, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ERN 00157561, C11/16, 9 Jan 2008.

⁴⁵ Application, p. 15.

⁴⁶ Rules, rule 34(2).

⁴⁷ Rules, rule 34(3).

⁴⁸ Application, p 15.



objectively might affect their impartiality, or objectively, give rise to an appearance of bias, and (4) it does not provide any supporting evidence.

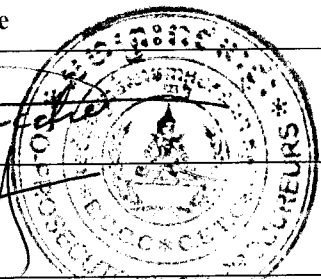
23. The sole “supporting evidence” cited by the Applicant is an “unofficial translation” of a speech made by the Prime Minister of Cambodia.⁴⁹ Even if the unofficial version of the speech was deemed to be an accurate reflection of what was said by the Prime Minister, the Applicant has failed to provide evidence that the two International Judges are *actually* subjectively or objectively biased. The burden is solely on the Applicant to displace the presumption of independence of the International Judges by adequate and reliable evidence, which, in the present case he has failed to discharge.

24. Therefore, the Application, being devoid of merit and any supporting evidence deserves dismissal *in limine*.

IV. CONCLUSION

25. The Co-Prosecutors request that the Pre-Trial Chamber summarily dismiss the Application as inadmissible.

Date	Name	Place	Signature
5 Nov 2009	CHEA Leang Co-Prosecutor	Phnom Penh	
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⁴⁹ Application, fn. 21.