



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
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អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

ថ្ងៃ ខែ ឆ្នាំ ទោសបញ្ជាក់ (Certified Date/Date de certification):
..... 10 / 09 / 2010

មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier..... SANN RADA

- 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.

Criminal Case File N° 002/17-06-2010-ECCC-PTC (09)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 10 September 2010

PUBLIC REDACTED

DECISION ON APPLICATION FOR DISQUALIFICATION OF JUDGE YOU BUNLENG

Co-Prosecutors

CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH

Charged Person

NUON Chea

Co-Investigating Judges

Judge YOU Bunleng

Co-Lawyers for the Charged Person

SON Arun
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Application for Disqualification of Judge You Bunleng” (“the Application”) filed by the Co-Lawyers for the Charged Person, NUON Chea (“the Applicant”), on 17 June 2010, and notified on 21 June 2010.¹

I. PROCEDURAL BACKGROUND

1. The Application seeks “to disqualify Judge You Bunleng from any and all further proceedings in Case File No 002/19-09-2007-ECCC/OCIJ (‘Case 002’).”²
2. On 22 June 2010, the Co-Lawyers for the Charged Person, IENG Thirith, filed “Defence for IENG Thirith Adoption of Defence for NUON Chea’s ‘Application for Disqualification of Judge You Bunleng’ of 17 June 2010” (“the Ieng Thirith Adoption”),³ informing the Pre-Trial Chamber that she “adopts the arguments set out in the said Application and the relief requested therein.”⁴
3. Co-Investigating Judge You Bunleng (“Judge You”) filed his “Response from Co-Investigating Judge YOU Bunleng to the Application for Disqualification Filed by Defence for NUON Chea” (“the Response”) on 30 June 2010, being notified on 1 July 2010.⁵
4. On 9 July 2010, Court Management Section of the ECCC (“CMS”) notified the Pre-Trial Chamber’s “Warning for Unauthorized Disclosure of Confidential Information.”⁶

¹ 17 June 2010, Doc. No. 1, ERN 00535168-00535181.

² Application, para. 1. *See also* para. 27.

³ 22 June 2010, Doc No. 2, ERN 00539199-00539200.

⁴ Ieng Thirith Adoption, para. 2.

⁵ 30 June 2010, Doc. No. 3, ERN 00543507-00543519.

⁶ 9 July 2010, Doc Nos. 4 (ERN 00543130-00543134) and D314/1/11, including Request for Correction, 9 July 2010, D314/1/11/Corr-1. A public version of this Warning was also notified on 9 July 2010.

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5. Co-Lawyers for the Applicant filed “Addendum to Nuon Chea Application for Disqualification of Judge You Bunleng” (“the Addendum”)⁷ on 15 July 2010, being notified on 21 July 2010.
6. On 2 August 2010, the Pre-Trial Chamber filed its “Decision on Addendum to Nuon Chea Application for Disqualification of Judge You Bunleng” (“the Decision on Addendum”), in which it held:

[5] The first part of the Addendum is the Applicant’s submissions on a recent report published by the Open Society Justice Initiative on 6 July 2010 entitled “Political Interference at the Extraordinary Chambers in the Courts of Cambodia” (“OSJI Report”).⁸ The Applicant presents his submissions on the OSJI Report as further “supporting evidence”⁹ for the Application to “disqualify Co-Investigation Judge You Bunleng from all further proceedings in Case 002.”¹⁰

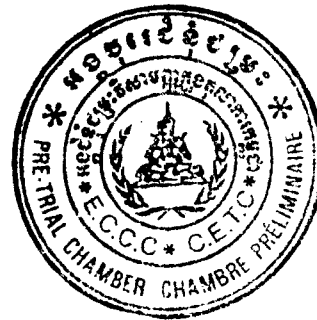
[6] The Pre-Trial Chamber reserves its decision on the admissibility and merits of this first part of the Addendum for its fully reasoned decision on the Application, which will be issued in due course.

...

[9] The Pre-Trial Chamber finds that this second part of the Addendum relating to Mr. Knut Rosandhaug is inadmissible because it does not qualify as “supporting evidence” within the meaning of Internal Rule 34(3).

[10] Nevertheless, the Pre-Trial Chamber considers that the Applicant’s concern that “[I]t is highly likely that the public will misconstrue [Mr. Rosandhaug’s] *personal views* as those of this Chamber” will be adequately addressed by the notification of a public redacted version of this Chamber’s fully reasoned decision on the Application, which will be issued in due course.

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY
DECIDES:**



⁷ 15 July 2010, Doc. No. 5, ERN 00568724-00568728.

⁸ <http://www.soros.org/initiatives/justice> (accessed 19 July 2010). See the Addendum, paras. 1-5, 7-8, 10.

⁹ Internal Rule 34(3).

¹⁰ Addendum, para. 10.

1. **DIRECTS** that Judge You, if he so wishes, may present the Pre-Trial Chamber with his additional written submissions in response to the Applicant's submissions in the Addendum on the OSJI Report within ten (10) working days from the notification date of the Addendum, that is, by 4 August 2010.
2. **FINDS** inadmissible the submissions in the Addendum relating to Mr. Knut Rosandhaug.¹¹
7. On 4 August 2010, Judge You filed his "Additional Observation on Addidum [sic] to Nuon Chea Application for Disqualification"¹² ("the Observation on Addendum"). In the Observation on Addendum, Judge You stated that he has "no intention to make any additional observation on the addendum to Nuon Chea application for disqualification other than what were mentioned in my previous observation and especially those contained in the public joint press statements that the both Co-Investigating Judges have made regarding the case files 003 and 004."

II. PRELIMINARY ISSUES

A. Request for Investigation and/or Oral Hearing

Submissions of the Parties

8. The Applicant is "satisfied that [he] has provided all 'sufficient evidence' in support of [the Application]."¹³ He nevertheless submits the following:

[S]hould the PTC take the view that further corroborative material may be useful in reaching its decision, it *could* – pursuant to its inherent powers: (i) order an investigation into the circumstances surrounding Judge Bunleng's (in)actions and/or (ii) conduct a public hearing on the matter with the full participation of the parties . . .

¹⁴

9. As the Applicant notes,¹⁵ the Pre-Trial Chamber has previously held that it does not have the power "to order any investigation of allegations of partiality which are not supported

¹¹ 2 August 2010, Doc. No. 6, ERN 00577612-00577615.

¹² 4 August 2010, Doc. No. 7, ERN 00578909-00578909.

¹³ Application, para. 25.

¹⁴ Application, para. 26 (footnotes omitted; emphasis in original).

¹⁵ Application, para. 18.



by sufficient evidence.”¹⁶ The Applicant submits that “[t]he logical corollary of this position [of the Pre-Trial Chamber] is that, where ‘sufficient evidence’ has been adduced, the PTC can act pursuant to its inherent powers.”¹⁷

10. The Response seeks to have the Pre-Trial Chamber reject the Applicant’s request for a public hearing because “the procedure of disqualification defined in rule 34 is confidential and that the public hearing and the participation of both Co-Investigating Judges will affect seriously the case file 002 as it is at its final stage and we are now busy drafting the Closing Order.”¹⁸

Consideration by the Pre-Trial Chamber

11. It is clear from the Application that the Applicant’s requests for an investigation and a public hearing depend on a finding by the Pre-Trial Chamber that “further corroborative material may be useful in reaching its decision.” Since the Pre-Trial Chamber decides not to make such a finding, the Applicant’s requests will not be further considered by the Pre-Trial Chamber.

III. ADMISSIBILITY

A. Timeliness of the Application

Submissions of the Parties

12. The Pre-Trial Chamber recalls that an application for disqualification must be filed “as soon as the party becomes aware of the grounds in question”¹⁹ and “submitted . . . before the Closing Order.”²⁰ The Pre-Trial Chamber notes that the Application and Addendum satisfy the second of these two cumulative conditions.

¹⁶ 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, ERN 00485317-00485329, para. 20 (“Decision on Nuon Chea’s Application to Disqualify Judge Lemonde”).

¹⁷ Application, para. 18.

¹⁸ Response, para. 33.

¹⁹ Internal Rule 34(3).

²⁰ Internal Rule 34(4)(a).

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13. Regarding the first condition, the Applicant states, “As required by Rule 34(3), the instant application was filed as soon as the Defence became aware of Judge Bunleng’s (in)actions.”²¹ In a footnote the Applicant states, “Rule 34(3)’s requirement that applications are to be filed ‘as soon as the party becomes aware of the grounds in question’ must take into account the additional time needed to translate submissions and supporting material.”²²
14. The submission of Judge You is that the Application is inadmissible because it was not filed as soon as the Applicant became aware of the grounds in question. The Response states the following:

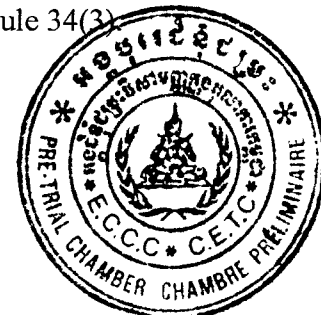
Fundamental facts (**grounds**) stated in the Application have long been raised and the Defence used to exploit those facts in their earlier complaints. Only facts in relations to my decision in Case File 003 and 004 are the new facts but that decision is indeed in the context of other cases which are not related to Case File 002 in which they are representing. Thus, the Defence has failed to file a complaint on the facts that they may have filed long time ago without any obstacles if they wanted to. According to the above provisions, even if what has been raised by the Defence is true, any belated filing should not be admissible.

...

I would like . . . [to] request the PTC [to] consider declaring the Application inadmissible because the Application is . . . filed at an inappropriate timeframe.²³

Consideration by the Pre-Trial Chamber

15. The Pre-Trial Chamber must first determine the “grounds” of the Application within the meaning of Internal Rule 34(3). The Pre-Trial Chamber considers that there is no legal difference between the words “causes” in Article 557 of the Code of Criminal Procedure of the Kingdom of Cambodia²⁴ and “grounds” in Internal Rule 34(3)



²¹ Application, para. 19.

²² Application, fn. 57.

²³ Response, paras. 11-12 (footnotes omitted; emphasis in original).

²⁴ “The party who wishes to apply for disqualification of a judge shall file the application as soon as he becomes aware of the causes. Failure to do so shall cause the application to be inadmissible.” See also Article 558, “The application for disqualification shall clearly state the grounds for the challenge, supported by evidence, otherwise the application is inadmissible.”

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16. The Application does not explicitly indicate the ground(s) for disqualification as such.

The “Introduction” of the Application states:

In light of: (i) the well-documented history of executive interference in the courts of Cambodia; (ii) the vigorous and consistent positions taken by government officials on purely judicial matters at the ECCC; and (iii) Judge Bunleng’s treatment of Defence requests to hear high-ranking government witnesses; his recent decision to ‘unsigned’ certain rogatory letters in . . . (‘Cases 003 and 004’) would lead a reasonable observer to conclude that he lacks the independence required of his office. Accordingly, Judge Bunleng’s continued involvement in Case 002 would amount to a violation of Nuon Chea’s absolute right to be investigated by an independent tribunal and further undermine the credibility and integrity of all proceedings at the ECCC.²⁵

17. Under the section “Argument”, sub-section “The Objective Test is Satisfied,” the Application states:

The crux of this application is simple: Judge Bunleng’s (in)actions over the course of the judicial investigation – culminating in his recent about face – ‘would lead a reasonable observer, properly informed, to reasonably apprehend’ a lack of independent on his part.

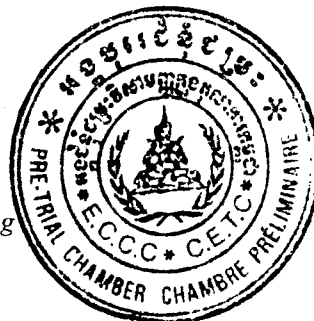
On at least three occasions, Judge Bunleng has demonstrated an apparent willingness to improperly utilize his judicial power in the service of the Government’s agenda:

- a. His refusal to sign OCIJ letters [REDACTED] seeking an interview with [REDACTED] is consistent with RGC efforts to prevent their delivery.
- b. His refusal to sign OCIJ summonses to six high-ranking Government officials is consistent with contemporaneous comments made by the RGC’s Prime Minister (that he personally blocked the testimony of certain individuals) and Minister of Information (that, according to the Government, the six summonsed individuals should not testify).
- c. And, most blatant, he ‘unsigned’ rogatory letters in Cases 003 and 004 immediately after: (i) his original endorsement became public and (ii) the spokesman for the RGC’s Interior Ministry publicly repeated the Government’s opposition to the new investigations. Judge Bunleng offered what can only be considered a hollow justification for this truly remarkable act.

Accordingly, it would seem to any properly informed reasonable observer (*i.e.* one familiar with the institutional concerns discussed above) that Judge Bunleng is either unwilling or unable to adhere to the strict prohibition against ‘accept[ing] or seek[ing] instructions from [his] Government’.²⁶

²⁵ Application, para. 1.

²⁶ Application, paras. 20-21 (footnotes omitted).



18. Judge You appears to have incorrectly interpreted the admissibility requirement of Internal Rule 34(3) by equating “grounds” with “supporting evidence.”²⁷ Internal Rule 34(3) does not state that an application for disqualification shall be filed as soon as the party becomes aware of the “supporting evidence” in question. Rather, Internal Rule 34(3) states that an application for disqualification shall be filed as soon as the party becomes aware of the “grounds” in question.
19. Internal Rule 34(3) will often require a party to file the application as soon as s/he becomes aware of the supporting evidence in question.²⁸ The Pre-Trial Chamber also considers that, under Internal Rule 34(3), a party may become aware of some of the “supporting evidence” before s/he “becomes aware” of the ground(s) for disqualification. The justification for and scope of this interpretation of Internal Rule 34(3) was established by the Pre-Trial Chamber as follows in its Decision on Khieu Samphan’s Application to Disqualify Judge Lemonde:

[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.²⁹

20. The Pre-Trial Chamber will not always admit “past evidence” provided by an applicant as “supporting evidence” in an application for disqualification. Otherwise, the timeliness requirement in Internal Rule 34(3) would become meaningless and there would be no limit to how far into the past an applicant could reach. The Pre-Trial Chamber will decide the admissibility of such past evidence on a case by case basis in accordance with the Internal Rules.
21. The Pre-Trial Chamber considers that the Application indicates the following single ground for disqualification: Judge You allegedly lacks the necessary independence

²⁷ Response, para. 11 (“Fundamental facts (**grounds**) stated in the Application”).

²⁸ Public Decision on the Co-Lawyer’s Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, 002/19-09-2007-ECCC/OCIJ(PTC 01), C11/29, para. 4 (“Decision on Nuon Chea’s Application to Disqualify Judge Ney”).

²⁹ Decision on Khieu Samphan’s Application to Disqualify Judge Lemonde, para. 20.
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required of his position as Co-Investigating Judge.³⁰ The Pre-Trial Chamber also considers that the Application provides three actions of Judge Bunleng as supporting evidence for this ground.

22. The Pre-Trial Chamber notes that the Applicant was notified of the three actions approximately eleven months,³¹ seven months,³² and eight days³³ respectively, prior to the filing date of the Application. The Application states, “[T]he instant application was filed as soon as the Defence became aware of Judge Bunleng’s (in)actions.”³⁴ The Applicant’s use of the word “culminating”³⁵ to describe the effect of the third and most recent action of Judge You indicates his submission that the context of Judge You’s alleged lack of independence, including the contextual relevance of Judge You’s first and second actions, did not become apparent to him until he became aware of Judge You’s third action. Judge You has not presented the Pre-Trial Chamber with any reason to doubt this submission of the Applicant.

23. The Pre-Trial Chamber notes that the Applicant did not file an application for disqualification against Judge You as soon as he became aware of the second action of Judge You. It was only after the third and most recent action of Judge You that the Applicant filed his application. The consequence of these decisions by the Applicant is that the issue before the Pre-Trial Chamber is whether the third action of Judge You, considered in the context of his first and second actions, demonstrates an appearance of his lack of independence or impartiality.³⁶ If Judge You’s third action does not

³⁰ Application, paras. 1, 12-13, 17, 20, 23, 25.

³¹ The first letter from the International Co-Investigating Judge, D122/5, was filed on 15 July 2009 and notified to the Applicant’s Co-Lawyers on 15 July 2009 in Khmer and English. The second letter from the International Co-Investigating Judge, D122/5/2, was filed in Khmer on 22 July 2009 and in English on 27 July 2009, and notified to the Applicant’s Co-Lawyers in Khmer on 22 July 2009 and in English on 28 July 2009.

³² The six summonses were filed in Khmer on 29 September 2009 and in English on 9 October 2009 and 16 November 2009, and notified to the Applicant’s Co-Lawyers in Khmer on 7 October 2009 and in English on 13 October 2009 and 16 November 2009 (see A296/1, A297/1, A298/1, A299/1, D136/2/1, and D136/3/1).

³³ On 9 June 2010, the Applicant’s Co-Lawyers were sent the “Statement from the Co-Investigating Judges” (dated 9 June 2010), Internal Memorandum from Co-Investigating Judge Marcel Lemonde to Co-Investigating Judge You Bunleng (dated 2 June 2010), and Internal Memorandum from Co-Investigating Judge You Bunleng to Co-Investigating Judge Marcel Lemonde (dated 8 June 2010).

³⁴ Application, para. 19. See also footnote 57 of the Application, as reproduced in paragraph 13 above of this Decision.

³⁵ Application, para. 20.

³⁶ See Application, para. 1.



demonstrate the appearance of his lack of independence or impartiality, the Application cannot be granted on the basis of the first and second actions of Judge You alone.

24. The Pre-Trial Chamber finds that the three actions of Judge You provided by the Applicant are admissible as supporting evidence. The Pre-Trial Chamber also finds the Application admissible insofar as it was filed as soon as the Applicant became aware of the ground in question.

B. Clarity of the Application

25. Judge You submits that the Application is inadmissible “because [it] is based on general and unclear facts.”³⁷ The Pre-Trial Chamber agrees with Judge You that, pursuant to Internal Rule 34(3), an application for disqualification is inadmissible if it does not “clearly indicate the grounds.”

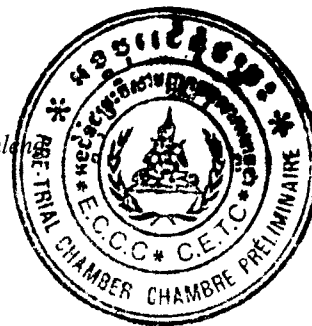
26. The Pre-Trial Chamber considers that an assessment of whether an application for disqualification clearly indicates the grounds occurs prior to and is distinct from an assessment of the merits of the application. To satisfy the clarity requirement for admissibility purposes, an application need only identify a ground(s) for disqualification with sufficient clarity to enable the relevant Chamber to conduct a proper review of the merits of the ground(s). Recalling paragraphs 16 and 21 above of this Decision, the Pre-Trial Chamber finds that the Application indicates the ground for disqualification with sufficient clarity.

C. Relationship between Cases 002, 003, and 004

27. Judge You appears to suggest that the first two actions in the Applicant’s supporting evidence should not be admitted as such because they are dissimilar from the third action in that the former relate to Case 002 while the latter relates to Cases 003 and 004.³⁸ The Pre-Trial Chamber notes that Internal Rule 34(3) does not require the supporting evidence

³⁷ Response, para. 12.

³⁸ Response, para. 11.



to have arisen out of the same case before the ECCC, or any case before the ECCC in fact. Internal Rule 34(2) requires that the ground(s) for disqualification, including the supporting evidence, be “in” or “concern” Case 002. The Pre-Trial Chamber considers that the third action of the Applicant’s supporting evidence concerns Case 002.

D. Admissibility of the Response

28. The Response was filed within the time limit prescribed by Internal Rule 34(7), and is otherwise admissible.

E. Admissibility of the Addendum and the Observation on Addendum

29. Unlike in this Chamber’s “Decision on Ieng Sary’s ‘Supplement to Ieng Sary’s Application to Disqualify Judge Marcel Lemonde & Request for a Public Hearing’,”³⁹ the additional supporting evidence (the OSJI Report) contained in the Addendum could not have been obtained before the Application was filed on 17 June 2010 because it became publicly available on 6 July 2010. The Addendum was filed on 15 July 2010. The Pre-Trial Chamber finds that the Addendum is admissible as it was filed in a timely manner.

30. The Pre-Trial Chamber finds that Judge You’s Observation on Addendum is admissible as it was filed within the time limit prescribed by the Decision on Addendum.

IV. APPLICABLE LAW

A. Ground(s) for Disqualification

31. Internal Rule 34(2) states:

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.

³⁹ 002/9-10-2009-ECCC/PTC(01), Doc. No. 6, ERN 00411027-00411029
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32. In its Decision on Nuon Chea's Application to Disqualify Judge Ney, the Pre-Trial Chamber set out the law governing a consideration of the merits of an application for disqualification 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 their 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.

[...]

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'.

[...]

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 appraised [sic] also of the fact that impartiality is one of the duties that Judges swear to uphold'. [footnotes omitted]

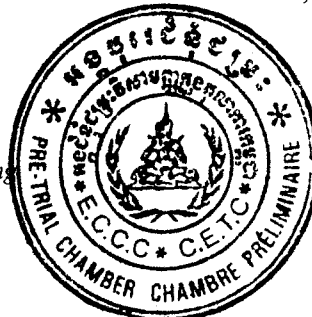
33. In the recent Decision on Ieng Sary's & Ieng Thirith's Applications to Disqualify Judge Lemonde, the Pre-Trial Chamber noted the following:

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'. 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'. The Code of Judicial Ethics of the International Criminal Court contains identical provisions.

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'. 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'. [footnotes omitted]

34. The Pre-Trial Chamber has consistently held that the starting point for any determination of an allegation of bias is the presumption of impartiality that attaches to a judge, and the Applicant bears the burden of displacing that presumption, which imposes a high threshold. The Pre-Trial Chamber has stated:

The reason for this high threshold is that while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias. The decisive question is whether a perception of lack of impartiality is objectively justified. A mere feeling or suspicion of bias by the accused is insufficient; what is



required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.⁴⁰

35. As noted above, the single ground for the disqualification of Judge You is his alleged lack of independence. The Applicant requests the Pre-Trial Chamber to consider the concepts of independence and impartiality “together” because they are “closely linked.”⁴¹ The Applicant also submits, “[I]t need not be shown that a demonstrable lack of independence has led to the violation of any *additional* fair-trial rights. Simply, where a judge’s independence is objectively dubious, he must be disqualified.”⁴²
36. The Pre-Trial Chamber finds that the Applicant’s supporting evidence does not warrant a finding that Judge You appears to lack independence or impartiality. The Pre-Trial Chamber therefore considers it unnecessary to examine the relationship between independence and impartiality with respect to the applicable test for deciding an application under Internal Rule 34(2).

B. Allegations of Bias Based on a Judicial Decision

37. The Pre-Trial Chamber has previously observed the following:

[I]t ‘has the duty to examine the content of the judicial decisions cited as evidence of bias’ and . . . ‘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’ . . . [E]rror, 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.⁴³

38. The Pre-Trial Chamber has also noted that it is unavoidable that one of the parties may not be satisfied with a judicial decision. Dissatisfaction does not, by itself, “raise grounds

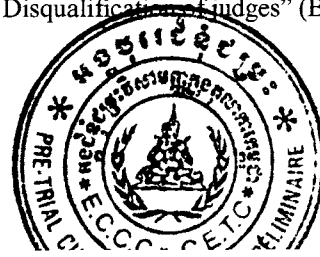
⁴⁰ Decision on Ieng Sary’s Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, 002/20-10-2009-ECCC/OCIJ(PTC 03), Doc. No. 5, ERN 00404595-00404601, para. 7 (“Decision on Ieng Sary’s Application for Appropriate Measures”) (footnotes omitted).

⁴¹ Application, para. 17.

⁴² Application, para. 23 (emphasis in original).

⁴³ Decision on Khieu Samphan’s Application to Disqualify Judge Lemonde, para. 34, quoting from *Prosecutor v Arsene Shalom Ntahobali*, ICTR-97-21-T, “Decision on Motion for Disqualification of Judges” (Bureau), 7 March 2006, para. 12.

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for disqualification but rather for appeals or for exhaustion of other existing legal remedies during the pre-trial, trial and appellate stage of the proceedings.”⁴⁴

C. Statements Quoted in the Press

39. In its Decision on Ieng Sary’s Application for Appropriate Measures, the Pre-Trial Chamber noted that a speech given by Prime Minister Hun Sen that was reported in the press alleged intervention by foreign governments in relation to all international judges of the ECCC, but did not attribute specific conduct to Judges Lahuis and Downing. The Pre-Trial Chamber considered, “Even if accepting the passages cited in the Motion as an accurate record of the Prime Minister’s speech, they do not amount to adequate and reliable evidence to show that these two judges are objectively or subjectively biased.”⁴⁵

V. CONSIDERATION OF THE MERITS

A. General Claims against the Cambodian Judiciary

40. The Applicant submits that the Cambodian judiciary as a whole suffers from executive interference and a lack, or perception of a lack, of independence.⁴⁶ The Addendum submits that the Pre-Trial Chamber should give “due consideration”⁴⁷ to the July 2010 OSJI Report. The Addendum states:

In particular, the Report highlights (among other things): (i) Cambodia’s historical lack of an independent judicial system; (ii) the Kingdom’s current lack of any ‘meaningful separation of powers between the judiciary and the executive branch’; (iii) several instances of political interference at the Court; and (iv) the difficulty of ameliorating such meddling given the procedural framework imposed by the ECCC Agreement.

...

Given its longstanding role as an objective, neutral observer of ECCC proceedings, the OSJI should be considered a reasonable observer of the Tribunal - that is, ‘an informed [organization], with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised [sic] also of the fact that impartiality if one of the duties that Judges swear to uphold.’⁴⁸

⁴⁴ Decision on Khieu Samphan’s Application to Disqualify Judge Lemonde, para. 35 (footnote omitted).

⁴⁵ Decision on Ieng Sary’s Application for Appropriate Measures, para. 11.

⁴⁶ E.g., Application, paras. 1-2.

⁴⁷ Addendum, para. 8.

⁴⁸ Addendum, paras. 2, 8 (footnotes omitted).



41. The Pre-Trial Chamber previously held as follows in its Decision on Nuon Chea's Application to Disqualify Judge Ney:

Much of the evidence produced by the Defence is that of commentary from third parties and relates in general terms to observations upon the alleged competence and motivation of the Cambodia judiciary as a whole, and not just Judge Ney Thol. These general observations and assertions are no evidence in respect of an apprehension of bias by Judge Ney Thol in this case of Nuon Chea.⁴⁹

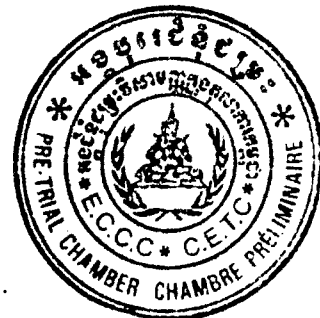
42. The Chamber agrees with Judge You that the Applicant's allegations against the Cambodian judiciary are "too vague to serve as ground for the disqualification Application"⁵⁰ because "the principle of the application for disqualifying any judge is that it must refer to the acts of that judge personally."⁵¹ The Pre-Trial Chamber finds that the general claims in the Application and Addendum, including the July 2010 OSJI Report, against the Cambodian judiciary do not establish that Judge You in particular appears to lack independence or impartiality, and therefore do not rebut the presumption of impartiality that attaches to Judge You by virtue of his appointment as a judicial officer of the ECCC.

B. First Action of Judge You

Submissions of the Parties

43. The Applicant submits that Judge You's "refusal to sign OCIJ letters [REDACTED] seeking an interview with [REDACTED] is consistent with RGC efforts to prevent their delivery."⁵² The Application also states, "[E]vents surrounding the OCIJ's efforts [to interview [REDACTED]] make clear that RGC officials actively interfered with the attempts to invite [REDACTED] for an interview," even though, as the Applicant admits, "the Government has never gone on record as to its position on this (now highly unlikely) eventuality."⁵³

44. Judge You states the following in his Response:



⁴⁹ Decision on Nuon Chea's Application to Disqualify Judge Ney, para. 32.

⁵⁰ Response, para. 13.

⁵¹ Response, para. 15. *See also* Decision on Ieng Sary's Application for Appropriate Measures, para. 11.

⁵² Application, para. 21(a).

⁵³ Application, para. 5 (footnotes omitted).

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[I have] already provided several arguments as reasoned in the Order on Requests for Summons of Witnesses filed by Nuon Chea and Ieng Sary, and this Order has already been heard by the PTC based on the appeals by the Defence of Charged Person, particularly by Nuon Chea's.⁵⁴

I wish to confirm that decision to summon or not summon any necessary witness for the search for truth is based on discretionary appreciation of both Co-Investigating Judges. These appreciations are, by no means, in common at all time. The Agreement between Cambodia and the United Nations, the ECCC Law, and the Internal Rules has beforehand anticipated such discretion discrepancies during the judicial proceedings. Therefore, at some points of the proceedings, disagreement is inevitable for the sake of the case file . . . All in all, the importance is that each of the Co-Investigating Judge[s] must abide by the mandate set forth in the law.⁵⁵

Consideration by the Pre-Trial Chamber

45. The Pre-Trial Chamber notes that nowhere in the Application does the Applicant try to explain how Judge You's prior decision not to sign the letters is connected to the Royal Government of Cambodia's subsequent "active . . . interfere[nce] with the attempts to invite [REDACTED] for an interview."⁵⁶ The Application merely asserts that Judge You's decision and the Government's "active interference" are "consistent" with each other. The Pre-Trial Chamber dismisses this bare assertion with the following reference to its case law:

[I]t is not for the Pre-Trial Chamber to speculate as to any reason why only Judge Lemonde may have signed the letters [REDACTED]. On the basis of the lack of cooperation between the Co-Investigating Judges or any disagreement between the Judges the Pre-Trial Chamber further cannot draw any conclusion considering the impartiality [or independence] of a judge.⁵⁷

C. Second Action of Judge You

Submissions of the Parties

46. The second action of Judge You provided by the Applicant as supporting evidence is stated as follows:

⁵⁴ Footnotes 17-18 in the Response cite the Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses, 13 January 2010, 002/19-09-2007-ECCC-OCIJ, D314, and the Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, 002/19-09-2007-ECCC/OCIJ (PTC 50 & 51), D314/1/8, D314/2/7.

⁵⁵ Response, paras. 19-20.

⁵⁶ Application, para. 5.

⁵⁷ Decision on Nuon Chea's Application to Disqualify Judge Lemonde, para. 22.
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[Judge You's] refusal to sign OCIJ summonses to six high-ranking Government officials is consistent with contemporaneous comments made by the RGC's Prime Minister (that he personally blocked the testimony of certain individuals) and Minister of Information (that, according to the Government, the six summonsed individuals should not testify).⁵⁸

47. Judge You responded that "my refusal to endorse summons for those witnesses had been made even before the public announcements of those leaders . . . [REDACTED]

[REDACTED]⁵⁹ Judge You also states that the Prime Minister's comments, while made on 9 September 2009, were not publicly reported in the press until 8 October 2009.⁶⁰

Consideration by the Pre-Trial Chamber

48. The Applicant acknowledges that the Minister of Information's comments were reported on 9 October 2009 in *The Phnom Penh Post*, "[t]wo weeks after [the six summonses were filed]."⁶¹ Similar to the first action of Judge You, instead of trying to connect Judge You's prior decision with the Minister of Information's subsequent reported comments, the Applicant merely asserts that the two are "consistent" with each other. Therefore, for the same reasons as above, the Pre-Trial Chamber dismisses the Applicant's submissions relating to the Minister of Information's reported comments.

49. Although the Prime Minister's reported comments were made on 9 September 2009,⁶² the Applicant provides nothing to challenge Judge You's response that his "refusal to endorse summons for those witnesses had been made even before the public announcements of those leaders . . . [REDACTED]

[REDACTED]."⁶³ The Applicant even acknowledged that "It is unclear from the text of the speech [by the Prime Minister] (i) precisely which witnesses the Prime Minister had rejected and (ii) how he managed, procedurally, to execute this

⁵⁸ Application, para. 21(b).

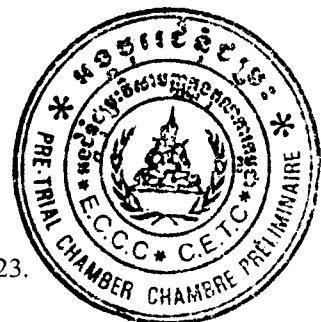
⁵⁹ Response, para. 21.

⁶⁰ Response, fn. 23.

⁶¹ Application, para. 4 and fn. 13.

⁶² Request for Investigation, 30 November 2009, D254, para. 6; Response, fn. 23.

⁶³ Response, para. 21.



apparent veto.”⁶⁴ The Applicant’s submissions relating to the second action of Judge You are therefore dismissed.

D. Third Action of Judge You

Submissions of the Parties

50. The third and final action of Judge You provided by the Applicant as supporting evidence of his alleged lack of independence is allegedly the “most blatant.” The Application states:

[Judge You] ‘unsigned’ rogatory letters in Cases 003 and 004 immediately after: (i) his original endorsement became public and (ii) the spokesman for the RGC’s Interior Ministry publicly repeated the Government’s opposition to the new investigations. Judge Bunleng offered what can only be considered a hollow justification for this truly remarkable act.⁶⁵

51. The Applicant relies on press articles to submit that “For over a decade, Prime Minister Hun Sen has repeatedly announced ‘that no more than five suspects should be prosecuted by the [ECCC] . . . This overtly political line has been consistently and openly towed by senior RGC officials as well as ‘Cambodian judicial officials at the Court’.”⁶⁶ The Applicant also notes that the spokesman’s comments were made on 7 June 2010 and reported in the press on 8 June 2010.⁶⁷

52. Judge You responded as follows:

[I]f I had to follow the Government’s instructions, I would be able to take a clear position and would have no hesitation in conducting the investigation in case files 003 and 004. More importantly, I used to think that it was time to take action in these case files and I accordingly signed the draft rogatory letters that Judge Marcel Lemonde sent to me. This manifest hesitation and the fact that I used to sign the rogatory letters best illustrate my clear and real intention regarding these case files 003 and 004.

[My] hesitation arose since early June . . .

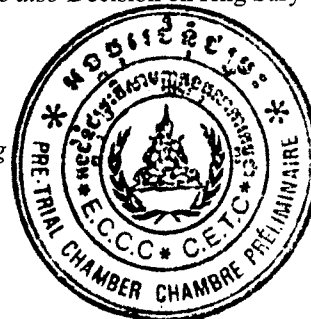
⁶⁴ Request for Investigation, 30 November 2009, D254, para. 6. *See also* Decision on Ieng Sary’s Application for Appropriate Measures, para. 11.

⁶⁵ Application, para. 21(c) (footnotes omitted).

⁶⁶ Application, para. 3 (footnotes omitted).

⁶⁷ Application, para. 9 and fn. 22.

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[M]y signature on the draft of the rogatory letters that does not make them valid yet as I have not given them to the Greffiers . . .

The Defence also fails to adduce that I receive instructions from the executive on how to conduct investigations at the ECCC and did not prove what are my interests in following the instructions of the executive. Such vague arguments cannot serve as ground for disqualifying a judge.

[T]he Defence fails to indicate any of my specific actions, besides the judicial decisions duly based on legal principles, leading a reasonable and independent observer to apprehend my bias in the case file 002. In addition, as a lawyer and legal practitioner, they could never invoke any superficial material with no evidential value.⁶⁸

Consideration by the Pre-Trial Chamber

53. The Pre-Trial Chamber does not agree with the Applicant's factual assertion that Judge You decided to cross out his signature "immediately after" the spokesman made his public comments. It is true that the spokesman's comments were reported to have been made on 7 June 2010 and were then reported in the press on 8 June 2010.⁶⁹ However, it is not clear at what time between 4 June 2010 (the date when Judge You signed the rogatory letters⁷⁰) and 8 June 2010 (the date of Judge You's Internal Memorandum to Judge Lemonde) that Judge You decided in his mind that he would cross out his signature. The Applicant simply assumes, without support, that Judge You decided "immediately after" the spokesman's comments were made or reported. Even if Judge You decided to cross out his signature after the spokesman's comments were made or reported, that single fact does not establish the appearance that Judge You has acted without independence or impartiality. The Pre-Trial Chamber also reminds the Applicant that it was within the discretion of Judge You to cross out his signature on a document before it is filed.

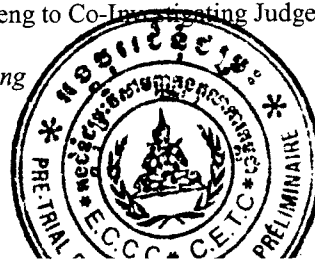
54. The Pre-Trial Chamber also notes that the Applicant has failed to provide submissions on the possibility that Judge You's actions indicate and are therefore consistent with his independence and impartiality. Two examples of such actions are [REDACTED]

⁶⁸ Response, paras. 25-27, 29, 32.

⁶⁹ Douglas Gillison, "KRT begins investigation of five new regime suspects," *The Cambodia Daily*, 8 June 2010, p. 26.

⁷⁰ Internal Memorandum from Co-Investigating Judge You Bunleng to Co-Investigating Judge Marcel Lemonde.

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[REDACTED]
[REDACTED] and his initial decision to sign the rogatory letters.

55. The Pre-Trial therefore dismisses the Applicant's submissions relating to the third action of Judge You, as well as any remaining submissions in the Application and Addendum, as they do not establish that Judge You has acted or appears to have acted without independence or impartiality.



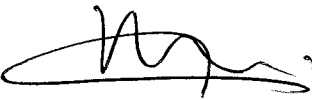

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

1. **FINDS** admissible the Application, Addendum, Response, and Observation on Addendum;
2. **DISMISSES** the Application and the Addendum.

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

Phnom Penh, 10 September 2010^{cl}

Pre-Trial Chamber

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan