



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

CM/29

**អង្គបុរេជំនុំជម្រះ**

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

**Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 01)**

**PRE-TRIAL CHAMBER**

**Before:**

**Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge PEN Pichsaly  
Judge Katinka LAHUIS  
Judge HUOT Vuthy**

**Date:**

**04 February 2008**

**ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
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du dossier: ..... CHEA ..... Kosa!

**PUBLIC DECISION ON THE CO-LAWYERS' URGENT APPLICATION FOR  
DISQUALIFICATION OF JUDGE NEY THOL PENDING THE APPEAL AGAINST THE  
PROVISIONAL DETENTION ORDER IN THE CASE OF NUON CHEA**

**Co-Prosecutors**

CHEA Leang  
Robert PETIT

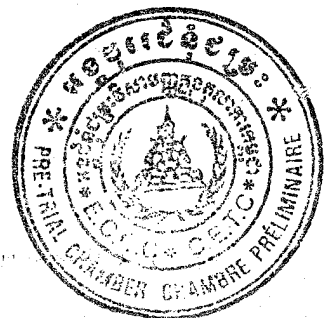
**Charged Person**

NUON Chea

**ឯកសារដើម**  
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du dossier: ..... SANN RADA

**Defence Counsel**

SON Arun  
Michiel PESTMAN



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);

**NOTING** the Appeal against Provisional Detention Order of the Co-Investigating Judges of 19 September 2007 filed on 17 October 2007 and the Co-Lawyers’ Appeal Brief of 12 November 2007, and the scheduled hearing for this appeal on 4 February 2008.

**SEIZED** of the Defence’s Urgent Application for Disqualification of Judge Ney Thol, filed on 29 January 2008, pursuant to Rule 34 of the Internal Rules;

**HAVING RECEIVED** the Co-Prosecutors’ Preliminary Observations on Nuon Chea’s Urgent Application for Disqualification of Judge Ney Thol on 31 January 2008;

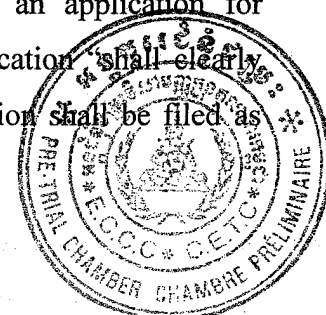
**HAVING RECEIVED** the Defence’s Response to Co-Prosecutors’ Preliminary Observations on Urgent Application for Disqualification of Judge Ney Thol on 01 February 2008;

**HAVING RECEIVED** the confidential submissions by Judge Ney Thol pursuant to Rule 34(7) on 01 February 2008;

**CONSIDERING** that Judge Ney Thol did not decide to step down voluntarily;

### **I. PRELIMINARY OBSERVATIONS**

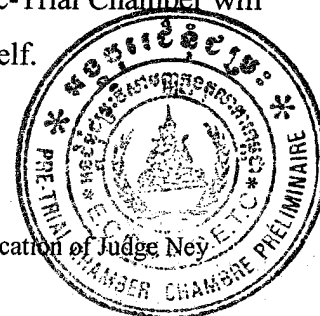
1. On 28 January 2008 the Defence tried to file their Urgent Application for Disqualification of Judge Ney Thol. As the Application did not meet the requirements set out in the Practice Direction on the Filing of Documents before the ECCC, it was returned as deficiently filed. On 29 January 2008 the Co-Lawyers filed their application in compliance with the Practice Direction.
2. The Pre-Trial Chamber notes that the application filed on 29 January 2008 is signed only by Victor Koppe and on behalf of Michiel Pestman. The Pre-Trial Chamber furthermore notes that Victor Koppe has not yet been admitted by the Bar Association of the Kingdom of Cambodia.
3. Rule 34(2) of the Internal Rules provides that “any party may file an application for disqualification of a judge [...]”. Paragraph (3) provides that such application 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”.



4. The Pre-Trial Chamber observes that the evidence adduced on behalf of the Charged Person was available well before his arrest on 19 September 2007. The Chamber therefore questions the compliance with the requirement in Rule 34(3) that the application for disqualification should be filed “as soon as the party becomes aware of the grounds in question”.
5. According to Rule 34(5) of the Internal Rules “the Judge in question may continue to participate in the judicial proceedings pending a decision”. Paragraph (7) provides that the Chamber Judges shall consider the application for disqualification of the Judge, along with the submissions by the Judge and shall vote on the matter.
6. The Co-Prosecutors submit that there is little basis for the purported urgency of this Request. According to the Co-Prosecutors, the timing of the filing and the consequent dates set to respond are neither conducive to the proper administration of justice nor to a sound disposition of such a serious matter. They argue that it should be dealt with appropriately by the Pre-Trial Chamber with due regard being paid to the opportunity for all parties involved to fully respond to the legal and factual basis of the Request.<sup>1</sup>
7. The Defence submit in their response to the Co-Prosecutors’ Preliminary Observations that “the Defence is in full agreement with the submissions of the Office of the Co-Prosecutors that “it is not necessary to decide on this Request before the Appeal Hearing” and propose that for Judge Ney Thol to step down voluntarily “appears to be the most prudent course of action”. The Defence have also requested the Pre-Trial Chamber to invite the submission of written *amicus curiae* briefs and to hold a public hearing.

#### PRELIMINARY FINDINGS

8. The Pre-Trial Chamber finds that Rule 34 provides for a number of procedural possibilities for determining an application for disqualification. In this case the Pre-Trial Chamber finds that it has sufficient information to decide on the application, and it is in the interests of justice to proceed expeditiously to consider the matter without holding a public hearing or calling for written *amicus curiae* briefs. Furthermore, in the interests of justice, the Pre-Trial Chamber will not examine the question of possible technical defects in the application itself.



<sup>1</sup> Co-Prosecutors’ Preliminary Observations on Nuon Chea’s Urgent Application for Disqualification of Judge Ney Thol, 28 January 2008, para. 9.

## II. ADMISSIBILITY OF THE APPLICATION

9. The Application requests the Pre-Trial Chamber to disqualify Judge Ney Thol from any and all further proceedings<sup>2</sup>. The jurisdiction of the Pre-Trial Chamber 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 gives rise to the appearance of bias”.

10. This means that the Pre-Trial Chamber has jurisdiction to consider the application for disqualification in the appeal against the Provisional Detention Order of Nuon Chea. Therefore, the application as originally filed was inadmissible to the extent that it requests that a general order of disqualification be made. The Defence attempted to correct this in their Response to the Co-Prosecutors’ Preliminary Observations.
11. The Pre-Trial Chamber deems the application admissible to the extent that it seeks the disqualification of Judge Ney Thol in the proceedings concerning the provisional detention appeal by Nuon Chea only.

## III. THE TEST FOR BIAS

12. The test for bias to be applied by the Pre-Trial Chamber is provided in Internal Rule 34.2, as mentioned above, and which refers to actual bias and perceived bias.
13. The Defence submits that they are “unaware of any evidence of actual bias on the part of Judge Ney against Mr. Nuon or the Khmer Rouge.” Furthermore, the instant application does not allege any personal or financial interest in the outcome of the ECCC proceedings. Accordingly, the Defence does not seek to satisfy either the Subjective Test or the first prong of the Objective Test, as formulated by the *Furundzija* Judgement and reflected in Rule 34(2)”<sup>3</sup>.
14. The Defence submits further in paragraph 24 of their application:

<sup>2</sup> See the Application for Disqualification paragraphs 1 and 49.

<sup>3</sup> See the Application for Disqualification paragraph 23.



The crux of the application is twofold: (i) Judge Ney's position as an officer in the RCAF amounts to an "association which objectively might affect his [...] impartiality" and (ii) his demonstrated willingness to inappropriately employ his judicial power at the behest of the CPP "objectively give[s] rise to the appearance of bias". In other words, Judge Ney's position as a serving military officer and his participation in highly questionable judicial decisions "would lead a reasonable observer, properly informed, to reasonably apprehend bias" against Mr. Nuon and the Khmer Rouge and in favour of the CPP.

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".<sup>4</sup> "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".<sup>5</sup>

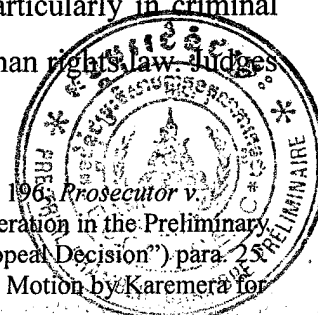
16. The Pre-Trial Chamber considers that this presumption of impartiality applies to the Judges of the ECCC. Article 3.3 of the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic 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

<sup>4</sup> *Prosecutor v. Furundzija*, 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, ("Norman Appeal Decision") para. 25.  
<sup>5</sup> *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; Norman Appeal Decision, para. 25.



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.<sup>6</sup>

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.<sup>7</sup>

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 also of the fact that impartiality is one of the duties that Judges swear to uphold”.<sup>8</sup>

#### IV. CONSIDERATION OF THE APPLICATION

22. The Pre-Trial Chamber will consider the two allegations in turn.

<sup>6</sup> Royal Decree of 07 May 2006, NS/RKT/0506/214.

<sup>7</sup> *Prosecutor v. Furundzija*, IT-95-17/1-A, “Judgment”, Appeals Chamber, 21 July 2000, para. 189.

<sup>8</sup> *Prosecutor v. Furundzija*, IT-95-17/1-A, “Judgment”, Appeals Chamber, 21 July 2000, para. 190.

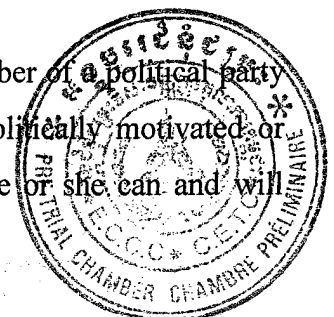


**i. Judge Ney Thol's position as a serving RCAF officer**

23. The Defence submits in paragraph 25 of the application that "as a serving RCAF officer, Judge Ney 'remain[s] subject to military discipline and assessment' and 'belong[s] to the army which in turn takes its orders from the executive', in this case the CPP Prime Minister".
24. The Pre-Trial Chamber considers that Judge Ney Thol's does not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of an RCAF officer, but in his personal capacity. Judge Ney Thol has been appointed in accordance with Articles 3.3 and 7.2 of the Agreement and Article 10(new) of the ECCC Law.
25. The Pre-Trial Chamber finds that the comparison made by the Defence with the case of *Öcalan* before the European Court of Human Rights is not relevant. The military judge in the Turkish National Security Court, in the case of *Öcalan*, served as an officer and not in a civil and personal capacity.
26. The evidence adduced by the Defence on the position of Judge Ney Thol as President of the Military Tribunal and the conclusions drawn from this position do not therefore reach the required threshold of evidence required to rebut the presumption of impartiality.

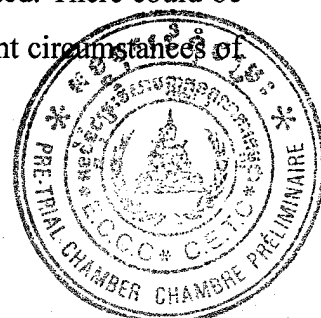
**ii. Judge Ney Thol's participation in political cases**

27. The Defence submits in paragraph 28 of the application that "Judge Ney has shown a seeming willingness to improperly utilize his judicial power in the service of the CPP's agenda. His role in three particular cases demonstrates the ostensible ease with which he appears to freely subjugate fundamental legal norms to considerations of political expediency". The Defence subsequently discusses three alleged "political cases" Judge Ney Thol participated in and adduces several reports relating to the unfairness of these trials and the alleged influence of the CPP in them. The Defence asserts that Judge Ney Thol is a member of the CPP.
28. The Pre-Trial Chamber notes that the mere fact that a judge was a member of a political party does not give rise to the necessary inference that his decisions are politically motivated or influenced. When a judge takes his oath of office it is assumed that he or she can and will disabuse their minds of any irrelevant personal beliefs or predispositions.



29. The Pre-Trial Chamber further observes that Judge Ney Thol submits that he resigned as a member of the Central Committee of the CPP upon his appointment. This is found to be the case. Reference is made to the copy of the acceptance of Judge Ney Thol's resignation on 26 July 2006.
30. The Pre-Trial Chamber notes that the ECCC, although it is part of the Cambodian court system, is a separate and independent court with no institutional connection to any other court in Cambodia. A judge of the ECCC is selected upon the basis of internationally agreed criteria and takes a separate and distinct judicial oath. In this respect the ECCC is a new internationalised court applying international norms and standards.
31. Furthermore, the Defence has not referred to any authority for the proposition that a judge's analysis in a different case could suggest bias in the case currently being heard. The Defence has not demonstrated that the opinions expressed in one case can give rise to any appearance of bias in another case. It is also important to note that Nuon Chea is not alleged to have been involved, or mentioned by Judge Ney Thol, in any previous case.
32. 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 Cambodian 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.
33. No evidence adduced by the Defence is demonstrative of any instruction from a political party having been given to Judge Ney Thol or of him acting at the behest of the CPP or any other person.
34. Considering the high threshold to be reached by the Defence, the quality of the evidence submitted does not reach the standard to allow the conclusion that Judge Ney Thol acted upon the instruction of any political organisation or that he was politically motivated. There could be no such apprehension of bias by an objective observer informed of all relevant circumstances of the matters put before the Pre-Trial Chamber.

## V. CONCLUSION





The Pre-Trial Chamber decides unanimously that:

- 1) The application is in part inadmissible, for the reasons given in paragraphs 9 to 11 above; and
- 2) Is otherwise dismissed.



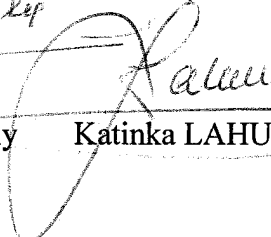


This decision is not open to appeal (Internal Rule 34.8).

**GIVEN BY** the Pre-Trial Chamber,

Phnom Penh, 4 February 2008

**Pre-Trial Chamber**

**President**

Rowan DOWNING    PEN Pichsaly    Katinka LAHUIS    HUOT    PRAK Kimsan

