

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

FILING DETAILS

Case no: 002/19-09-2007-ECCC/TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: Khmer
Date of document: 06 October 2014



CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សាធារណៈ/Public
Classification status:
Review of interim classification:
Records officer name:
Signature:

**NUON CHEA APPLICATION FOR DISQUALIFICATION OF
JUDGE PEN PICHSAKY**

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I. INTRODUCTION

1. Pursuant to ECCC Internal Rule 34, the Co-Lawyers for Mr. Nuon Chea (the “Defence”) submit this application to disqualify Judge Pen Pichsaly from the special bench constituted by the Judicial Administration Committee (the “Special Bench”)¹ to consider the Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne and You Ottara (the “Trial Chamber Disqualification Application”).²

II. BACKGROUND

A. Procedural History

2. On 7 August 2014, the Trial Chamber issued the Case 002/01 Judgement.³
3. On 11 August 2014, the Defence notified the Trial Chamber of its intention to file the Trial Chamber Disqualification Application.⁴
4. On 25 August 2014, the Co-Lawyers for Khieu Samphan filed a request (“Khieu Samphan Request”) to stay proceedings in Case 002/02 until the rendering of the Case 002/01 Judgement or, in the alternative, to disqualify all Trial Chamber judges.⁵
5. On 4 September 2014, the ECCC Judicial Administration Committee appointed Trial Chamber Judge Thou Mony (presiding) and Pre-Trial Chamber Judges Rowan Downing, Chang-ho Chung, Huot Vuthy, and Pen Pichsaly to constitute a bench to hear the Trial Chamber Disqualification Application, as well as the Khieu Samphan Request.
6. On 29 September 2014, the Defence filed the Trial Chamber Disqualification Application.

B. Judge Pen Pichsaly

7. Judge Pen Pichsaly currently serves as a reserve judge in the Pre-Trial Chamber. At the same time, Judge Pen Pichsaly works full-time for the Ministry of Justice of Cambodia

¹ Doc. No. E314/4, ‘Decision of the JAC regarding the constitution of the bench following disqualification motions’, 4 Sep 2014, p. 1.

² Doc. No. E314/6, ‘Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara’, 29 September 2014.

³ Doc. No. E313, ‘Case 002/01 Judgement’, 7 August 2014.

⁴ Doc. No. E314.1, ‘Notice and requests regarding prospective motion for disqualification’, 11 August 2014.

⁵ Doc. No. E314/1, ‘Demande de réexamen de M. Khieu Samphan sur la nécessité d’attendre un jugement définitif dans le procès 002/01 avant de commencer le procès 002/02 et sur la nomination d’un nouveau collège de juges’, 25 Aug 2014.

as the Director General of the General Department of Prosecution and Criminal Affairs.⁶ The Defence understands that Judge Pen Pichsaly has been appointed as a Judge since 2001,⁷ although he is currently appointed as a judge only at the ECCC.

III. APPLICABLE LAW

A. Separation of Executive and Judicial Branches

8. Under the Constitution of Cambodia, the executive and judicial branches must be separate,⁸ and “[j]udicial power shall not be granted to the ... executive [branch]”.⁹

B. Independence of the Judiciary

9. As argued in our Trial Chamber Disqualification Application, the right to be tried by an independent tribunal is at the heart of an accused’s right to a fair trial.¹⁰ It is “an *absolute right* that may suffer no exception”.¹¹ That is, it applies “in all circumstances and to all courts, whether ordinary or special”.¹²
10. ECCC judges must be “independent in the performance of their functions” and not “accept or seek any instructions from any government or any other source”.¹³ The ICTR Appeals Chamber has described judicial independence as a “functional attribute which implies that the institution or individual possessing it is not subject to external authority and has complete freedom in decision-making”.¹⁴ When evaluating the independence of a court or tribunal, the ECtHR has long considered “the manner of appointment of its

⁶ Royal Decree No. 0914/1113 dated 6 September 2014; also see ECCC Website, ‘Judge Pen Pichsaly (Reserve)’, available at: <http://www.eccc.gov.kh/cn/persons/judge-pen-pichsaly-rsreserve>.

⁷ ECCC Website, ‘Judge Pen Pichsaly (Reserve)’, available at: <http://www.eccc.gov.kh/cn/persons/judge-pen-pichsaly-rsreserve>.

⁸ Constitution of the Kingdom of Cambodia, Art. 51(5): “The Legislative, Executive and Judicial power shall be separated”.

⁹ Constitution of the Kingdom of Cambodia, Art. 130.

¹⁰ UDHR, Art. 10; ICCPR, Art. 14(1); ECHR, Art. 6(1); ACHR, Art. 8(1); AfCHPR, Art. 7(1); *see, also, Prosecutor v. Furundžija*, Appeal Judgement, Case No. IT-95-17/1-A, 21 Jul 2000 (“Furundžija Judgement”), para. 177; *Prosecutor v. Nahimana et al.*, ‘Judgement’, Case No. ICTR-99-52-A, 28 Nov 2007 (“Nahimana Judgement”), paras. 28, 47.

¹¹ *González del Río v. Peru*, UN HRC, Comm. No. 263/1987, UN Doc. No. CCPR/C/46/D/263/1987, 28 Oct 1992, para. 5.2 (emphasis added).

¹² Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN Doc. No. HR/P/PT/9, 2003, p. 118.

¹³ ECCC Law, Art. 10 new; *see, also*, Rome Statute, Art. 40; STL Statute, Art. 9(1).

¹⁴ *Prosecutor v. Nahimana et al.*, Appeal Judgement, Case No. ICTR-99-52-A, 28 Nov 2007, para. 19.

members and their term of office, the existence of safeguards against external pressure and the question whether the body presents an *appearance* of independence”.¹⁵

B. Disqualification of Judges

11. Under Rule 34(2) of the ECCC Internal Rules (the “Rules”), the test for disqualifying ECCC judges is as follows:

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.

C. Disqualification of a Member of the Special Bench

12. Rule 34(6) provides that:

A sitting Judge shall be replaced in the Chamber by a reserve judge for the purposes of the application only. If, due to multiple disqualification applications, it is impossible to convene a Chamber to hear the applications, the Judicial Administration Committee shall choose additional judges from amongst the ECCC judges.

13. Therefore, all members of the Special Bench are effectively considered members of the Trial Chamber for the purposes of considering the Trial Chamber Disqualification Application only. It follows that an application to disqualify a member of the Special Bench must be filed in accordance with Rule 34(4)(c), which set out the temporal requirements for disqualification applications concerning Trial Chamber judges.

IV. SUBMISSIONS

A. The Application is Timely and Admissible

14. The Defence seeks to disqualify Judge Pen Pichsaly from the Special Bench not simply because of his current position with the executive of the Cambodian government – which the Defence emphasises, specifically concerns the work of the national *prosecution* – but because holding that position may lead him to be biased when considering certain, similar arguments in the Trial Chamber Disqualification Application. The Defence was therefore unable to file this Application until it had finalised and filed the Trial Chamber Disqualification Application on 29 September

¹⁵ See, e.g., *Volkov v. Ukraine*, ‘Judgement’, ECtHR, App. No. 21722/11, 27 May 2013 (“Volkov Judgement”), para. 103, *Findlay v. UK*, ‘Judgement’, ECtHR, App. No. 22107/93, 27 Feb 1997, para. 73 (emphasis added).

2014. It thereafter undertook every effort to file this Application expediently, at the same time as preparing for its Case 002/01 appeal and the start of the Case 002/01 trial.

15. Since the matters giving rise to this Application only arose after the Case 002/02 initial hearing, pursuant to Rule 34(3) and (4)(c), the Application shall be deemed timely and admissible as it was filed as soon as the Defence became aware of the matters and before the final judgement in Case 002/02.

B. By Serving in both the Executive and Judicial Branches, Judge Pen Pichsaly Has Extinguished an Appearance of Independence

16. The Defence submits that the requirement of judicial independence is most importantly intended to guarantee independence *from the influence of the executive* and to ensure that core powers within a state remain separated. By serving in both the executive and judicial branches, and particularly in an executive role which relates to the work of the national *prosecution*, Judge Pen Pichsaly's appointment extinguishes any *appearance* of his independence, in addition to violating the Constitution of Cambodia.
17. Judge Pen Pichsaly's appointment lacks "safeguards against external pressure" required under the ECtHR test, since it would instead create a direct line to the Cambodian executive. In addition, Judge Pen Pichsaly's receipt of two salaries – one for his executive appointment and one for his judicial appointment – would also fail the ECtHR test. The ECtHR held that in such a situation, a judge would inevitably have "material, hierarchical and administrative dependence on their primary employers and [endanger] both their independence and impartiality".¹⁶
18. As Judge Pen Pichsaly lacks an appearance of independence, he therefore lacks the relevant qualifications to maintain his position on the ECCC judiciary and should accordingly be disqualified from the Special Bench.

C. Judge Pen Pichsaly's Situation Gives Rise to an Appearance of Bias Regarding Certain Arguments in the Trial Chamber Disqualification Application

19. The Defence submits that, since Judge Pen Pichsaly is both a current member of the Cambodian executive and its judiciary, a reasonable observer would apprehend bias by Judge Pen Pichsaly towards the Defence's arguments in paragraphs 43 to 51 of the Trial Chamber Disqualification Motion. In those paragraphs, the Defence argued that Judges

¹⁶ Volkov Judgement, para. 113.

Nil Nonn, Ya Sokhan and You Ottara should be disqualified from any further proceedings against Nuon Chea for reasons including that Cambodia's judiciary is dominated by the executive and therefore lacks independence, an argument applicable not only to the general national judiciary but also the national judges appointed at the ECCC. As there is such an appearance of bias, Judge Pen Pichsaly should be disqualified from the Special Bench.

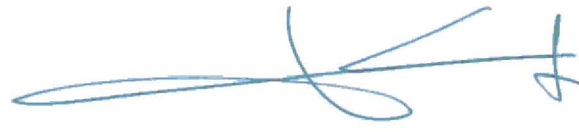
VI. RELIEF

20. For the reasons stated above, the Defence requests that: **(i)** the Chamber admit this Application; **(ii)** Judge Pen Pichsaly be permanently disqualified from the Special Bench; **(iii)** Judge Pen Pichsaly step down voluntarily pursuant to Rule 34(5) while this Application is determined; and **(iv)** the Chamber treat this Application as a matter of urgency given its nature.

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