



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

គណៈកម្មាធិការអង្គបាលតុលាការ

Judicial Administration Committee
Comité d'Administration Judiciaire

INTEROFFICE MEMORANDUM

Date: 23 March 2012
Classification: Public*

FROM: H.E. KONG Srim
President, Judicial Administration Committee (“JAC”);

TO: Judge PRAK Kimsan
President, Pre-Trial Chamber (“PTC”);

CC: JAC Members: Judge MONG Monichariya, Judge Motoo NOGUCHI,
Judge Jean-Marc LAVERGNE, Judge YOU Ottara;
Pre-Trial Chamber’s Judges: Judge HOUT Vuthy, Judge PEN Pichsaly, Judge
NEY Thol, Judge Rowan DOWNING, Judge Chang-Ho CHUNG.

SUBJECT: Decision of the JAC regarding the request to appoint two international judges to hear the application for disqualification of the President of the Pre-Trial Chamber.

- (1) Reference is made to the Interoffice Letter from the PTC Judges Rowan DOWNING and Chang-Ho CHUNG dated 2 March 2012. They request that the JAC appoint two international judges to replace them in the panel assigned to adjudicate the Application for Disqualification of the President of the PTC filed by the International Reserve Co-Investigating Judge on 8 February 2012.
- (2) The JAC decides by supermajority (Judge LAVERGNE dissenting) that it is not properly seised for the following reasons. Internal Rule 34(1) provides that, where a judge recuses him/herself, s/he “shall notify the Chamber in which he or she is sitting”. It follows that it is for the relevant Chamber alone, and not for external bodies such as the JAC, to decide whether the recusal fulfils the requirements set out by Internal Rule 34(1). Only after the relevant Chamber’s determination, may the JAC be requested by the Chamber’s President – or, if the President recuses him/herself, by the Chamber’s

* Pursuant to Internal Rule 19(3) the JAC acts on a confidential basis. In light of the high level of public attention involving the present case, however, the JAC exceptionally determines that it is in the interest of justice to inform the public of its decision.

“oldest national judge”¹ – to exercise its subsidiary powers to appoint additional judges pursuant to Internal Rule 34(6).

- (3) For the foregoing reasons, the JAC decides (Judge LAVERGNE dissenting) that the Interoffice Letter be returned to its senders and recommends that the recusals be examined by the PTC.

Dissenting opinion of Judge LAVERGNE:

I cannot agree with my colleagues for the following reasons:

The JAC is not a judicial organ, but rather a committee established to provide the Office of Administration with advice and guidance. It has also been given a limited power to appoint additional judges to complete a bench when it is impossible to convene a Chamber to decide on an application for disqualification. When a decision to recuse him/herself has been duly notified by a judge to his/her Chamber and when the JAC has been informed of such circumstances and asked to appoint additional judges, it has no authority to review the validity of the proceedings before this Chamber, especially when none of the judges of the said Chamber has raised any concern about the recusal.

Furthermore, Internal Rule 34(1) gives a judge a right to recuse him/herself in a case in which he/she has a personal or financial interest or an association which might affect his/her impartiality or give rise to the appearance of bias. Rule 34 gives the Chamber no power to review the judge’s decision to recuse him/herself. If the Chamber did have such a power, it would give rise to the absurd and deeply unjust possibility that a judge who believed him/herself unable to act impartially and who wished to recuse him/herself could nonetheless be compelled to participate in proceedings by the Chamber. Rule 34(1) requires, in very clear language, that a judge who recuses him/herself “notify the Chamber in which he or she is sitting” and “immediately cease to participate in the judicial proceedings”. There is no intermediate step. To interpret the duty to notify as a duty to make a request constitutes a paradox beyond understanding by creating an obstacle to the proper administration of justice instead of ensuring that justice can be delivered.

I therefore consider that the JAC ought to appoint two international judges to replace Judges CHUNG and DOWNING.

¹ Internal Rule 77(9).