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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១២)

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Before: Judge KONG Srim, President
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

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DECISION ON IENG SARY’S APPEAL AGAINST THE TRIAL CHAMBER’S DECISION ON MOTIONS FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT

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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the immediate appeal filed by IENG Sary (“the Accused”) against the decision of the Trial Chamber on the Accused’s request for investigation into periodic *ex parte* meetings between Judge Silvia Cartwright, international Co-Prosecutor Andrew Cayley, and Deputy Director of Administration Knut Rosandhaug (“*Ex Parte* Meetings”):

I. PROCEDURAL HISTORY

1. On 2 December 2011, the Trial Chamber issued a decision dismissing applications from NUON Chea and IENG Sary, filed under Internal Rules 34 and 35, respectively,¹ concerning the *Ex Parte* Meetings (“Impugned Decision”).²
2. On 5 January 2012, the Co-Lawyers for the Accused (“the Defence”) filed an appeal against the Impugned Decision (“Appeal”).³ On 19 January 2012, the Co-Prosecutors filed a Response.⁴

II. IMPUGNED DECISION & SUBMISSIONS

a. Impugned Decision

3. The Trial Chamber held that the Accused’s motion was “in substance a motion for disqualification”⁵ and considered it on that basis, making no further reference to Internal Rule 35. On the merits, the Trial Chamber held that: both accused failed to meet the Internal Rule 34 evidentiary requirements;⁶ the meetings in question are similar to the “Co-ordination Councils” employed at other courts and are required to fulfil the participants’ “significant non-judicial and administrative responsibilities”;⁷ the meetings are not prohibited by the ECCC’s legal framework;⁸ and Mr. Rosandhaug had already provided adequate clarification regarding the purpose of the meetings in an email sent in response to IENG Sary and NUON Chea’s initial request for information.⁹ The Trial Chamber noted that, as Mr. Rosandhaug’s email explained,

¹ IENG Sary’s Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3 (“Request”); Urgent Application for Disqualification of Judge Cartwright, 21 November 2011, E137/2.

² Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5.

³ IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 5 January 2012, E137/5/1/1.

⁴ Co-Prosecutors’ Response to Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 19 January 2012, E137/5/1/2 (“Response”).

⁵ Impugned Decision, para. 12.

⁶ Impugned Decision, para. 19.

⁷ Impugned Decision, paras 19-20.

⁸ Impugned Decision, para. 21.

⁹ Impugned Decision, para. 20.

“matters under discussion at these meetings are concerned with a range of operational issues affecting the international component of the ECCC.”¹⁰

b. Submissions on Admissibility

4. The Defence submits that the Appeal is admissible under Internal Rule 104(4)(d) as an appeal from a decision on interference with the administration of justice under Internal Rule 35(6).¹¹ The Defence contends that the Trial Chamber erred in law or, in the alternative, abused its discretion, in treating its Request as an Internal Rule 34 application for disqualification rather than a request for investigation under Internal Rule 35.¹²
5. The Co-Prosecutors respond that the Appeal should be deemed inadmissible and manifestly unfounded because it does not concern an issue subject to immediate appeal under Internal Rule 104(4) and fails to present a *prima facie* showing to justify a Rule 35 investigation.¹³ The Co-Prosecutors submit that it was within the Trial Chamber’s discretion to characterize the motion as falling under Internal Rule 34, and note that “[n]owhere in the ‘Applicable Law’ section [of the initial Request] does the Ieng Sary Defence mention or cite to Rule 35.”¹⁴

c. Submissions on Merits

6. The Defence submits that, as the meetings between Judge Cartwright and Mr. Cayley have no express legal basis, and Mr. Cayley has and will continue to appear before Judge Cartwright in Case 002, the Trial Chamber erred in law in failing to hold that such communications constitute a violation of applicable ethical standards.¹⁵ According to the Defence, such a violation is sufficient to satisfy the “extremely low threshold” of a “reason to believe” that an interference with the administration of justice has taken place.¹⁶ The Defence notes that it is not “averring that anything inappropriate was discussed during these meetings”, however, at a minimum, the *Ex Parte* Meetings give the appearance of knowing and wilful interference with the administration of justice.¹⁷

¹⁰ Impugned Decision, para. 20.

¹¹ Appeal, para. 7.

¹² Appeal, para. 5.

¹³ Response, para. 21.

¹⁴ Response, para. 15.

¹⁵ Appeal, paras 29-39.

¹⁶ Appeal, para. 11.

¹⁷ Appeal, para. 30.

7. The Defence submits that the Trial Chamber was incorrect to find that the meetings are necessary for the United Nations component of the ECCC as neither Judge Cartwright's nor Mr. Cayley's non-judicial or administrative responsibilities justify the *ex parte* communications. If coordination by the United Nations component of the ECCC is necessary, it should be arranged in accordance with the ECCC legal framework, which prohibits *ex parte* communications.¹⁸ Under the Internal Rules, the administrative function allegedly served by the meetings between Judge Cartwright and Mr. Cayley is reserved for the Judicial Administration Committee ("JAC") and the Office of Administration; if necessary, a coordination council could "likewise transparently be set up in accordance with the Rules."¹⁹ The Defence submits that the meetings at issue are distinguishable from the Coordination Councils at other tribunals because Mr. Cayley is currently appearing before Judge Cartwright and because such councils are provided for in the rules and regulations of those courts.²⁰
8. The Defence requests that the Supreme Court Chamber annul the Impugned Decision and order an investigation pursuant to Internal Rule 35(2).²¹ The Defence further requests a public, oral hearing under Internal Rule 109(1).²²
9. The Co-Prosecutors respond that the Defence has failed to meet the evidentiary burden under Internal Rule 35, as there must be a material basis, not mere speculation, which supports the alleged material and mental elements.²³ There is no material evidence suggesting that the meetings interfered with the administration of justice in Case 002, and further, the Defence does not put forward any argument that the requisite mental elements were present.²⁴ Moreover, Internal Rule 35 actions are discretionary.²⁵
10. Finally, the Co-Prosecutors submit that the communications are "necessary and appropriate in the context of an internationalised criminal tribunal."²⁶ The Co-Prosecutors submit that the ECCC Code of Judicial Ethics²⁷ does not prohibit such meetings and that such meetings reflect

¹⁸ Appeal, paras 2 -3.

¹⁹ Appeal, para. 34.

²⁰ Appeal, para. 36.

²¹ Appeal, para. 1.

²² Appeal, para. 12.

²³ Response, para. 18.

²⁴ Response, para. 19.

²⁵ Response, para. 17.

²⁶ Response, para. 22.

²⁷ Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia, Arts 1, 2.

the best practice of other international and internationalised courts and tribunals.²⁸ The Co-Prosecutors therefore request the Appeal be dismissed.

III. DISCUSSION

a. Admissibility

11. Internal Rule 104(4)(d) expressly establishes this Chamber's jurisdiction over appeals from decisions under Internal Rule 35. By contrast, Internal Rule 104 makes no mention of appeals from a decision on an application for disqualification under Internal Rule 34, which are furthermore expressly foreclosed by Internal Rule 34(8). The Appeal is therefore admissible only if the Request can be characterized at least in part as a request for investigation pursuant to Internal Rule 35.
12. The Chamber recognizes that the Request before the Trial Chamber made limited reference to Internal Rule 35 and indeed identified Internal Rule 34, and not Internal Rule 35, as the "applicable law" to the proceedings.²⁹ Nevertheless, the Request sought an investigation under Internal Rule 35(2)³⁰ and should be deemed admissible unless it presents allegations to which Internal Rule 35 is manifestly inapplicable.³¹
13. Pursuant to the jurisprudence of the ECCC, the applicability of Internal Rule 35 to judicial conduct is highly circumscribed. The Pre-Trial Chamber has previously refused to initiate an investigation under Internal Rule 35 into allegations that a judicial decision was improperly influenced, holding that the ECCC Chambers have no jurisdiction to determine whether a "judicial action" amounts to an interference with justice under Internal Rule 35.³² The Pre-Trial Chamber has furthermore held that "there is no prescribed jurisdiction for any of the Chambers of the ECCC to deal with disciplinary matters in respect of any of the judges of the ECCC" beyond the limits of Internal Rule 34.³³ This Chamber has held that an erroneous judicial

²⁸ Response, para. 24.

²⁹ Request, paras 13-22.

³⁰ Request, Preamble, para. 1.

³¹ See, e.g. Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring His Presence in Court, 13 January 2012, E130/4/3 ("Decision on Ieng Sary's Appeal Against Trial Chamber's Order").

³² Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation (Rule 35), 2 November 2010, D364/5/2 ("Decision on Appeal Against the Order on Nuon Chea's Second RIA"), para. 31 (the Pre-Trial Chamber has "no jurisdiction to determine whether or not a judicial action [...] by itself satisfies the threshold to initiate an investigation under Internal Rule 35(2)(b)").

³³ Decision on IENG Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, Case No. 002/07-12-2009-ECCC/PTC(06), 29 March 2010, Doc No. 5, ERN 00486637-00486642, para. 11.

holding is not, by itself, legally sufficient to satisfy the Internal Rule 35 standard.³⁴ There does not appear to be any jurisprudence at other international criminal tribunals enforcing any kind of sanction or disciplinary action against a judge pursuant to a provision similar to Internal Rule 35.

14. In each of these cases, Chambers of the ECCC have refused to apply Rule 35 to the act of rendering a judicial opinion. However, the jurisprudence has not conclusively explained whether judges are in effect immune from jurisdiction under Internal Rule 35 or whether certain categories of judicial conduct are excluded from the provision's *ratione materiae*. In that regard, the Chamber notes that the language of Internal Rule 35 does not expressly exempt any category of individual and indeed applies to "any person". By contrast, by specifying the content of "interference with the administration of justice" in subparagraphs (a) through (f), the rule clearly contemplates limits on the spheres of conduct to which it applies. Therefore a judge is at least in principle within the jurisdiction of Internal Rule 35, provided that her alleged conduct rises to the level of an interference with the administration of justice within the meaning of that Rule.

15. The existence of the disqualification procedure under Rule 34 does not preclude the application of Rule 35 to judges. Whereas Rule 34 is a specialized procedure intended to safeguard the right to a fair trial and the integrity of the judicial role, Rule 35 is a general provision establishing certain categories of prohibited conduct. Accordingly, the two procedures protect different legal values. A party applying under Rule 34 must demonstrate that a judge is unable to impartially resolve disputes, or that there is an objective appearance of a lack of impartiality in a particular case.³⁵ Under Rule 35, the question is whether an offence against the administration of justice has been committed. A finding that the standard under Rule 34 has been met does not require a determination of wrongdoing on the part of the judge. Moreover, the standard of proof³⁶ and the possible consequences³⁷ of a successful application differ. Finally, while the conduct of a judge

³⁴ Decision on Ieng Sary's Appeal Against Trial Chamber's Order.

³⁵ *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000 ("Furundžija Appeal Judgement"), para. 189; Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 7.

³⁶ Compare Internal Rule 35(2) (Co-Investigating Judges or Chamber can take further action, including an investigation, if there is a "reason to believe" a violation of Rule 35(1) has taken place) with 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, Case No. 002/20-10-2009-ECCC/OIJ (PTC03), 30 November 2009, Doc No. 5, ERN 00404595-00404601 ("Decision on Application for Appropriate Measures"), paras 8 (application for disqualification must be supported by a factual basis), 10 (burden rests on applying party to provide evidence substantiating a factual basis for allegations of bias; no jurisdiction to investigate under Rule 34).

³⁷ Compare Internal Rule 35 (2)(a) through (c) (Co-Investigating Judges or Chamber may deal with the matter summarily, conduct further investigations or refer the matter to the appropriate authorities), with Decision on

could in theory implicate both Rules 34 and 35, this would be nothing unusual: attorneys at the ECCC are similarly governed both by the general proscriptions in Rule 35 and the specific regulations applicable to lawyers in Rule 38.³⁸

16. Furthermore, in this case, the Request sought an investigation into *ex parte* meetings which included not only Judge Cartwright but also Mr. Cayley and Mr. Rosandhaug. The Request specifically reviewed the ethical standards applicable to Mr. Cayley and alleged that those standards prohibited the meeting in question.³⁹ The Pre-Trial Chamber has previously recognized that conduct *involving* a judge may be subject to a Rule 35 investigation even if the Chamber has no jurisdiction to investigate or sanction the judge herself.⁴⁰ The Appeal is therefore admissible as a request for investigation of the conduct of Judge Cartwright, Mr. Cayley and Mr. Rosandhaug.

17. For these reasons, the Chamber deems the Appeal admissible.

b. Merits

i. Scope of Internal Rule 35

18. Internal Rule 35 applies to “any person” whose conduct which “interferes with the administration of justice.” Although examples of such conduct are provided in subparagraphs (a) through (f), the word “including” in the introductory clause of Internal Rule 35(1) indicates that this list is not exhaustive.⁴¹

19. However, the scope of Internal Rule 35 is not limitless. Each of the specific prohibitions set out in Internal Rules 35(a) through (f) entails an effort to frustrate the mandate or functioning of the Court. Paragraphs (a), (b) and (e) concern non-compliance with an order of the Court. Paragraphs (c) and (d) concern interference with the evidence to be given in proceedings before

Application for Appropriate Measures, para. 10 (only possible outcome of a successful Rule 34 application is disqualification).

³⁸ Internal Rule 35(5) (concerning the possibility of taking action against an attorney under Internal Rules 35 and 38 simultaneously).

³⁹ Request, paras 20, 35.

⁴⁰ Decision on Appeal Against the Order on Nuon Chea’s Second RIA, paras 40-44 (taking Rule 35 jurisdiction over alleged efforts to improperly influence a co-investigating judge but not the “judicial actions” allegedly resulting from said influence).

⁴¹ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 003, 24 October 2011, D14/1/3, para. 27.

the Court. Paragraph (f) concerns assistance to an accused person to evade the jurisdiction of the Court. In accordance with the *esjudem generis* rule of statutory construction, only conduct that is analogous to these enumerated grounds should be considered to be within the scope of Internal Rule 35. This analysis is supported by the plain meaning of the phrase “interference with the administration of justice”, which suggests an effort to obstruct the functioning or execution of court proceedings.⁴²

ii. Standard under Internal Rule 35

20. Internal Rule 34 provides that a party may file an application for disqualification in any case in which a 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.” This last aspect of the Internal Rule 34 test concerning the appearance of bias is well-established in the recusal jurisprudence of the ECCC,⁴³ as well as at other international courts.⁴⁴

21. However, such language is absent from both the text of Internal Rule 35 and the jurisprudence interpreting it, as well as ICTY and ICTR Rules of Procedures and Evidence Rule 77, the closest analogue at the *ad hoc* tribunals. Furthermore, the language of Internal Rule 35, which contemplates a knowing and wilful interference with the administration of justice, is inconsistent with an “appearance of interference” standard. An appearance of bias requires only that a reasonable observer apprised of all the circumstances would apprehend bias, not that bias actually exists.⁴⁵ Such a standard cannot be reconciled with the requirement in Internal Rule 35 that the interference with the administration of justice be “knowingly and wilfully” committed.

⁴² *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), Appeals Chamber, 23 June 2005, para. 2 (power under Rule 77 to punish conduct that interferes with the administration of justice “can only be used against those whose actions are calculated to obstruct the court’s task of getting at the truth”).

⁴³ 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, 4 February 2008, C11/29 (“*Ney Thol* Disqualification Decision”), para. 20.

⁴⁴ *Furundžija* Appeal Judgement, para. 189.

⁴⁵ *Ney Thol* Disqualification Decision, para. 21; *Furundžija* Appeal Judgement, para. 190.

iii. Application to this Case

22. The Defence does not “aver[] that anything inappropriate was discussed during these meetings.”⁴⁶ Although the Defence alleges that the *ex parte* meetings create an “appearance of knowing and wilful interference with the administration of justice”, as explained above by the Chamber, such a standard is not applicable under Internal Rule 35.
23. The Chamber holds that the mere fact that *ex parte* meetings have been held among Judge Cartwright, Mr. Cayley and Mr. Rosandhaug does not establish a reason to believe that any of these individuals has wilfully and knowingly interfered with the administration of justice at the ECCC. In accordance with the Chamber’s interpretation of Internal Rule 35, only those acts which frustrate the judicial process fall within the scope of Internal Rule 35. According to Mr. Rosandhaug, the purpose of their meetings has been not to frustrate, but to facilitate trial proceedings. The Defence does not dispute that claim, and has conceded that a similar objective is served by the Coordination Councils functioning at other international tribunals. The fact that the meetings between Judge Cartwright and Mr. Cayley have taken place on an *ex parte* basis does not transform a facilitative process into wilful and knowing “interference” even if, *arguendo*, the *Ex Parte* Meetings may constitute a violation of certain rules of ethical conduct. Hence, the Chamber finds that an *ex parte* meeting in which nothing inappropriate is alleged to have been discussed does not amount to a wilful and knowing interference with the administration of justice within the meaning of Internal Rule 35.
24. That said, absent any institutional basis either in the ECCC founding documents or the Internal Rules such meetings could be perceived as being related to a case or cases in which the attending judge has a concern. As such they may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge. Therefore, in order to avoid such appearances and giving rise to disqualification motions it would seem advisable to reconsider the make-up of any meetings that trial judges wish to have with the prosecutors by allowing the participation of the Defence Support Section or members of the defence teams, as appropriate.

FOR THE FOREGOING REASONS the Supreme Court Chamber:

DECIDES that the Appeal is admissible;

⁴⁶ Appeal, para. 30.

REJECTS the request for a public, oral hearing; and

DECIDES to dismiss the Appeal on the merits.



Phnom Penh, 17 April 2012
President of the Supreme Court Chamber

Kong Srim