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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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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Before:

Judge NIL Nonn, President

Judge Claudia FENZ

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge YOU Ottara

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DECISION ON IENG SARY'S APPLICATION FOR DISQUALIFICATION OF JUDGE CARTWRIGHT

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

Accused

NUON Chea

IENG Sary

KHIEU Samphan

Civil Party Lead Co-Lawyers

PICH Ang

Elisabeth SIMONNEAU FORT

Lawyers for the Defence

SON Arun

Michiel PESTMAN

Victor KOPPE

ANG Udom

Michael G. KARNAVAS

KONG Sam Onn

Jacques VERGÈS

Arthur VERCKEN

Anta GUISSÉ

1 INTRODUCTION

1. The Trial Chamber is seised of IENG Sary's Application of 27 April 2012 requesting that the Chamber disqualify Judge Silvia CARTWRIGHT pursuant to Internal Rule 34, or, alternatively, instruct Judge CARTWRIGHT and order International Co-Prosecutor Mr. Andrew CAYLEY to cease and desist from *ex parte* communications and meetings and copy a representative from the Defence Support Section ("DSS") or Defence teams on all future ECCC-related communications between them.¹ IENG Sary also requests that the Chamber instruct Judge CARTWRIGHT and order Mr. CAYLEY to disclose all *ex parte* communications that have taken place between them since 24 November 2011, including all correspondence, and, in relation to *ex parte* meetings, the number of meetings held, their dates, their agendas, and any actions taken at and pursuant to such meetings.

2 PROCEDURAL HISTORY

2. On 22 November 2011, the NUON Chea Defence filed an application under Internal Rule 34 seeking the disqualification of Judge CARTWRIGHT on the basis of informal meetings that had taken place periodically between Judge CARTWRIGHT, Mr. CAYLEY and ECCC Deputy Director of Administration Mr. Knut ROSANDHAUG ("Meetings").² On 24 November 2011, the IENG Sary Defence filed a motion requesting further investigation into the Meetings under Internal Rule 35.³ The Trial Chamber dismissed both applications on 2 December 2011.⁴ The Supreme Court Chamber dismissed the IENG Sary Defence's appeal against the Trial Chamber's decision on its Internal Rule 35 application on 17 April 2012.⁵

3. On 19 April 2012 the below e-mail sent by Judge CARTWRIGHT was mistakenly directed to a large number of ECCC staff ("First E-mail"):

Of course I was only trying to see the lighter side.

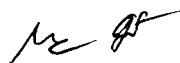
¹ IENG Sary's Rule 34 Application for Disqualification of Judge Silvia CARTWRIGHT or, in the Alternative, Request for Instruction and Order to Cease and Desist from *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications, E191, 27 April 2012 ("Application").

² NUON Chea Defence Team's Urgent Application for Disqualification of Judge CARTWRIGHT, E137/2, 21 November 2011.

³ IENG Sary's Request for Investigation Concerning *Ex Parte* Communications Between the International Co-Prosecutor, Judge CARTWRIGHT and Others, E137/3, 24 November 2011.

⁴ Decision on Motions for Disqualification of Judge Silvia CARTWRIGHT, E137/5, 2 December 2011 ("Fourth Disqualification Decision").

⁵ Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia CARTWRIGHT, E137/5/1/3, 17 April 2012 ("Appeal Decision").



As you know Andrew, I am seriously considering my own position. I shall not make a hasty decision [*sic*]

Silvia

4. In response to a request for clarification from a representative of the IENG Sary Defence, the Trial Chamber Senior Legal Officer Ms. Susan LAMB sent the following e-mail on 20 April 2012 ("Second E-mail"):

Dear Ms. Pettay,

I have been asked to convey the below information to you in response to your email message to me of 19 April 2012:

"The emailed message sent yesterday to a number of recipients was intended for the Deputy Director of Administration and Andrew Cayley, International Co-Prosecutor.

The message was part of a brief discussion among Judge Cartwright, Mr Cayley and Mr Rosandhaug concerning the appropriate reaction to the recent SCC decision in which an appeal against a refusal to recuse Judge Cartwright had been dismissed.

The management meetings which were the subject of the recusal motion were originally convened at the request of the Office of Legal Affairs, but in light of the SCC comments, a decision has been made to discontinue them.

Future management issues should be addressed directly to the Administration."

Best regards,

Susan Lamb

5. The Co-Prosecutors responded to the Application on 10 May 2012.⁶ Judge CARTWRIGHT opted not to exercise her right to present written submissions to the Chamber.⁷


3 SUBMISSIONS

6. IENG Sary submits that the First and Second E-mails, read together, prove that an *ex parte* dialogue occurred between Judge CARTWRIGHT and Mr. CAYLEY which related to the substance of proceedings in Case 002.⁸ According to IENG Sary, such dialogue demonstrates actual or apparent bias on the part of Judge CARTWRIGHT because it gives the appearance of asymmetrical access by the International Co-Prosecutor to a trial judge; as

⁶ Co-Prosecutors' Response to "IENG Sary's Rule 34 Application for Disqualification of Judge Silvia CARTWRIGHT or, in the Alternative, Request for Instruction and Order to Cease and Desist from *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications", E191/1, 10 May 2012 ("Response").

⁷ See Internal Rule 37(7).

⁸ Application, paras 7, 9, 11, 15.



Judge Cartwright does not permit representatives of the Defence teams to communicate with her directly, there is an alleged disparity in treatment between the Co-Prosecutors and the Defence teams.⁹

7. IENG Sary suggests that Judge CARTWRIGHT “has disregarded guidance issued by the Supreme Court Chamber and the Trial Chamber regarding the legal effect of *ex parte* communication.”¹⁰ He also argues that the alleged “shar[ing] of information *ex parte* regarding Case 002 jurisprudence” between Judge CARTWRIGHT and Mr. CAYLEY, in conjunction with Judge CARTWRIGHT’s “failure to disclose the nature of her participation” in the Meetings prior to the Defence raising the issue, gives rise to the appearance of bias according to the international jurisprudence.¹¹

8. In the event that the Trial Chamber does not consider the evidentiary threshold for disqualification under Internal Rule 34 to have been met, IENG Sary requests that the Chamber instruct Judge CARTWRIGHT and order Mr. CAYLEY to refrain from further *ex parte* communications and send a copy of any future ECCC-related communications to a representative of the DSS or the Defence teams. IENG Sary also asks the Chamber to order the disclosure of any *ex parte* communications between Judge CARTWRIGHT and Mr. CAYLEY that have taken place since 24 November 2011. The legal basis on which these requests are made is not specified.¹²

9. The Co-Prosecutors respond that the IENG Sary Application is inadmissible as it fails to disclose an evidentiary basis in support of the purported grounds for disqualification.¹³ Alternatively, the Co-Prosecutors contend that IENG Sary has failed to discharge his burden of proof under Internal Rule 34, as the communications between Judge CARTWRIGHT and Mr. CAYLEY did not relate to the substance of proceedings and, in any event, do not substantiate the allegations of actual or apparent bias.¹⁴

10. The Co-Prosecutors also submit that IENG Sary’s request for disclosure should be dismissed on the grounds that it merely repeats an earlier request, which was rejected at first

⁹ Application, paras 8, 12-15.

¹⁰ Application, para. 10.

¹¹ Application, para. 11 (citing *Prosecutor v. Karemera*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material, ICTR Appeals Chamber, ICTR-98-44-AR15bis.2, 22 October 2004 (“*Karemera* Interlocutory Appeals Decision”)).

¹² Application, paras 17-22.

¹³ Response, paras 9-11.

¹⁴ Response, paras 12-16, 20-21, 23, 27-29.

instance and on appeal, and that there is no legal basis on which the requested order could be made.¹⁵

11. Finally, the Co-Prosecutors argue that IENG Sary's request for alternative relief lacks any basis in law, as it falls outside the scope of Internal Rules 34 and 35.¹⁶

4 FINDINGS

4.1 Legal framework

4.1.1 *Internal Rule 34*

12. Internal Rule 34 governs applications for the disqualification of judges. 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.

13. An appearance of bias is established if "a judge is a party to the case or has a financial or proprietary interest in the outcome of the case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved; or the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."¹⁷ As the Trial Chamber has consistently noted, a reasonable observer in this regard is "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."¹⁸ The starting point for any determination of an allegation of partiality is therefore a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment.¹⁹ The

¹⁵ Response, paras 30-39.

¹⁶ Response, paras 41-42.

¹⁷ Decision on Application for Disqualification of Judge Silvia CARTWRIGHT, E171/2, 9 March 2012 ("Fifth Disqualification Decision"), para. 12; Fourth Disqualification Decision, para. 13 (citing *Prosecutor v. Furundžija*, Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 189).

¹⁸ Fifth Disqualification Decision, para. 12; Fourth Disqualification Decision, para. 14 (citing *Furundžija* Appeal Judgement, para. 190).

¹⁹ Fifth Disqualification Decision, para. 12; Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony, E55/4, 23 March 2011, para. 12; Fourth Disqualification Decision, para. 14; 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, C11/29, 4 February 2008, paras 15-17 (citing *Furundžija* Appeal Judgement, para. 196).



moving party bears the burden of displacing that presumption, which imposes a high threshold.²⁰

14. Internal Rule 34(3) requires that a party seeking the disqualification of a judge “shall clearly indicate the grounds and shall provide supporting evidence”. An application that is speculative or based on a mere feeling or suspicion of bias by an accused is insufficient.²¹

4.1.2 *The Meetings*

15. The Trial Chamber and the Supreme Court Chamber have previously noted that the holding of meetings between judicial, prosecutorial and administrative officials is commonplace at other international and internationalised tribunals.²² The Meetings at the ECCC served the same purpose, and, as they were concerned with non-judicial, managerial and administrative issues affecting the international component of the ECCC rather than the substance of proceedings, the Trial Chamber has already found that their occurrence does not rebut the presumption of impartiality to which Judge CARTWRIGHT is entitled.²³

16. The Supreme Court Chamber has confirmed in the substantive part of its decision that the occurrence of the Meetings does not give rise to any reason to believe that the participants in the Meetings wilfully and knowingly interfered with the administration of justice.²⁴

4.2 Analysis

17. It is clear from the First and Second E-mails that the communications between Judge CARTWRIGHT, Mr. CAYLEY and Mr. ROSANDHAUG related to the Meetings and whether (or how) they should be conducted in future in light of the Appeal Decision. As such, they were concerned exclusively with managerial and administrative issues, and did not relate to the substance of Case 002 or any other judicial proceedings. As the Meetings themselves – which also concerned non-judicial, managerial and administrative issues – did not give rise to

²⁰ Fifth Disqualification Decision, para. 12; Fourth Disqualification Decision, para. 14; *see also Furundžija Appeal Judgement*, para. 197 (noting that professional judges are able to “disabuse their minds of any irrelevant personal beliefs or predispositions”).

²¹ Fifth Disqualification Decision, para. 13; Fourth Disqualification Decision, para. 14 (citing *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera’s Motion for Disqualification of Judge Byron and Stay of Proceedings, ICTR Trial Chamber (ICTR-98-44-T), 20 February 2009, para. 5).

²² Fourth Disqualification Decision, para. 19; Appeal Decision, para. 23 (noting that Internal Rule 35 extends only to acts which frustrate the judicial process, whereas the aim of the meetings in question was, to the contrary, to facilitate trial proceedings).

²³ Fourth Disqualification Decision, paras 19-22.

²⁴ Appeal Decision, para. 23.

any grounds for sanctions or disqualification, neither, *ipso facto*, does the continuing communication between the participants in the Meetings establish such grounds. The Trial Chamber notes, however, that a decision has been made to discontinue the Meetings, and therefore advises the IENG Sary Defence and the other parties that the administrative and managerial issues it has previously sought to resolve through these Meetings should in future instead be raised directly with the ECCC Administration.²⁵

18. The Chamber further rejects IENG Sary's allegation that the Co-Prosecutors and the Defence teams are treated disparately by Judge CARTWRIGHT.²⁶ Outside the ordinary channels for addressing the Chamber or filing documents, no parties to the proceedings in Case 002 are permitted to communicate directly with judges about matters that relate to the substance of judicial proceedings. IENG Sary has offered no evidence to suggest that this practice is applied inconsistently.

19. The international jurisprudence cited by IENG Sary in support of the Application confirms that the evidentiary burden on a party seeking the disqualification of a judge is high.²⁷ This burden has not been met in the instant case.

20. In relation to IENG Sary's request for alternative relief in the event that the evidentiary threshold for disqualification under Internal Rule 34 is not met, the Chamber notes that Rule 34 provides no basis for the remedies sought. Nor has the IENG Sary Defence specified any other legal basis on which this alternative relief could be granted.²⁸ Although the Application makes passing reference to Internal Rule 35, *ex parte* meetings (and, by implication, communications associated with them) in which nothing inappropriate is alleged to have been discussed do not give rise to a reason to believe that there has been a knowing and wilful interference with the administration of justice.²⁹ Consequently the Chamber has no basis to act under Rule 35 and rejects the request for alternative relief.³⁰

²⁵ See e.g. Annex: Email from Tanya Rene PETTAY to Susan LAMB, E191/2.1 9 February 2012.

²⁶ Application, paras 8, 12-15.

²⁷ Application, para. 11; *Karemera* Interlocutory Appeals Decision, para. 67 (noting that the finding of apparent bias in that case was based on the association and cohabitation of a judge with prosecuting counsel; the failure of the judge to disclose the matter until it was raised by defence counsel; and the voluntary withdrawal of the judge from the case).

²⁸ Application, paras 17-19.

²⁹ Application, para. 19 (requesting that the instruction and order sought carry "the threat of sanctions pursuant to Rule 35 in the event of breach").

³⁰ Appeal Decision, paras 14, 23; see also Decision on Rule 35 Applications for Summary Action, E176/2, 11 May 2012, para. 20 (noting that the threshold for action under Internal Rule 35(2) is a reasonable belief that a person may have interfered with the administration of justice).



21. The Chamber also rejects IENG Sary's request that it order Judge CARTWRIGHT and Mr. CAYLEY to disclose all *ex parte* communications between them since 24 November 2011. For the reasons already given, the Chamber has no power to make such an order under Internal Rules 34 or 35, and IENG Sary has failed to specify any other legal basis on which this request could be founded. Further, there are no grounds for the Chamber to grant the request, as the communications in question are not improper and the IENG Sary Defence is not a participant in discussions concerning the overall management and administration of the international component of the ECCC.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES IENG Sary's application for the disqualification of Judge CARTWRIGHT;

DENIES IENG Sary's request that it instruct Judge CARTWRIGHT and order Mr. CAYLEY to cease and desist from *ex parte* communications and meetings and copy a representative from the DSS or Defence teams on all future ECCC-related communications between them; and

DENIES IENG Sary's request that it instruct Judge CARTWRIGHT and order Mr. CAYLEY to disclose all *ex parte* communications between them since 24 November 2011. *He g*

Phnom Penh, 4 June 2012
President of the Trial Chamber

