



ព្រះរាជាណាចក្រកម្ពុជា
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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

Before:

Judge NIL Nonn, Presiding

Judge Silvia CARWRIGHT

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge THOU Mony

Date:

9 May 2011

Original language(s):

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Classification:

PUBLIC

DECISION ON IENG THIRITH AND IENG SARY'S APPLICATIONS FOR DISQUALIFICATION OF JUDGE YOU OTTARA FROM THE SPECIAL BENCH & REQUESTS FOR A PUBLIC HEARING

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

Accused

NUON Chea

IENG Sary

IENG Thirith

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

PHAT Pouv Seang

Diana ELLIS

SA Sovan

Jaques VERGÈS

Philippe GRÉCIANO

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I. INTRODUCTION

1. On 14 February 2011, the Judicial Administration Committee (JAC) appointed a panel of five judges to determine three pending applications for disqualification of all judges of the Trial Chamber (“Special Bench”). On 9 March 2011 and 18 March 2011 respectively, the IENG Thirith and IENG Sary defence teams filed applications for the disqualification of Judge YOU Ottara from the Special Bench (“IENG Thirith Application” and “IENG Sary Application”).¹ On 24 March 2011, the Office of the Co-Prosecutors filed a response opposing the IENG Thirith Application.² Judge YOU Ottara declined to recuse himself, and on 23 March 2011 the Special Bench issued a consolidated decision on all applications for recusal of the Judges of the Trial Chamber.³ On 6 April 2011, Judge YOU Ottara notified the Trial Chamber of his intention not to respond to the present Applications under Rule 34(7).⁴

2. Internal Rule 34(5) states that an application for disqualification should be “submitted to the Chamber in which the judge in question is sitting.” At the time the Applications were filed, Judge YOU Ottara sat on both the Special Bench and as a reserve judge on the Trial Chamber. The Trial Chamber referred the IENG Thirith Application to the JAC for consultation, which referred the matter back to the Trial Chamber.⁵ The Trial Chamber disagrees with IENG Sary that a conflict of interest exists in the Chamber’s determination of these Applications,⁶ which are based on general allegations of judicial independence and do not implicate the judges of the Trial Chamber in any way. In light of Rule 34(5) and the decision of the JAC, the Trial Chamber is properly seized of these Applications.

3. In accordance with Internal Rule 34(9), any decision issued prior to the determination of an application for disqualification is deemed valid. As the Special Bench has exhausted its mandate, the IENG Thirith and IENG Sary Applications are moot. Nonetheless, given the importance of the issues raised, the Chamber issues the present decision in order to rule on the substance of the allegations in the Applications, which are found to be without merit.

¹ Ieng Thirith Application to Disqualify Judge YOU Ottara from the Special Bench for Lack of Independence, E63, 9 March 2011 (“Ieng Thirith Application”); Ieng Sary’s Motion to Support Ieng Thirith’s Application to Disqualify Judge You Ottara from the Special Bench for Lack of Independence & Request for a Public Hearing, E63/1, 18 March 2011 (“Ieng Sary Application”).

² Co-Prosecutors’ Response to Ieng Thirith Application to Disqualify Judge You Ottara from the Special Bench, E63/2, 24 March 2011.

³ 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.

⁴ Memorandum of Judge YOU Ottara to the president and Judges of the Trial Chamber regarding motion to disqualify him from the special bench, E63/4, 6 April 2011.

⁵ Decision of the JAC to defer IENG Thirith’s application to disqualify Judge YOU Ottara from the Special Bench, E63/3, 4 April 2011.

⁶ IENG Sary Application, para. 2.



II. SUBMISSIONS

4. The allegations of bias against Judge YOU Ottara stem from his role on a panel of the Cambodian Supreme Court which, in June 2010, upheld the conviction of an opposition politician, Mu Sochua, for defamation of Prime Minister Hun Sen.⁷ Relying on third party commentary from three non-governmental organizations, the UN Office of the High Commissioner for Human Rights (OHCHR) and the UN Special Rapporteur on Human Rights in Cambodia, the Applications submit that the opinion is so bereft of legal reasoning that it constitutes a “concession to the Prime Minister” rather than a genuine evaluation of the appeal’s merits.⁸ The fact that a concurrent complaint for defamation by Ms. Sochua against the Prime Minister was dismissed is alleged to reinforce the inference of bias.⁹

5. The Applications furthermore allege that the government has a “clear interest” in the conviction of the accused in Case 002.¹⁰ Based on his supposed willingness to “deliver the ‘desired’ result” in the Mu Sochua case, the Applications reason that Judge YOU Ottara is, or would reasonably be perceived to be, equally susceptible to government pressure in this case.¹¹

6. The IENG Thirith Application acknowledges that Chambers of the ECCC have denied applications for disqualification based on alleged improprieties in a prior case. However, it maintains that the present circumstances are distinguishable, as in this case there is both (i) specific evidence of Judge YOU Ottara’s past malfeasance¹² and (ii) a link between that malfeasance and the circumstances of the present case.¹³

7. In support of its request for an oral hearing, the IENG Sary Application invokes American jurisprudence previously cited by the Trial Chamber.¹⁴ That caselaw has found that where there is bias in one case, further inquiry may be warranted in another.¹⁵ The IENG Sary Application also submits that, since the sources criticizing the Mu Sochua case are trustworthy and easily accessible, they would be more likely to influence the reasonable observer.¹⁶

⁷ *Prosecutor General v. Mu Sochua*, Supreme Court, Criminal Proceeding No. 201, 13 November 2009, Sentence No. 58, 2 June 2010.

⁸ IENG Thirith Application, paras 26-27, 38.

⁹ IENG Thirith Application, para. 26.

¹⁰ IENG Thirith Application, paras 44-45.

¹¹ IENG Thirith Application, para. 45.

¹² IENG Thirith Application, para. 38.

¹³ IENG Thirith Application, paras 43-45.

¹⁴ IENG Sary Application, para. 38.

¹⁵ IENG Sary Application, para. 38.

¹⁶ IENG Sary Application, paras 41-42.

III. DELIBERATIONS

8. Internal Rule 34(4)(c) provides that an application for disqualification of a judge of the Trial Chamber must be submitted, “concerning matters arising before the trial, at the latest at the initial hearing”. Internal Rule 34(3) further requires the filing of disqualification applications as soon as the moving party becomes aware of the grounds in question. The Applications were filed within a reasonable time after the appointment of Judge YOU Ottara to the Special Bench and are therefore timely.¹⁷

a. Requests for a public hearing

9. As the Chamber has previously held, neither the Internal Rules nor domestic Cambodian law contemplate a public hearing on an application for disqualification. Nor has that practice been followed at the ECCC or any of the international criminal tribunals. Transparency is adequately guaranteed by the classification of all relevant filings as public.¹⁸

10. IENG Sary’s reliance on the decisions of U.S. courts in *Bracy v. Gramley* and *Cartalino v. Washington* is misplaced.¹⁹ Those cases held that where impropriety has been firmly established in a prior case, further inquiry is warranted to determine whether the judge is also biased in the present case. They do not support IENG Sary’s proposed application, which instead requests an investigation into mere allegations of bias in a prior case.

b. Legal Framework

11. ECCC jurisprudence establishes the following framework for a Rule 34 application:

10. Internal Rule 34(2) provides that “[a]ny 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.” In accordance with Internal Rule 34(3), such applications “shall clearly indicate the grounds and shall provide supporting evidence.”

11. The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias. An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary

¹⁷ IENG Thirith Application, para. 5.

¹⁸ Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, E5/3, 28 January 2011, para. 3 (“NIL Nonn Decision”).

¹⁹ IENG Sary Application, para. 38, citing *Bracy v. Gramley*, 520 U.S. 899, 901 (1997) and *Cartalino v. Washington*, 122 F.3d 8, 9 (1997).

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 (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

12. 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". As has been noted in previous ECCC jurisprudence, the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment. The moving party bears the burden of displacing that presumption, which imposes a high threshold.²⁰

c. Merits

12. Rule 34 concerns the impartiality of a judge in a particular case. In order to succeed, an application must demonstrate the inability of the judge to rule fairly with respect to the issues or parties before him. Bias manifested in a different case does not by itself require disqualification. Allegations about the general fitness of an individual to serve as a judge are similarly beyond the scope of Rule 34.²¹

13. As the Trial Chamber has previously held, judicial independence is of paramount importance. However, within the ECCC context, it is typically ensured by mechanisms enshrined within Cambodian domestic law guaranteeing the independence of the judiciary and fitness of individuals to hold judicial office.²² Only where a lack of independence has a demonstrable impact on a particular case before the ECCC can it form the basis of a Rule 34 application.²³ The ICTY similarly requires a link between the alleged lack of independence and the case under consideration.²⁴

14. Although both Applications produce a lengthy narrative and cite to several reports of third party observers, pursuant to a request for cassation, the Supreme Court's role is limited to the grounds set out in the request.²⁵ The numerous allegations of impropriety in the broader context of the case, including the decision not to proceed with Ms. Sochua's complaint against

²⁰ 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, paras 10-12.

²¹ NIL Nonn Decision, paras 7-8.

²² NIL Nonn Decision, paras 9-14.

²³ NIL Nonn Decision, para. 11.

²⁴ *Prosecutor v. Delalic et al.*, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, ICTY Bureau (IT-96-21-T), 25 October 1999, para. 10.

²⁵ Code of Criminal Procedure of the Kingdom of Cambodia, Article 419.

the Prime Minister and the decision of the Cambodian Parliament to strip Ms. Sochua of Parliamentary immunity, did not form part of the request for cassation before the Cambodian Supreme Court and thus cannot form the basis of any alleged lack of impartiality. Much of the criticism in the reports is furthermore directed toward the substance of Cambodian criminal defamation law and its effect on the right of free speech in Cambodia, a subject that is beyond the scope of these Applications and the subject-matter jurisdiction of the ECCC.

15. The reports cited by the Applications include few references to the alleged weaknesses in the legal reasoning of the Supreme Court opinion,²⁶ and only one raises any concerns about the independence of Judge YOU Ottara.²⁷ A reasonable observer would not consider them to be a conclusive determination of the independence of the Cambodian Supreme Court or of its individual members. As the PTC has previously observed, third party opinions are generally insufficient on their own to establish a reasonable apprehension of bias.²⁸

16. Further, Judge YOU Ottara's personal opinion as a single member of a five judge panel where decisions are taken by majority vote cannot be identified. Deliberations and voting records at the Cambodian Supreme Court are confidential, and rulings are given by the entire court without identifying the particular views of each individual member of the bench. Further, Cambodian law does not envisage dissenting opinions.²⁹ It is accordingly not possible to identify Judge YOU Ottara's specific opinion on the decision in question.

17. In light of these findings, it is not necessary for the Chamber to determine whether, under these circumstances, an alleged lack of judicial independence in a prior case before the

²⁶ IPU, Committee on the Human Rights of Parliamentarians, Case No. CMBD/47 – Mu Sochua – Cambodia, Decision adopted by the Committee at its 130th session, Geneva, 12-15 July 2010, para. 2; UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, 16 September 2010, UN Doc. A/HRC/15/46, para. 43.

²⁷ CCHR, "Analysis of the Fairness of the Judicial Process Resulting in the Conviction of Elected Representative Mu Sochua", 13 July 2010, para. 20.

²⁸ 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, 002/20-10-2009-ECCC/OCIJ (PTC03), Doc No. 5, 30 November 2009, para 8.

²⁹ Code of Civil Procedure of Cambodia, Article 24 (Deliberations of panel) states:

1. The deliberations of a panel in a case shall not be open to the public.
2. The deliberations shall be commenced and controlled by the presiding judge.
3. Each judge shall express his/her opinions during the deliberations.
4. The progress of the deliberations, as well as the opinions of the judges and the size of the majority, shall be maintained in strict secrecy.

Article 25 (Decision by panel) states:

1. A case shall be decided in accordance with the opinions of the majority of the judges comprising the panel.
2. Each judge comprising the panel shall be given an equal vote.

Cambodian Supreme Court and not related to any case before the ECCC would merit disqualification from any judicial office at the ECCC.³⁰

FOR THE FOREGOING REASONS, THE CHAMBER:

REJECTS the requests for a public hearing; and

DENIES the Applications.

Pursuant to Internal Rule 34(8), this decision is not open to appeal. *NUM #*

Phnom Penh, 9 May 2011.

[Signature]
NIL Nonn



[Signature]
Silvia CARTWRIGHT

[Signature]
YA Sokhan

[Signature]
Jean-Marc LAVERGNE

[Signature]
THOU Mony

³⁰ See NIL Nonn Decision, para. 11.