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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.ត.ក(១)
Case File/Dossier N°. 002/19-09-2007-ECCC/SC(1)

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

Date: 3 June 2011

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DECISION ON IENG THIRITH'S APPLICATION TO DISQUALIFY JUDGE SOM SEREYVUTH FOR LACK OF INDEPENDENCE

Co-Prosecutors
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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of an application filed by the International Co-Lawyer for the Accused, IENG Thirith (“Accused”), to disqualify Judge SOM Sereyvuth from the Supreme Court Chamber of the ECCC for his alleged lack of independence (“Application”).¹

I. PROCEDURAL HISTORY

1. On 21 January 2011, the Accused filed a request to the Trial Chamber for immediate release.² On 31 January and 16 February 2011, the Trial Chamber respectively heard oral submissions³ and filed its decision on the Accused’s request for release.⁴ On 3 March 2011, the Accused initiated appellate proceedings before the Supreme Court Chamber by filing an immediate appeal against the Trial Chamber’s decision (“Immediate Appeal”).⁵ On 16 March 2011, the Accused’s Application was notified to the parties. On 18 March 2011, IENG Sary filed a motion in support of the Application (“Motion”).⁶ On 24 March 2011, the Co-Prosecutors filed their response to the Application (“Response”),⁷ to which the Accused replied on 5 April 2011 (“Reply”).⁸

II. SUBMISSIONS

2. On 2 June 2010, the Supreme Court of Cambodia rejected an appeal by an opposition politician, Mrs. Mu Sochua, against the decision of the Court of Appeal to uphold her criminal conviction at first instance for defamation of Prime Minister Hun Sen.⁹ Judge SOM Sereyvuth was one of five judges on the Supreme Court of Cambodia who participated in the decision on Mrs. Mu

¹ IENG Thirith Application to Disqualify Judge SOM Sereyvuth from the Supreme Court Chamber for Lack of Independence, 14 March 2011, Doc. 1, ERN 00651908-00651923 (EN).

² Urgent Request for Immediate Release of Madame IENG Thirith, 21 January 2011, Doc. E21.

³ Transcript of Hearing – Application for Immediate Release: Nuon Chea, Khieu Samphan, Ieng Thirith, 31 January 2011, Doc. E1/1.1.

⁴ Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, Doc. E50.

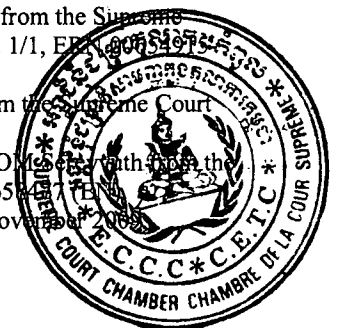
⁵ Appeal against Trial Chamber’s ‘Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith’ filed on behalf of the Appellant Madame Ieng Thirith, 3 March 2011, Doc. E50/2/1/1. The Accused filed a notice of appeal (Doc. E50/2), which is not required under Internal Rule 105(2), on 2 March 2011.

⁶ Ieng Sary’s Motion to Support Ieng Thirith’s Application to Disqualify Judge SOM Sereyvuth from the Supreme Court Chamber for Lack of Independence & Request for a Public Hearing, 18 March 2011, Doc. 1/1, ERN 00654929 (EN). The Khmer translation was filed on 4 April 2011.

⁷ Co-Prosecutors’ Response to Ieng Thirith Application to Disqualify Judge SOM Sereyvuth from the Supreme Court Chamber for Lack of Independence, 24 March 2011, Doc. 1/2, ERN 00656393-00656398 (EN).

⁸ Defence Reply to Co-Prosecutors’ Response to Ieng Thirith Application to Disqualify Judge SOM Sereyvuth from the Supreme Court Chamber for Lack of Independence, 5 April 2011, Doc. 1/3, ERN 00658473-00658474 (EN).

⁹ *Prosecutor General v. Mu Sochua*, Supreme Court of Cambodia, Criminal Case No. 201, 13 November 2009, Appeal Judgment No. 58, 2 June 2010, Doc. E63.1.1, ERN 00651069-00651076 (EN).



Sochua's appeal. The Accused submits that Mrs. Mu Sochua's "conviction at first instance was criticised by local NGOs as lacking any legal basis and being politically motivated. The United Nations Office of the High Commissioner for Human Rights (UN OHCHR) and Inter-Parliamentary Union (IPU) also expressed their strong concern at the verdict."¹⁰ The Accused submits that the decision by the Supreme Court of Cambodia to reject Mrs. Mu Sochua's appeal was "criticized by local NGOs, the UN, and the European Union, with a number of statements noting the lack of any convincing legal reasoning from the courts throughout the legal process."¹¹ Based on these facts, the Accused submits the following:

[A] Judge who formed part of that bench convicting Mu Sochua on such grounds cannot be deemed independent and impartial, and should be disqualified from the Supreme Court Chamber [of the ECCC] that deals with the defence's [Immediate Appeal on detention]. Through his involvement in upholding a decision that was considered by numerous independent observers to be without legal merit and politically motivated, Judge SOM Sereyvuth has been shown to have a clear association with the Royal Government of Cambodia (RGC) that might affect his impartiality and independence when considering the [Immediate Appeal on detention]. At a minimum, his prior involvement in upholding a politically motivated criminal conviction gives rise to an objective appearance of bias.¹²

3. In his Motion, IENG Sary supports the Application with submissions similar to those advanced by the Accused.¹³ The Co-Prosecutors submit that the Application lacks merit, and should be dismissed on the basis of the reasoning set forth in the Pre-Trial Chamber's decision¹⁴ on the application to disqualify Judge Ney Thol, and the Trial Chamber's decision¹⁵ on the application to disqualify Judge Nil Nonn.¹⁶

III. FINDINGS

A. Admissibility

4. An application for disqualification against a judge on the Supreme Court Chamber must satisfy the following cumulative conditions in order to be formally admissible. First, the application must "clearly indicate the grounds and shall provide supporting evidence" (Internal Rule 34(3)).

¹⁰ Application, para. 3.

¹¹ Application, para. 24.

¹² Application, para. 4.

¹³ Motion, paras. 27-38.

¹⁴ 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, Doc. C11/29.

¹⁵ Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2009, Doc. E5/3.

¹⁶ Response, paras. 6-9.



Second, the application “shall be filed as soon as the party becomes aware of the grounds in question” (Internal Rule 34(3)). Third, where the application concerns a matter(s) that arose before the filing of an immediate appeal or appeal against the judgment, it must be filed at the beginning of the appellate proceedings. Where the application concerns a matter(s) that arises during the appellate proceedings, or of which the parties were unaware before the filing of an immediate appeal or appeal against the judgment, it must be filed before the final decision or judgment on the appeal (Internal Rule 34(4)(d)). These three conditions necessarily imply that the applicant must have an appeal pending before the Chamber at the time of the filing of the application for disqualification. This is consistent with the requirement that the applicant have legal interest that could be adversely affected (*gravamen*) if the Supreme Court Chamber does not consider the merits of his/her application for disqualification.

5. The present Application relates to a matter that arose before the Accused could file her Immediate Appeal to the Supreme Court Chamber. The Accused filed the Application 11 calendar days after she filed her Immediate Appeal. The Supreme Court Chamber finds that the Application was filed “at the beginning of the appellate proceedings” in accordance with Internal Rule 34(4)(d).
6. IENG Sary submits that his Motion is admissible “because the Defence has two appeals currently pending before the Chamber.”¹⁷ On 2 and 9 March 2011, IENG Sary filed two notices of immediate appeals to the Supreme Court Chamber.¹⁸ On 18 March 2011, IENG Sary filed his present Motion in support of the Application. On 8 April 2011, the Supreme Court Chamber decided that the two notices of immediate appeals from IENG Sary were inadmissible.¹⁹ The Supreme Court Chamber decides to admit the Motion because IENG Sary had two notices of immediate appeals pending before the Chamber at the time he filed his Motion.

B. Request for a Public Oral Hearing

7. The Accused requests the Supreme Court Chamber to hold a public oral hearing because it will “provide the parties with the opportunity to respond to the facts as alleged in this application and the applicable law in more detail” and “it is essential that applications relating to the disqualification of judges are dealt with as transparently as possible, so as to allow the public to

¹⁷ Motion, para. 1.

¹⁸ Docs. E9/7/1/1 and E51/6/1.

¹⁹ Decision on Two Notices of Appeal Filed by IENG Sary, Case File No. 002/19-09-2007-ECCC-03 and 05, 8 April 2011, p. 2, Doc. E9/7/1/1/1/4.



gain a full understanding of the proceedings.”²⁰ IENG Sary also requests a public hearing as a means to enquire further into the allegations of bias against Judge SOM Sereyvuth.²¹ The Co-Prosecutors ask the Chamber to deny the Accused’s request for a hearing.²²

8. The Supreme Court Chamber recalls that the Internal Rules do not require or state a preference that a public hearing be held to consider an application for disqualification.²³ The Code of Criminal Procedure of Cambodia states that “no hearing of the parties or the relevant judge is necessary.”²⁴ The Supreme Court Chamber agrees with the Trial Chamber that “other international tribunals routinely decide similar applications on the basis of written pleadings alone.”²⁵ Having reviewed the Application, Motion, and Response, the Supreme Court Chamber decides that affording the Accused the opportunity to file a written reply is sufficient for the Chamber to properly hear the parties’ full submissions on the Application. No further enquiry into the Application is necessary beyond these written submissions. For the sake of transparency, the Supreme Court Chamber will reclassify as public the Application, Motion, Response, and Reply in due course. The requests for a hearing are rejected.

C. Applicable Law

9. The Internal Rules (Rev. 7) provide as follows:

Rule 34. Recusal and Disqualification of Judges

...

2. 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.

3. A party who files an application for disqualification of a judge shall clearly indicate the grounds and shall provide supporting evidence. The application shall be filed as soon as the party becomes aware of the grounds in question.

4. To be admissible an application must be submitted:

...

²⁰ Application, paras. 48-49.

²¹ Motion, para. 38.

²² Response, para. 9.

²³ Internal Rule 109(1) states, “The Chamber may decide to determine immediate appeals on the basis of written submissions only.”

²⁴ Code of Criminal Procedure of the Kingdom of Cambodia, Article 561.

²⁵ Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 8, fn. 24 (“Decision on Applications to Disqualify all TC Judges”).



d) against a Supreme Court Chamber Judge, concerning matters arising before the appeal, at the beginning of the appellate proceedings; or concerning matters arising during the appellate proceedings or of which the parties were unaware before the start of the appeal, before the final decision on the appeal.

5. An application for disqualification [against a Supreme Court Chamber Judge]...shall be submitted to the Chamber in which the judge in question is sitting. The Judge in question may continue to participate in the judicial proceedings pending a decision. However, he or she may decide to step down voluntarily at any point in the following proceedings.

...

10. The Supreme Court Chamber adopts the following legal framework for deciding an application for disqualification as laid out by the Trial Chamber:

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 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.

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.²⁶

D. Merits of the Application

11. The Accused submits that Judge SOM Sereyvuth should be disqualified from serving on the Supreme Court Chamber of the ECCC in Case 002 because there is an objective appearance that he lacks independence from the Royal Government of Cambodia. Judge SOM Sereyvuth's alleged lack of independence stems from the fact that he sat on a panel of the Supreme Court of Cambodia that rejected an appeal from an opposition politician against her criminal conviction for defamation of Prime Minister Hun Sen. The Accused submits that both the decision of the Supreme Court of Cambodia in the *Prosecutor General v. Mrs. Mu Sochua* case and its lack of convincing legal reasoning have been widely criticized by third party observers as politically

²⁶ Decision on Applications to Disqualify all TC Judges, paras. 11-12 (footnotes omitted).



driven.²⁷ The Supreme Court Chamber finds that the Application is without merit for several reasons.

12. The Supreme Court Chamber must first ask whether the decision of the Supreme Court of Cambodia in the *Prosecutor General v. Mrs. Mu Sochua* case is attributable to Judge SOM Sereyvuth. It is not possible for the Supreme Court Chamber to identify Judge SOM Sereyvuth's individual opinion on the appeal by Mrs. Mu Sochua because decisions of the Supreme Court of Cambodia are taken by majority, Cambodian law does not envisage the publication of separate concurring or dissenting opinions, and deliberations and voting records are confidential.²⁸ The fact that Judge SOM Sereyvuth merely performed the judicial duties assigned to him²⁹ by sitting on a panel that issued a widely criticized decision neither demonstrates that he endorsed the decision nor acted without independence.

13. The Application must fail even if the decision of the Supreme Court of Cambodia in the *Prosecutor General v. Mrs. Mu Sochua* case is attributable to Judge SOM Sereyvuth by his participation on the panel. To demonstrate bias on the part of a judge it is insufficient to argue that the legal reasoning of that judge in a prior decision in an unrelated case is arbitrary or unconvincing. A judge's legal reasoning in a decision may be attributable to a variety of factors, such as the particular legal system in which the judge has been trained and/or works, the absence or weakness of submissions by counsel for the parties, and human error. The Accused has failed to show that Judge SOM Sereyvuth's contribution, if any, to the legal reasoning of the decision by the Supreme Court of Cambodia in the *Prosecutor General v. Mrs. Mu Sochua* case

²⁷ See the Accused's Table of Authorities, Doc. 1.1, ERN 00651947-00651952 (EN), and IENG Sary's Table of Authorities, Doc. 1/1.1, ERN 00655075-00655080 (EN).

²⁸ Code of Civil Procedure of Cambodia, Articles 24-25:

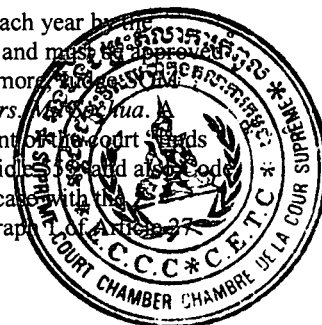
24. (Deliberations of panel)

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.

25. (Decision by panel)

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.

²⁹ The distribution of cases to a judge in Cambodia is automatic and determined in advance for each year by the president of the court. A change to such distribution may only be made in limited circumstances and must be approved by the president of the court (Code of Civil Procedure of Cambodia, Articles 26(1)-(3)). Furthermore, Judge SOM Sereyvuth could not have unilaterally recused himself from the case of *Prosecutor General v. Mrs. Mu Sochua*. A judge's self-recusal is permitted under Cambodian law in a criminal case only where the president of the court finds that the reasons [for self-recusal] are legitimate" (Code of Criminal Procedure of Cambodia, Article 27) and also Code of Civil Procedure of Cambodia, Article 29 ("A judge may recuse him/herself or herself from a case with the permission of the director of the court to which the judge belongs where the provisions of Paragraph 1 of Article 27 (Exclusion of a judge) or Paragraph 1 of Article 28 (Challenge of a judge) apply").



is, or would reasonably be perceived as, attributable to his pre-disposition against the Accused, and not genuinely related to the application of law or assessment of facts.³⁰

14. Assuming for the sake of argument that the Accused is correct that the legal reasoning of the Supreme Court of Cambodia was unconvincing,³¹ it simply does not follow that Judge SOM Sereyvuth thereby intentionally gave a “concession to the Prime Minister,”³² and even less that he “might not bring an impartial and unprejudiced mind”³³ to Case 002 at the ECCC. The Accused relies heavily on commentary by third party observers to argue that Judge SOM Sereyvuth “cannot be considered independent and impartial.”³⁴ However, only one of the third party observers relied on by the Accused expresses concern that Judge SOM Sereyvuth serves as a judge at the ECCC, and does not substantiate such concern.³⁵ Furthermore, contrary to the Accused’s submission, the fact that Mrs. Mu Sochua’s initial defamation complaint against the Prime Minister was immediately dismissed does not help to demonstrate that Judge SOM Sereyvuth lacks independence or impartiality.³⁶ That issue fell outside the cognisance of the Supreme Court of Cambodia because it was not part of Mrs. Mu Sochua’s request for cassation, and therefore cannot form the basis of any alleged lack of independence or impartiality on the part of Judge SOM Sereyvuth.³⁷

15. Although the Application purports to target Judge SOM Sereyvuth, the Supreme Court Chamber finds that the Application in fact targets the legal system of Cambodia and all judges who participated in the *Prosecutor General v. Mrs. Mu Sochua* case.³⁸ The Supreme Court Chamber recalls that the substance of Cambodian criminal defamation law and its effect on the right of free speech in Cambodia are subjects beyond the subject-matter jurisdiction of the ECCC.³⁹ An application to disqualify Judge SOM Sereyvuth from Case 002 at the ECCC is not

³⁰ Decision on Applications to Disqualify all TC Judges, para. 13.

³¹ Application, paras. 24, 27; Motion, para. 14.

³² Application, para. 28.

³³ *Prosecutor v. Radoslav Brdanin and Momir Talic*, Case IT-99-36-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, T. Ch. II, 18 May 2000, para. 19.

³⁴ Application, para. 29.

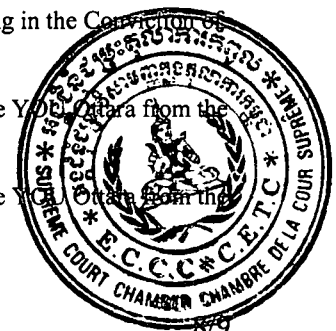
³⁵ Cambodian Center for Human Rights, 'Analysis of the Fairness of the Judicial Process Resulting in the Conviction of Elected Representative Mu Sochua', 13 July 2010, para. 20, Doc. E63.1.11.

³⁶ Application, para. 28.

³⁷ See also Decision on IENG Thirith and IENG Sary’s Applications for Disqualification of Judge Yon Yon Zie from the Special Bench & Requests for a Public Hearing, 9 May 2011, Doc. E63/5, para. 14.

³⁸ Response, para. 7.

³⁹ See also Decision on IENG Thirith and IENG Sary’s Applications for Disqualification of Judge Yon Yon Zie from the Special Bench & Requests for a Public Hearing, 9 May 2011, Doc. E63/5, para. 14.



the appropriate mechanism to address putative errors or shortcomings in a decision of the Supreme Court of Cambodia in a prior and unrelated case.⁴⁰

16. Due to the foregoing reasons, the Supreme Court Chamber holds that the submissions in the Application, Reply, and Motion would not lead an objective observer, properly informed, to reasonably apprehend bias on the part of Judge SOM Sereyvuth in relation to Case 002 at the ECCC. The Accused and IENG Sary have failed to establish that Judge SOM Sereyvuth has, or has had, any association which objectively might affect his or her impartiality, or objectively gives rise to the appearance of bias. The Application and Motion are therefore dismissed.

IV. DISPOSITION

FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:

DISMISSES the Application of IENG Thirith and Motion of IENG Sary; and
DISMISSES the requests for an oral hearing.

Phnom Penh, 3 June 2011

President of the Supreme Court Chamber



⁴⁰ See also Decision on Applications to Disqualify all TC Judges, para. 13.