ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 02 / 12 / 2011
ម៉ោង (Time/Heure): 16:22
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:

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, President**
**Judge Claudia FENZ**
**Judge YA Sokhan**
**Judge Jean-Marc LAVERGNE**
**Judge YOU Ottara**

**Date:** **2 December 2011**
**Original language(s):** **Khmer/English/French**
**Classification:** **PUBLIC**

# DECISION ON MOTIONS FOR DISQUALIFICATION OF JUDGE SILVIA 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 Oun
Jacques VERGÈS

# 1. INTRODUCTION

1. The Trial Chamber is seised of NUON Chea's motion to disqualify Judge Silvia Cartwright and IENG Sary's request for investigation into *ex parte* communications.[1] The Trial Chamber, composed of Judge NIL Nonn, President, Judge Claudia FENZ, Judge YA Sokhan, Judge Jean-Marc LAVERGNE and Judge YOU Ottara, issues the following decision.

# 2. PROCEDURAL HISTORY

2. On 4 November 2011, the NUON Chea Defence sent a letter to the President of the Trial Chamber, stating they had received information from unnamed sources indicating that *ex parte* meetings had been taking place between Judge Cartwright and the international Co-Prosecutor.[2] It asserted that some of these meetings were also attended by the UNAKRT Coordinator and ECCC Deputy Director of Administration. It also stated that it had requested clarification from Judge Cartwright on 1 and 3 November 2011, but received no response.[3]

3. On 7 November 2011, the Deputy Director of Administration responded to the IENG Sary request, stating:

> [t]he suggestion of regular meetings between Judge Cartwright, the international Co-Prosecutor and the UNAKRT coordinator, keeping their Cambodian counterparts closely informed, was made by the Legal Counsel during her visit to the ECCC in April 2010. The aim was to add focus to communication between the UN component and the ECCC and UN Headquarters. Such meetings would replicate, in an informal way, the coordination committees that are standard in other UN and UN-assisted tribunals. These meetings concern administrative and organizational matters and do not deal in any way with the substance of the cases before the ECCC.[4]

4. On 15 November 2011, the NUON Chea Defence filed a further request before the Trial Chamber, seeking information as to whether alleged political interference or the NUON Chea request for investigations were discussed during such meetings.[5] Although asserting that the

---

1 NUON Chea Defence Team's Urgent Application for Disqualification of Judge Cartwright, E137/2, 21 November 2011 ("NUON Chea Application") and IENG Sary's Request for Investigation Concerning *Ex Parte* Communications between the International Co-Prosecutor, Judge Cartwright and Others, E137/3, 24 November 2011 ("IENG Sary Request").

2 Request for Information related to ex-parte meetings between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug, E137, 4 November 2011 ("NUON Chea Request for Information").

3 NUON Chea Request for Information.

4 E-mail Correspondence between Deputy Director of Administration and Defence Teams, E137/5.1.

5 Request for Information Regarding Ex-parte Meetings among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, E137/1, 15 November 2011 ("NUON Chea Second Request"), para. 7.

Defence had reason to believe these issues were discussed, no information or particularization is provided in support of this claim.[6]

## 3. SUBMISSIONS

### 3.1. The Defence Motions

5. NUON Chea submits that Judge Cartwright's participation in *ex parte* meetings with the international Co-Prosecutor and the Deputy Director of Administration gives rise to an unacceptable appearance of bias.[7] Based upon these meetings, IENG Sary submits that Judge Cartwright may not have acted independently at all times in relation to Case 002 and asserts that she may be biased in favour of the Office of the Co-Prosecutors.[8] NUON Chea and IENG Sary further submit that as the Judicial Administration Committee is the exclusive mechanism for dealing with administrative and judicial support at the ECCC, there is no legal basis for *ex parte* meetings of an informal, *ad hoc* nature.[9]

6. Although not explicitly prohibited by the ECCC Code of Judicial Ethics, NUON Chea and IENG Sary submit that *ex parte* communications are prohibited by the Cambodian Code of Judicial Ethics and international norms.[10] IENG Sary submits that an investigation is necessary to determine whether there could be a reasonable apprehension of bias based upon these meetings, but he also argues that these meetings prejudice the rights of the Accused, as "it is not inconceivable to imagine that a judge who is predisposed to a prosecutor as a result of these numerous *ex parte* contacts would, if not intentionally, rule in that party's favor."[11]

7. NUON Chea and IENG Sary contend that Judge Cartwright's conduct would lead an objective, reasonably informed observer to doubt her ability to perform judicial duties independently and impartially, noting the absence of meeting minutes and the failure of Judge Cartwright to disclose information concerning the meetings.[12]

---

6 NUON Chea Second Request, para. 7.
7 NUON Chea Application, para. 15.
8 IENG Sary Request, paras 26, 31-32.
9 NUON Chea Application, paras 11, 16; IENG Sary Request, para. 24.
10 NUON Chea Application, para. 10; IENG Sary Request, paras. 13, 16, 20, 21 and 28 (further alleging that these meetings would be prohibited by New Zealand's Guidelines for Judicial Conduct and the Code of Conduct of the Bar of England and Wales).
11 IENG Sary Request, paras 25, 29, and 33 ("it is beyond cavil that both Mr. Cayley and Judge Cartwright are aware of matters which could [...] arguably be said to give rise to a reasonable apprehension of bias").
12 NUON Chea Application, paras 2, 15-19 (noting that the Trial Chamber was seised of NUON Chea's request to investigate alleged political interference by the Royal Government of Cambodia at the time of these meetings); IENG Sary Request, paras 24-26, 30-32.

8. IENG Sary requests the Trial Chamber to summon the international Co-Prosecutor and to "encourage" Judge Cartwright to make a statement disclosing information about the meetings.[13] IENG Sary also requests a public, oral hearing to decide his Request or, in the alternative, leave to reply to any response.[14] NUON Chea seeks the immediate and permanent disqualification of Judge Cartwright from Case 002.[15]

### 3.2. Co-Prosecutors' Response

9. The Co-Prosecutors submit that the NUON Chea Application is inadmissible for failing to adduce any evidentiary basis in support of the alleged grounds for disqualification. The sole support for the assertion that these informal meetings were improper is a reference to information purportedly received by the Defence from a "reliable source" who "currently wishes to remain anonymous."[16] Failure to identify this source or to provide a written statement from that source (even on a strictly confidential basis or in redacted form) cannot discharge the burden on the filing party to provide evidence in support of a motion for disqualification.[17] Nor can a complaint that Judge Cartwright did not respond to NUON Chea's previous filings on this matter satisfy this threshold, as "[i]f that were sufficient, any judge who does not respond to any frivolous filing could be subject to disqualification."[18]

10. The Co-Prosecutors further submit that Judge Cartwright is a highly qualified and experienced jurist and that a "reasonable observer would not lightly assume that she has engaged in improper conduct in violation of her judicial ethics and in contravention of her professional obligations."[19] Communications between a Vice-President, Prosecutor and/or Deputy Director of Administration are necessary and appropriate in the context of an internationalized criminal tribunal such as the ECCC, where the international Co-Prosecutor's role is not solely that of a party to proceedings.[20] The best practice of other international and internationalized courts and tribunals further demonstrates the need for mechanisms to

---

[13] IENG Sary Request, p. 15.
[14] IENG Sary Request, p. 15.
[15] NUON Chea Application, p. 9.
[16] Co-Prosecutors' Joint Response to: 1) NUON Chea's Urgent Application for Disqualification of Judge Cartwright; and 2) IENG Sary's Request for Investigation Concerning *ex parte* Communications [...], E137/4, 1 December 2011 ("Co-Prosecutors' Joint Response"), paras 9-10.
[17] Co-Prosecutors' Joint Response, paras 9-10.
[18] Co-Prosecutors' Joint Response, para. 10.
[19] Co-Prosecutors' Joint Response, paras. 16-17, 24 (noting that this reasonable observer would be aware that in international tribunals, judges have administrative functions that bring them in contact with members of the Prosecution, and would not, for that reason, doubt the impartiality of a judge; as well as features of the Civil Law system requiring contact between a judge and prosecutor).
[20] Co-Prosecutors' Joint Response, paras 20-21.

support effective administration, prudent management of resources and high-level strategic coordination between their adjudicative, prosecutorial and administrative branches.[21]

11. Regarding IENG Sary's Request, the Co-Prosecutors submit that in order to meet its burden under Internal Rule 35, the IENG Sary Defence must demonstrate a reason to believe that an individual "knowingly and wilfully interfere[d] with the administration of justice" on grounds of "a material basis or reason that is the foundation of their belief."[22] The IENG Sary Defence has failed to demonstrate a material basis to substantiate either that these meetings constitute interference with the administration of justice, or that any such alleged interference was done with the necessary intent.[23] The Co-Prosecutors therefore request the Trial Chamber to dismiss both the NUON Chea Application and the IENG Sary Request.[24]

## 4. APPLICABLE LAW

12. As the IENG Sary motion is in substance a motion for disqualification, the Trial Chamber considers this motion to have been improperly based on Internal Rule 35. The relevant provision is instead Internal Rule 34(2), which 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.

13. The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated either where a judge is actually biased, or where there is an appearance of bias.[25] 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.[26]

---

[21] Co-Prosecutors' Joint Response, para. 21.
[22] Co-Prosecutors' Joint Response, para 27.
[23] Co-Prosecutors' Joint Response, paras 28-29.
[24] Co-Prosecutors' Join Response, para. 30.
[25] *Prosecutor v. Furundžija*, Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 ("*Furundžija* Appeal Judgement"), paras 181-88.
[26] *Furundžija* Appeal Judgement, para. 189.

14. 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."[27] The ECCC jurisprudence has stressed that 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.[28] The moving party bears the burden of displacing that presumption, which imposes a high threshold.[29] In accordance with Internal Rule 34(3), such applications "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.[30] All evidence relied upon by the applicant is to be provided upon the filing of an application for disqualification.[31] Internal Rule 35 is not the proper mechanism to procure evidence in support of a motion for disqualification.[32]

15. The basis of the requirement that disqualification applications disclose at least a *prima facie* evidentiary basis is that "while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, so too would disqualifying Judges on the basis of unfounded allegations of bias."[33] Repetitive or frivolous disqualification motions filed before other international tribunals have resulted in sanction or the threat of sanction.[34]

---

[27] *Furundžija* Appeal Chamber Judgement, para. 190.

[28] 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 ("Decision on IENG Thirith Application for Disqualification"), para. 12; 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 ("Ney Thol Decision"), paras 15-17 (citing *Furundžija* Appeal Chamber Judgement, para. 196).

[29] Ney Thol Decision, para. 15; *see also Furundžija* Appeal Judgement, para. 197 (noting that professional judges are able to "disabuse their minds of any irrelevant personal beliefs or predispositions").

[30] *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 ("Nzirorera Disqualification Motion"), para. 5 (*see also Furundžija* Appeal Judgement, para. 197).

[31] Decision on NUON Chea's Application for Disqualification of Judge Marcel Lemonde, 4, 23 March 2010, para. 18 (public redacted version).

[32] *Cf.* Decision on IENG Sary's Rule 35 Application for Judge Marcel Lemonde's Disqualification, 5, 29 March 2010, paras 11-14.

[33] Nzirorera Disqualification Motion, para. 6; *see also Prosecutor v. Delalić et al.,* Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001, para. 707 (noting although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour).

[34] *See e.g. Prosecutor v. Blagojevic el. al.,* Decision on Blagojević's Motion for Clarification, ICTY Bureau (IT-02-60-PT), 27 March 2003, para. 1 (indicating that the Bureau "seriously considered" imposing sanctions pursuant to ICTY Rule 46(C) in response to a motion filed by Mr. Karnavas seeking "clarification" of a prior decision denying a motion for disqualification, adjudged to be repetitious of previous filings).

16. The international jurisprudence has elaborated norms governing *ex parte* filing in relation to judicial proceedings.[35] Where, by contrast, communication between a prosecutor and a judge is instead unrelated to the substance of proceedings in any case, *ex parte* communications have been held not to demonstrate bias or an appearance of bias.[36]

17. In relation to an allegation of bias following the refusal of an ICTY judge to respond to a request for full disclosure of that judges' association with a UN Civil Affairs advisor, the ICTY President indicated that "[the] Trial Chamber originally denied the request for further clarification of the nature of Judge Prandler's relationship with Andreev on the basis that the more appropriate course of action was for the Prlić Defence to file a motion for disqualification pursuant to Rule 15(B) of the Rules to allow the issue to be explored through proper channels envisaged by the Rules."[37] The ensuing motion was subsequently rejected on grounds that the Defence "failed to substantiate any of their claims and therefore that it is not warranted to appoint a panel to consider the Motion."[38]

18. The ECCC Code of Judicial Ethics, while emphasizing the importance of judicial independence and impartiality, does not contain any specific provision regarding *ex parte* communication.[39] The ECCC Code of Judicial Ethics recognizes that it, and not the Cambodian Code of Ethics for Judges and Prosecutors, is the code governing the conduct of international judges of the ECCC.[40]

---

[35] *Prosecutor v. Karemera et al.,* Decision on Joseph Nzirorera's Motion for unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials, ICTR Trial Chamber (ICTR-98-44-T), 18 January 2008, para. 5 (noting that "[as] a general rule, motions must be filed *inter partes*. [...] However, *ex parte* applications may be necessary when they respond to the interests of justice and when the disclosure to the other party of the information contained in the application would likely prejudice the persons related to the application."); *Prosecutor v. Karemera et. al.,* Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen, ICTR Bureau (ICTR-98-44-T), 7 March 2008.

[36] *Prosecutor v. Karemera et al.,* Decision on Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, ICTR Trial Chamber (ICTR-98-44-T), 11 February 2009, para. 6 ("the Presiding Judge's assessment of a Queen's Counsel applicant does not demonstrate any bias or appearance of bias").

[37] *Prosecutor v. Prlić et. al.,* Decision of the President on Jadranko Prlić's Motion to Disqualify Judge Árpád Prandler, ICTY President (IT-04-74-T) ("Prlić Disqualification Decision"), 4 October 2010, para. 14.

[38] Prlić Disqualification Decision, para. 30.

[39] Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia, ("ECCC Code of Ethics"), Articles 1 & 2.

[40] ECCC Code of Judicial Ethics ("Considering the hybrid character of the Extraordinary Chamber in the Chambers in the Courts of Cambodia and the need to adopt a code of ethics applying to both Cambodian and international judges, and incorporating both national and international norms").

## 5. FINDINGS

19. While agreeing with the Co-Prosecutors that the Defence motions do not meet the threshold evidentiary requirements contained in Internal Rule 34, these motions are further rejected as being devoid of merit. The Trial Chamber notes that before other international and internationalized tribunals, regular meetings between the President, Prosecutor and the Registrar are commonplace.[41] These so-called Coordination Councils ensure the effective operation and coordination of administrative activities between the three organs of these tribunals and are necessary and integral to address the unique administrative challenges faced by international tribunals.[42] In each of these tribunals, the Defence plays no part on the Co-Ordination Council, Minutes, if they are prepared at all, are not made public.

20. Contrary to their assertions, the NUON Chea and IENG Sary requests for information regarding these meetings were adequately addressed by the e-mail of the Deputy Director of Administration of 7 November 2011. This email clarified that following the advice of the United Nations Legal Counsel, the meetings between Judge Cartwright, the international Co-Prosecutor and the Deputy Director of Administration were informally modelled upon these examples from the ICTR, ICTY and the ICC, as adapted to the specific ECCC context. The ECCC lacks a Presidency as such. The ECCC Chambers are presided over by Cambodian judges, whilst the ECCC confronts certain administrative matters which pertain exclusively to the United Nations component of the court. Judge Cartwright, as the Vice-President of the ECCC Plenary Session, therefore participates in these meetings. While it follows from its hybrid nature and smaller size that the ECCC does not possess all formal structures found in the *ad hoc* Tribunals and the ICC, the Deputy Director of Administration nonetheless has functions akin to those of a Registrar before other international tribunals. All principals therefore have significant non-judicial and administrative responsibilities that extend to, amongst other things, management, mentoring, budget, staffing and high-level contact with senior UN officials, diplomats, dignitaries and donor states. These functions are necessary to ensure that the international component of the ECCC has the necessary resources and logistical and administrative support to fulfil its mandate. As clarified by this email, matters

---

[41] Rule 23*bis*, International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence (whose Coordination Councils are "composed of the President, the Prosecutor and the Registrar" and "shall meet once a month"); Regulation 3, International Criminal Court Regulations of the Court (whose Coordination Council is "comprised of the President on behalf of the Presidency, the Prosecutor and the Registrar").

[42] ICTR Rule 23*bis*(B); ICTY Rule 23*bis*(B); ICC Regulation 3(2).

under discussion at these meetings are concerned with a range of operational issues affecting the international component of the ECCC and do not concern ECCC proceedings, still less any particular Accused.

21. While meetings between the Plenary Vice-President, international Co-Prosecutor and Deputy Director of Administration are not expressly described in the ECCC Internal Rules, nor does the ECCC legal framework debar coordination by the United Nations component of the ECCC, where required. The Judicial Administration Committee, constituted by Internal Rule 19, comprises both Cambodian and international judges (some of whom are non-resident in Cambodia) and was not designed to address matters relevant solely to the United Nations component of the ECCC. Nor is this Committee vested with exclusive competence in relation to administrative oversight and coordination.

22. As the basis for judicial disqualification cannot be established by unsupported allegations of impropriety, the mere existence of informal meetings between the Plenary Vice-President, the international Co-Prosecutor and the Deputy Director of Administration does not rebut the presumption that Judge Cartwright is unbiased and impartial in the conduct of her judicial functions. The Trial Chamber therefore considers that Judge Cartwright's participation in these meetings would not create a reasonable apprehension of bias by an informed person, with knowledge of all relevant circumstances, in particular as these meetings were unrelated to substantive matters in any case before the ECCC.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**REJECTS** IENG Sary's request for investigation;

**REJECTS** the IENG Sary Defence's request that the international Co-Prosecutor be summoned;

**DENIES** NUON Chea's request for the immediate and permanent disqualification of Judge Cartwright; and

**DENIES** in consequence IENG Sary's request for a public hearing on this matter.

**Phnom Penh, 2 December 2011**
**President of the Trial Chamber**

**Nil Nonn**