

Political interference and judicial misconduct impede justice in Cambodia
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JURIST Guest Columnist Nisha Valabhji, Officer-in-Charge of the Defence Support Section of the UN Assistance to the Khmer Rouge Trials, argues that political interference and judicial misconduct in the Extraordinary Chambers in the Courts of Cambodia are matters of grave concern that require immediate investigation...

The issue of political interference in the work of the judiciary at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and its impact on the fundamental right to a fair trial has become a matter of grave concern. The ECCC is a UN-assisted court located in Cambodia and established pursuant to the Agreement between the Cambodian government and the UN [PDF], signed in 2003. Several major NGOs, the executive director of the International Bar Association, and individual commentators have addressed this issue in recent months, calling for measures to be taken.

On October 5, 2011, the *Cambodia Daily* newspaper reported Cambodian Foreign Minister Hor Namhong as saying that only Cambodia can decide how many additional suspects the Khmer Rouge tribunal will prosecute. This statement echoed similar remarks made by other high-level Cambodian government officials, including Prime Minister Hun Sen, which were reported in the local press. The foreign minister's remarks came at a critical time with Cases 003 and 004 before the ECCC.

Such remarks evince a clear and blatant disregard for the concept of the independence and impartiality of the judiciary, as well as a gravely erroneous assumption that the Cambodian government must be able to dictate the outcome of a legal process. Developments in Case 003 have unfortunately only reinforced this view. Commenting on the long-standing and deep-seated problems in the Cambodian judiciary, UN Special Rapporteur on the Situation of Human Rights in Cambodia, Surya Subedi, emphasized on October 23, 2011, that "the independence of the judiciary needs to be anchored in fundamental laws on the judiciary, which have been awaiting adoption since 1993."

A principled approach must be taken with regard to the manifold problems at the ECCC and the rule of law must be upheld. If an institution responsible for adjudicating allegations of the most serious crimes — serious violations of international humanitarian law — is subject without doubt to governmental interference, fair trial rights cannot be guaranteed in its proceedings, and any decision in any case which has political implications for the ruling government will likely be subject to political interference.

Where such interference manifests itself in judicial decisions which lack legal basis and appear to be written to force particular outcomes, and which, as in three recent opinions of the ECCC's Pre-Trial Chamber in Case 003, consistently demonstrate a split between

the national judges (who constitute a majority in every judicial chamber, in line with the Agreement) and the international judges, dangerous and undesirable legal precedents are set in the still-developing field of international criminal law. In their dissenting opinions in these recent decisions, the international judges meticulously set out what they consider to be numerous irregularities and legal errors in the work of Co-Investigating Judges Siegfried Blunk and You Bunleng in Case 003. Judge Blunk recently resigned from the court.

Tellingly, in another decision rendered on September 9, 2010, concerning a defense appeal related to requests to summon six high-level officials as witnesses in Case 002, the Pre-Trial Chamber split again on national and international lines. The minority international judges held that "no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the [Cambodian Government] may have knowingly and willfully interfered with witnesses who may give evidence before the [Co-Investigating Judges]." The dissenting international judges concluded with an appeal, stating that it was imperative that the Pre-Trial Chamber "do its utmost to ensure that the charged persons are provided with a fair trial." Further, pursuant to the court's internal rules, if a supermajority decision by the second instance chamber (such as the Pre-Trial Chamber) cannot be reached, the decision rendered in the first instance stands, thereby depriving the parties of the right to a decision on appeal.

Such a situation is detrimental to the truth-finding process and to the determination of the precise boundaries of individual criminal responsibility — a complex process in and of itself — and undermines the rights of the accused in Case 002 and the suspects in Cases 003 and 004.

While independent and impartial investigations into political interference and judicial misconduct at the ECCC should be conducted immediately, the UN should also start exploring other solutions for the court without delay. It should, for example, consider revisiting the terms of the Agreement. Or it should consider the withdrawal of cooperation and ceasing to provide assistance to the court pursuant to the provisions of Article 28 of the Agreement.

This issue also has important implications for the work of other courts in the international criminal justice system and is therefore not isolated to the future of the ECCC. It must be resolved in full accordance with the rule of law and principles set out in the UN Charter, rather than with an adherence to the current framework whose negative legacy is only too painfully obvious to see.