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Corruption Allegations at the ECCC: Fair Trial Implications

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Corruption allegations have plagued the Extraordinary Chambers in the Courts of Cambodia (ECCC) since early 2007. Reports of corruption have appeared in the national and international press and NGO reports, supported by testimony from employees at the ECCC. The reports detail an elaborate kickback system in which employees pay a portion of their monthly salaries to government officials in exchange for employment. In late summer 2008, several Cambodian staff members approached senior officials with corruption allegations that implicated Cambodian officials within the court. These allegations were referred to the UN Office of Internal Oversight Services (OIOS), which opened a confidential review in early August 2008. While the results of the OIOS report remain confidential, it is believed to have found the corruption allegations, including those implicating high-ranking officials, to be credible.

In response, both the national and international sides of the court have instituted anti-corruption measures, which have met with mixed success. In July 2008, the UN's special expert to the ECCC outlined new anti-corruption measures for the international staff, which included a reporting system reviewed by the OIOS, the appointment of an ethics officer to receive confidential complaints and provide counsel and training, and revisions to the code of conduct for staff. The Cambodian court administration took similar steps. In August 2008, the ECCC adopted a code of conduct and established a committee to deal with violations. At the same time, the Office of Administration announced the establishment of a new anti-corruption committee to resolve claims involving Cambodian staff, designated two ethics monitors to receive complaints, and established a procedure by which allegation were reported directly to Deputy Prime Minister Sok An. Most recently, in August 2009, the UN and the Cambodian government agreed to the establishment of an Independent Counsellor to address corruption concerns. The Independent Counsellor will confidentially hear corruption allegations, counsel the staff member allegedly engaging in corruption, and, if the problem continues, report the complaint to the UN and the Cambodian government.

While these developments represent significant progress, they are not sufficient to resolve previous allegations or to prevent future corruption. Current procedures do not include a mechanism to address previous complaints or to protect staff members who come forward with reports of corruption. These procedures also lack a public reporting requirement and continue to deny the OIOS the authority to conduct an investigation into corruption allegations. Already these charges have raised national and international concern and undermined the court's relations with the donor nation community. If corruption of members of the Office of Administration or judges at the ECCC continues

with impunity, it will damage the credibility of the court and threaten the impartiality and independence of the trials. This article will discuss the fair trial implications of corruption of administrative staff members and of judges at the ECCC and will present a series of recommendations.

Corruption of Members of the ECCC Office of Administration

Staff members in the ECCC Office of Administration fulfill a wide variety of roles. The Office of Administration supports the Chambers, the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges and Plenary Sessions in the performance of their functions. As such, the Office of Administration is responsible for meeting the security, physical and administrative requirements of the ECCC, serving as the official channel for internal and external communication of the ECCC, keeping a database of all case files of the ECCC, ensuring the preservation, storage and security of evidence, and coordinating the training of ECCC personnel.

Corruption of a small number of individual administrative staff members would not necessarily preclude an impartial and independent trial. ECCC core documents, ECCC jurisprudence, and international law do not mandate the independence, the impartiality, or even the appearance of either quality in members of the administrative staff. While Article 31 of the Law Establishing the Extraordinary Chambers requires only that the Director of the Office of Administration “shall be a person of high moral character and integrity.” In contrast, Article 10 requires that judges “be independent in the performance of their functions” and possess “a spirit of impartiality.” Similarly, the ECCC Internal Rules do not include procedures for the disqualification of administrative staff for conduct in violation of fair trial standards.

While the court has not ruled directly on this issue, the Co-Investigating Judges have determined that the requirements of independence and impartiality “only apply to magistrates and not to investigators.”[1] Since investigators not only fall under the supervision of the Office of Administration but also have been delegated “quasi-judicial authority,”[2] it is very unlikely that, having denied a requirement of independence or impartiality for investigators, the Co-Investigating Judges would create a similar requirement for the entire Office of Administration. This position is consistent with the standards for administrative staff at the other *ad hoc* criminal tribunals.

However, while bias on the part of a small number of individual administrative staff members is unlikely to directly impact the judicial decision-making process, widespread administrative corruption could have severe fair trial implications. Since all of the case material available to the judges is pre-processed by the administrative staff, staff members have the ability to alter case material so as to give one side an unfair advantage over the other. This would upset the adversarial balance and prevent the equality of arms, or procedural equality of the parties. If widespread administrative corruption causes a judicial decision to be based on tampered evidence, it will distort the course of justice and preclude an impartial and independent trial.

In addition to potential fair trial implications, widespread administrative corruption would impair the legitimacy of the ECCC with the domestic and international public and runs counter to the goal of setting best practice examples for the courts. As a hybrid court, the ECCC bears the burden of setting best practice examples for domestic courts. This burden is particularly relevant for the ECCC since the Cambodian judicial system is universally acknowledged to be weak, lacking in independence, and rife with

corruption. If the ECCC allows widespread administrative corruption to flourish with impunity, it will signal a tolerance or even approval of corruption. This would squander the opportunity to provide a model of a fair trial for the Cambodian legal system, legal community, and general public and would also undermine the dignity and reputation of the ECCC.

A successful response to widespread administrative corruption requires alterations to the current anti-corruption mechanisms, such as instituting a protection mechanism for witnesses and whistleblowers, increasing international oversight, and providing for a judicial remedy. While the creation of the Independent Counsellor position addresses a primary failing of previous anti-corruption mechanisms, the requirement that Cambodian staff members report corruption allegations only to national ethics monitors instead of directly to UN officials, it was not accompanied by a protection mechanism for staff members who report corruption. The kickback system is alleged to be extensive and to include high-level Cambodian officials, and staff members who have made complaints of corruption in the past have reportedly been threatened and harassed. The addition of an Independent Counsellor is unlikely to encourage staff members to report instances of corruption if there is not a system in place to ensure their protection and that of their families. In order to successfully address widespread administrative corruption, anti-corruption mechanisms must include protection mechanisms.

The ECCC should also consider the possibility of increased international oversight to address widespread administrative corruption. International criminal tribunals have had analogous issues with corruption of court staff and difficulties with senior administrative officials, but they benefit from a higher level of international oversight than the ECCC. The UN Office of Internal Oversight Services (OIOS) has been particularly effective in conducting investigations and issuing recommendations to ICTR and ICTY. In contrast, the Government of Cambodia maintains the exclusive right to respond to corruption allegations that implicate Cambodian officials without international assistance. For example, the OIOS was not permitted to conduct an “investigation” into corruption allegations at the ECCC, instead conducting a “review” to determine whether the allegations were sufficiently credible to justify a Cambodian investigation. Considering the promising record of other OIOS investigations and the inability of the Office of Administration to objectively and effectively police itself if compromised by widespread corruption, the ECCC should consider increasing international oversight, such as an official OIOS investigation or a joint international and Cambodian investigation of national staff members. At the very least, the ECCC should release the results of the 2008 OIOS review to the parties, as requested by defense counsel and the civil parties and supported in principle by the prosecution.

If administrative remedies are not sufficient to address widespread administrative corruption, a judicial remedy will become appropriate. As stated previously, widespread corruption could directly impact judicial decision-making if it becomes so severe as to alter the body of evidence to favor one side over another or if it impairs the perception of the ECCC as an independent and impartial institution. In either case, a judicial remedy could be mandated to preserve the integrity of the proceedings. Under the Internal Rules, “investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.” If widespread administrative corruption becomes so severe as to preclude a fair trial, the judges may be required to annul the proceedings for procedural defect.

Corruption of Judges at the ECCC

Corruption of the judges at the ECCC could preclude an impartial and independent trial, particularly if it affects judicial decision-making or judicial selection. Unlike administrative staff members, ECCC core documents explicitly require judges to exercise both impartiality and independence. Independence refers to the ability of a judicial decision-maker to determine a matter without improper influence from another branch of government, the parties, or another source. Impartiality is closely linked to neutrality and requires that a judicial decision-maker to approach a particular case or issue without prejudice. Impartiality has both a subjective aspect, referring to actual bias, and an objective aspect, referring to the appearance of bias. Both qualities are threatened by judicial corruption.

Corruption of the Judges at the ECCC would impair impartiality if it impacts judicial decision-making in a particular case, subjecting the judge in question to disqualification.

ECCC law provides for the disqualification of a judge in cases 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 order to meet this test, the party moving for disqualification must meet a high threshold to overcome the presumption of impartiality that attaches to judges, based on their oath and qualifications for appointment. To meet this burden, the party moving for disqualification must establish either actual or perceived bias. Perceived bias can be demonstrated under the reasonable observer test, which The ICTY Appeals Chamber established in the Furundiza Judgment and which the ECCC Pre-Trial Chamber adopted in the Judge Ney Thol decision.[3] Under the reasonable observer test, there is an unacceptable appearance of bias if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. The reasonable observer test is consistent with similar tests for bias in international and domestic legal systems.

While the reasonable observer test does not require the establishment of actual bias, the bias apprehended must have a nexus to the case at hand and may not be a far-fetched and difficult proposition. Under current international standards, in order to succeed on an application for disqualification, the motion must demonstrate that it is possible for a reasonable observer, properly informed, to reasonably apprehend that participation in a kickback system in exchange for employment would create and “existing or potential financial temptation either to acquit or convict this Applicant, or all defendants from his faction, or all defendants.”[4] Based on the current allegations, a judge who engages in a kickback system in exchange for employment but without clear pressure to favor one side over another in a particular case is unlikely to face disqualification.

While judicial corruption is unlikely to preclude impartiality unless it directly affects judicial decision-making, judicial corruption is likely to impair independence by compromising the judicial selection process or preventing judges from exercising independence in the performance of their functions. Cambodian judges at the ECCC are appointed by the Supreme Council of the Magistracy, which consists of nine members, appointed by the King, and has been criticized in the past for functioning as an auxiliary of the ruling party. The first article of the United Nations Transitional Authority in Cambodia (UNTAC) Code incorporates the Basic Principles on the Independence of the

Judiciary (“Basic Principles”), which require that any method of judicial selection shall safeguard against judicial appointments for improper motives. If judicial selection is affected by the kickback system, the judicial appointments would be based on improper motives and could discriminate against judges without the financial assets or political connections necessary to participate in the system. This would be in violation of the Basic Principles.

In addition to compromising the integrity of the judicial selection process, a kickback system could threaten the independence of the court by granting the government undue influence over judicial decision-making. If judges participate in the kickback system in order to gain judicial appointments, they could feel beholden to their government regardless of whether payments continue after appointment to the ECCC. If judicial decision-making is affected, it would impair the ability of judges to be independent in the performance of the functions. Additionally, it would upset the delicate balance between judicial independence and state control over appointment. While all tribunals struggle with this balance, without exception all international tribunals require that judges exercise and maintain independence in the functions of their office.

As with widespread administrative corruption, if judicial corruption precludes judicial independence, it would fail to set best practice examples for domestic courts. Cambodia’s authoritarian legacy created a domestic legal system where courts served as instruments of the state. Today, this situation is compounded by a countrywide lack of resources and legal training so that the Cambodian judiciary suffers not only from problems of capacity, but also from a negative attitude towards judicial independence and impartiality. The ECCC offers a way to demonstrate the importance of independent and impartial trials while providing direct legal training and trial experience to the Cambodian court actors involved. If judicial corruption at the ECCC were to compromise independence of the court, this would squander the opportunity to set best practice examples for domestic courts. If judicial corruption continues with impunity, it could further weaken legal development efforts by sending a message that the ECCC condones corruption.

Since judicial corruption could preclude an independent trial by compromising judicial selection and granting the government undue influence over the proceedings and would fail to set best practice examples, efforts should be made to address and prevent judicial corruption. While the ECCC core documents do not provide for a procedure to remove judges other than through disqualification, the parties that appoint the judges could seek their removal. The Cambodian Constitution provides that the King shall be “the guarantor of the independence of the Judiciary”[5] and, upon proposals by the Supreme Council of the Magistracy, the King shall sign decrees appointing, transferring or removing judges.[6] If the judicial selection process is in violation of the Basic Principles or if the judges are not independent in their functions, the King should seek their removal. Donor nations could encourage such action by withholding funding or through public pressure with national or international attention to the issue.

Additionally, if judicial corruption were to continue and was sufficient to compromise the independence of the court, a judicial remedy could be mandated in order to preserve the integrity of the proceedings. Under the Internal Rules, “investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”[7] If judicial corruption becomes so severe as to preclude an independent trial, the judges may be required to annul the proceedings for

procedural defect.

The goals of the ECCC are ambitious: not only to “seek justice for the victims and for the entire Cambodian people, and to prevent the recurrence of genocide,”[8] but also to “assist the wider process of legal and judicial reform” in Cambodia.[9] If corruption of members of the Office of Administration or judges at the ECCC is permitted to flourish with impunity, it will undermine these goals and threaten the independence and impartiality of the court. Corruption allegations have already overshadowed the significant legal successes of the court and to allow them to continue would be a disservice to Cambodia and its people.

[1] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for Information regarding an eventual conflict of interest (Jan. 2008); Under Cambodian Law, both judges and prosecutors are considered magistrates and are subject to the supervision of the Supreme Council of Magistracy, unlike administrative staff. UNTAC Code, art. 2 (“Judges and prosecutors both are magistrates.”).

[2] Nuon Chea Defense Team, Case No: 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 19 (March 27, 2009).

[3] Prosecutor v. Furundiza, Case No. IT-95-17/1-A, Judgment, Appeals Chamber, ¶ 189 (July 21, 2000) (quoted in Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyer’s Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, ¶ 20 (Feb. 4, 2008)).

[4] Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Geoffrey Robertson, ¶ 24 (March 13, 2004).

[5] The Constitution of the Kingdom of Cambodia, art. 113.

[6] *Id.*, art. 21. *But see:* art. 114: (“Judges shall not be dismissed. The Supreme Council of the Magistracy shall take disciplinary actions against any delinquent judges.”).

[7] Internal Rules, Rule 48.

[8] Sok An, *The Khmer Rouge Tribunal: What It Means for Cambodia*, Open Society Justice Initiatives: The Extraordinary Chambers, Apr. 18, 2006, 28, http://www.soros.org/resources/articles_publications/publications/justice_20060421/jinitives_200604.pdf

[9] <mid://00000863/#_ftnref9> *Id.*, at 29.