



**Judging the Khmer Rouge Tribunal**  
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Nobody would accuse the Khmer Rouge tribunal—the Extraordinary Chambers in the Court of Cambodia (ECCC)—of moving with undue haste. Nevertheless, the court in Phnom Penh is on the verge of beginning a trial of one of its five defendants, that of Kaing Guek Eav, alias Duch, the former commander of an infamous torture facility.

Unfortunately there is little reason to rejoice. Despite years of ineffectual handwringing by the U.N., donors and monitors, the ECCC has failed to adequately address persistent accusations of corruption and political interference. The following four steps are the minimal prerequisites for the ECCC to regain a semblance of legitimacy before the trials officially start this month:

**1) Limit opportunities for political interference in judicial decision making.**

Fears about political influence in the ECCC's work were heightened in December last year when Cambodian co-prosecutor, Chea Leang, would not agree to the investigation of additional suspects beyond the five named defendants. The reasons she provided to justify this position had nothing to do with the sufficiency of the evidence or the legal basis for additional investigations, but were political in nature and aligned with the long-held views of the Cambodian Prime Minister who has long wanted to limit the trials to his political enemies and resisted efforts which might see people in positions of power (or whose patrons are) brought before the court.

The Pre-Trial Chamber is set to resolve the dispute between the international and Cambodian co-prosecutors, and has an opportunity to visibly assert the court's independence. Under the ECCC's rules, this decision is set to be made in secret and it is unclear whether its decision would be made public. Judges need to change this rule, and ensure the court operates with total transparency on a question which will go a long way towards determining whether the court is seen as one which is credible and not simply a tool of the government, in the same way that domestic courts are often viewed. At a minimum, the ECCC must allow domestic and international monitors to witness this secret proceeding.

**2) Create an independent investigation mechanism for accusations of wrongdoing.**

In June 2008, Cambodian staff brought to the UN specific complaints of corruption. These complaints followed a call by watchdog NGO Open Society Justice Initiative for

an investigation into allegations that ECCC Cambodian staff had to pay kickbacks in exchange for their jobs. In response to the U.N. report, which reportedly found merit in the complaints in its initial review, apparently asked the Cambodian government to investigate. However, with reports of retaliation against suspected whistleblowers—and a history in Cambodia of threats against those who challenge corrupt practices, a national investigation is unlikely to inspire confidence in local staff to come forward.

On February 23, a high-level U.N. delegation met with Cambodian Deputy Prime Minister Sok An, and issued a joint statement that an agreement has been reached involving continuing parallel domestic and international mechanisms to investigate corruption. The statement was ambiguous and unclear as to specifics. In so far as it appears to rely on Cambodian staff being willing to report wrongdoing to ethics monitors appointed by the Cambodian tribunal management, the parallel structure would seem to chill rather than encourage such reports. The joint statement reeks of political compromise.

Preferable to parallel mechanisms would be an entirely independent procedure for investigating corruption at the ECCC—one that does not rely for its success on the honest participation of Cambodian officials. One solution is an auditing model, which has already been used in a limited fashion at the tribunal. An independent auditing company acceptable to both the U.N. and the Cambodians could conduct a detailed investigation with the specific mandate of identifying corrupt practices. The initial audit report would be circulated to the U.N. and the Cambodian government, senior ECCC management, and donor nations, with only an executive summary made public. Subsequent quarterly audits would, however, be published in full. This would provide an incentive to quietly “clean house” of the corrupt individuals and practices identified in the first report. Absent cooperation on this matter, however, the U.N. should make public its prima facie review of the June 2008 allegations, suitably redacted to protect the identities of named individuals.

### **3) Human rights monitors, NGOs and reporters must be allowed to keep their sources confidential.**

Civil society, including human rights monitors and journalists, often play a critical role in calling out wrongs and abuses of power by institutions funded by public money. While this role is often a necessary pre-requisite to action—like investigations—their unique role must be respected. This includes ensuring that their ability to protect their sources—those who come forward with information about potential wrongdoing—remains intact. With the ECCC, a real danger exists that NGOs and other monitors may be compelled in the course of the legal proceedings at the tribunal to identify their confidential sources. Such disclosure would undermine the tribunal by imperiling the safety of sources and chilling potential critics and whistleblowers.

Such a testimonial privilege need not be absolute. Rather, a qualified privilege should be recognized in those situations where the communications were made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure, and that confidentiality is essential to the nature and type of the relationship with the confidant. The risk of being compelled to reveal sources may result in NGOs and

monitors choosing to leave Cambodia or face a jail sentence rather than be forced to identify their sources. The departure of such groups would be a disaster for anyone who values the watchdog role such groups perform.

**4) Ensure adequate whistleblower protections for those reporting wrongdoing.**

In those situations where a whistleblower is willing for her identity to be made public, or where her identity becomes known without her permission, there must be a clear guarantee that such persons will be free from all forms of retribution. Absent this assurance, those brave individuals who have come forward with allegations of corrupt practices lay dangerously exposed. These protections must carry the full weight of the international community – empty promises from the Cambodian government alone to not persecute whistleblowers will ring entirely hollow without international mandate.

The choice before the tribunal is quite clear: Proceeding with the trials without adequately addressing the allegations of corruption and political interference risks tainting the entire process and casting a shadow over any legal outcomes. That would be a disservice to the people of Cambodia—for whom the ECCC should provide an exemplar of a court operating to international standards. It would also be a disservice to the future of international justice, and would establish a precedent of U.N. acquiescence to regimes seeking to profit from and control internationally-backed tribunals.