

Analysis of the Rules of Detention at the ECCC

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The management of the detention facilities of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is structured differently than at other international criminal courts. While those courts delegate responsibility for this area to their main administrative body, the Registrar, the ECCC gives very little responsibility to its main administrative body, the Office of Administration (the OA). Instead at the ECCC, the office in charge of most administrative decisions about detention conditions is the Office of Co-Investigating Judges. This is potentially problematic due to the Co-Investigating Judges' role in leading the investigations of the detainees. The fact that an investigative body, the Office of Co-Investigating Judges, is wielding administrative authority raises questions about that body's ability to keep its investigative functions from biasing its administrative decisions.

The process in place to put a check on discretionary decisions made by the Co-Investigating Judges concerning detention conditions highlights this concern. Although there is a legal review mechanism in place, it differs from the mechanisms at other courts. On one hand, the Pre-Trial Chamber (PTC) of the ECCC has recently found a broader basis than is found at other courts to review administrative decisions. This could potentially bring greater scrutiny to decisions by allowing more to qualify for judicial review. On the other hand, the PTC applies a higher standard of review for Co-Investigating Judges' decisions than is used at other courts for administrative decisions, and does not permit appeals. This makes it more difficult for detainees to obtain a reversal of such decisions at the ECCC. Taken together, it is unclear if these differences are better or worse for the rights of the detainees.

There is little mention in the ECCC legal framework of a procedure to review a Co-Investigating Judges' administrative decision. The only mention of review in the Detention Facility Rules deals solely with telephone call monitoring.[1] However, in three public decisions so far, the Pre-Trial Chamber has found that it has broad authority to review decisions concerning other administrative detention issues as well using texts such as the Detention Facility Rules and the Internal Rules as the basis for review.[2] However, the ECCC has a different system of review and a different standard of review than international courts.

Although international courts allow judicial review by their Trial Chambers for administrative decisions as well, the basis for such review at the International Criminal Tribunals for Rwanda and the Former Yugoslavia (ICTR and ICTY) is limited to fair trial issues. However, other systems allow administrative review by the president whereas at the ECCC only a judicial chamber, specifically the Pre-Trial Chamber, appears to have the power to review such decisions by the Co-Investigating Judges. This lack of

administrative review likely makes the process slower at the ECCC because any review has to go through a Chamber that is busy with other judicial issues as well. Additionally, unlike at international courts, no party can appeal the Pre-Trial Chamber's review of an administrative decision.[3]

Another difference between the ECCC and international courts is the standard of review for administrative decisions. The Pre-Trial Chamber has used a higher standard of review of Co-Investigative Judges' administrative decisions than the one used by the Trial Chambers at international courts. Instead, it uses a standard similar to the one used by the Appeals Chamber at the ICTY and the ICTR. As a result, the Co-Investigating Judges are treated not like an administrative organ, such as a Registrar at the other tribunals, but as a court of first review. A high standard is applied to its decisions, allowing a review of the legal interpretation and the facts only when they are patently incorrect. At other courts, the standard for the initial review of an administrative decision is lower, for example allowing review if there was consideration of irrelevant material or failure to consider relevant material.[4] Thus, the first-level review of a Co-Investigating Judges administrative detention decision at the ECCC is treated like a second-level review at international courts. This conflates the Co-Investigating Judges' administrative and judicial roles: they are being treated as a judicial body for such decisions, even though they are acting in an administrative capacity similar to a Registrar.

In sum, there appear to be three main structural differences between the ECCC and international courts in how they handle review of administrative detention issues: 1) the ECCC Pre-Trial Chamber has a potentially broader basis for reviewing decisions made by the Co-Investigating Judges in their administrative capacity because it is not limited to consideration of fair trial issues; 2) reviews made by the Pre-Trial Chamber can apparently not be appealed whereas international courts allow a second review where fair trial rights are impacted; and 3) the Co-Investigating Judges' administrative decisions are reviewed using a standard typically applied to a judicial, not an administrative, body.

Despite the unique structural differences of the ECCC, specific procedures established in the Detention Facility Rules are mostly similar to international criminal courts around the world. However, in three areas, the rules differ substantially from those applied at international courts, in some cases giving the ECCC's Co-Investigating Judges more power than the Registrar in the other systems.

The first area where there is a difference is the handling of packages to the facility. Generally, international criminal courts have allowed the Chief Detention Officer to solely oversee the censorship of packages without notifying the Registrar or other officials.[5] The ECCC's regulations do not deviate greatly from international courts in terms of general restrictions on opening packages, with both the ECCC and international courts allowing officials great latitude in interfering with a detainee's correspondence. Unlike international courts though, the ECCC uses regulations promulgated by the Co-

Investigating Judges' to guide the Chief of Detention in its determination of the opening of packages.[6] Other courts solely grant that authority to the head detention official on premises. The lack of public access to the regulations put forth by the Co-Investigating Judges makes it difficult to assess in comparison with international courts, which although they give full discretion to the officers, nominally limit their ability to search to security concerns.

The second area deals with phone monitoring. The ECCC's Detention Facility Rules appears to be consistent with international courts in this respect, and may even conform to the higher standard required by the EHCR that requires accessible and foreseeable regulations with regard to monitoring.[7] Nevertheless, this is an area where the Co-Investigating Judges' dual role as both an investigative and administrative office creates a potential conflict of interest. Unlike at international courts, at the ECCC there is no purely administrative intermediary listening into or reviewing the phone calls. Additionally, both privileged and non-privileged phone calls can be monitored.[8] Therefore, the Co-Investigating Judges (and in some cases the Chambers) can under certain circumstances listen to potentially privileged information relevant to the case under consideration even though their primary role is not administrative, but judicial: conducting the investigation and compiling evidence.

The third area where the differences in the rules and structure of the ECCC might be troubling concerns the detainee's records. Compared to international criminal courts, the ECCC gives the detainees less control over their records and allows more persons to have access to records, including confidential personal records. The ECCC's Co-Investigating Judges, unlike Registrars at international courts, even have the power to prevent the detainee from accessing their own records. Additionally, the Co-Investigating Judges and the ECCC Chambers can automatically access books and records at the facility and have more power to determine who can access medical records than most Registrars.[9] International courts have been cautious about keeping records, particularly confidential medical records, solely in the hands of administrative and medical officers.[10] None of the international criminal courts allow investigative or judicial bodies automatic access to records. For this reason, the ECCC's rules again appear to create a conflict between the Co-Investigating Judges administrative role and their investigative role. There are conceivable scenarios where they could improperly use that information during their investigation. The propriety of making available records that contain sensitive information about the detainees to the officials investigating them could be questionable. Although there are reasons for a solely administrative body to be aware of such information, it is harder to justify allowing those in other positions to be granted access to such private documents. By giving the Co-Investigating Judges the primary administrative responsibility for detention, the ECCC has made the separation between administrative and judicial roles impossible.

The ECCC Detention Facility Rules give the Co-Investigating Judges a large role to play when it comes to detention facility matters. Although they are not the only authority

managing the detention facilities, they have the power to make a majority of the discretionary administrative decisions. In the core ECCC documents, the Co-Investigating Judges were not created to run an administrative office, but rather to head an investigative legal office. As a result there is some line blurring between their two roles. This blurring is found in the process of reviewing of the Co-Investigating Judges decisions. The Pre-Trial Chamber applies a standard of review to decisions of the Co-Investigative Judges as though they were a legal body, even when they are making administrative decisions related to detention. The lack of oversight by an administrative official such as a President over the Co-Investigating Judges' decisions also means that any review has to go through a slower judicial process, even when it does not implicate fair trial rights.

Additionally, the fact that the Co-Investigative Judges' administrative duties allow them access to the detainee's files, telephone conversations, and correspondence potentially creates a conflict of interest with their investigative role. Although no conflict issues have been publicly brought to light, the overlap does raise questions of the Co-Investigating Judges' ability to act impartially and draw a strict line between their administrative functions and their primary investigative duties.

The full version of this article is available at
http://www.dccam.org/Abouts/Intern/Wang_analysis_of_Rules_of_Detention.pdf

[1] ECCC, Detention Facility Rules, R. 30(9) (2008).

[2] See Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, Case No. 002/19-09-2007-ECCC/OCIJ (PTC05), ¶ 10 (Pre-Trial Chamber, Mar. 21, 2008); Nuon Chea's Appeal Concerning Provisional Detention Conditions, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09). ¶ 10 (Pre-Trial Chamber, Sept. 26, 2008); Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, Case No. 002/19-09-2007-ECCC/OCIJ (PTC64), ¶¶ 17-18 (Pre-Trial Chamber, June 11, 2010).

[3] Article 20, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

[4] Prosecutor v. Théonete Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, ¶ 37 (Trial Chamber I, Jan. 19, 2005) (citing *Kvocka et al*, Case No. IT-98-30/1-A at ¶ 13).

[5] International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 59 (rev. 2005); and International Criminal Court, Regulations of the Court, Reg. 75(2), 92 (2004); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 59 (1998).

[6] ECCC Detention Facility Rules, R. 14 (2008).

[7] Peers v. Greece, App. No. 28524/95, ¶ 84 (ECHR, Apr. 19, 2001), <http://www.echr.coe.int/eng>
<wmailhtml:%7b8C083D16-67D6-4B7B-A101-60C8C839DE8A%7dmid://00000152/!x-
usc:<http://www.echr.coe.int/eng>> .

[8] ECCC Detention Facility Rules, R. 40 (2008).

[9] ECCC Detention Facility Rules, R. 4, 5 (2008).

[10] International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 34(D) (rev. 2005); International Criminal Court, Regulations of the Registry, Reg. 156 (2006); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9 (1998); Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 19 (amended 2005).