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Making Sense of the Pre-Trial Chamber's Second Decision on an Appeal About Alleged Political Interference

By Professor David Scheffer, Director of the Center for International Human Rights, Northwestern University School of Law

On September 9, 2010, the five-judge Pre-Trial Chamber ("PTC") of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") failed to achieve a super-majority vote (of four judges) for a finding of error in the earlier determination by the Co-Investigating Judges not to conclude that political interference had occurred in the pre-trial attempt by Nuon Chea and Ieng Sary to summon top government witnesses for testimony. (See my earlier blog, co-authored with Michael Saliba, entitled, The Authority of the Co-Investigating Judges to Call for Witness Testimony (October 13, 2009).) The two charged persons hoped to discover from such witnesses exculpatory evidence in their cases relating to the anticipated Trial 002, which may begin in 2011. The three Cambodian judges on the PTC dismissed the Appeal by the two charged persons, which means that, at least for the time being, the attempt to summon the six witnesses fails and some long-festering charges of political interference by the Cambodian Government in the work of the ECCC will not be further investigated by either the Co-Investigating Judges or the PTC.

The two international judges on the PTC filed a strong dissent, arguing, "In surveying this material [supporting the allegations of possible interference with the administration of justice] we are of the view that no reasonable trier of fact could have failed to consider that the [relevant] facts and their sequence constitute a reason to believe that one or more members of the [Royal Government of Cambodia] may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs….The comment by [government spokesman] Khieu Kanharith ["that [the] government's position was that [the six government officials] should not give testimony"] satisfies us that there is a reason to believe he, or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge."

It would be unfortunate if this outcome in the PTC fuels criticism of the ECCC as a structurally imperfect judicial institution, the integrity of which is somehow being undermined by alleged political interference. The September 9th decision did not arise from the mere existence of the super-majority vote rule in the governing law of the ECCC and it did not result from a unanimous view about the allegations of political interference by all of the engaged international judges. As sympathetic as I am to the dissenting joint opinion of International Judges Catherine Marchi-Uhel and Rowan Downing, the outcome in this matter originates with the final judgment of the International Co-Investigating Judge, Marcel Lemonde, and the plausible, albeit arguable, conclusion reached by the Cambodian judges on the PTC of the nature and consequence of Khieu Kanharith's provocative statement in the Phnom Penh Post on October 9, 2009.

The dismissal of the Appeal by the PTC has nothing to do with the merits of the super-majority rule. Three out of five judges (a simple majority) decided to dismiss the Appeal of Nuon Chea and Ieng Sary. For those sympathetic with a conventional majority vote standard in judicial decision-making rather than the existing super-majority vote standard of the ECCC, they have to acknowledge that the PTC conformed to the majority vote standard (with a 3 to 2 vote resulting in dismissal). There was no majority view, much less no super-majority view, to uphold the Appeal of the two charged persons. The real issue is whether the original structure of the ECCC, with a majority of Cambodian judges and a minority of international judges in each chamber, including the PTC, was the right formulation for the ECCC. That was a long negotiated issue between the Cambodian Government and the United Nations lawyers in the 1990s, but in 2000 it was agreed that there would be a majority of Cambodian judges and a minority of international judges in all of the ECCC chambers but guided by the super-majority vote rule. Otherwise, there simply never would have been an ECCC.

To repeat, even if the ECCC had been originally designed to have a voting rule requiring only a majority of judicial votes for a decision, the same result would have emerged from the PTC on September 9. The only possible way to have avoided the September 9th result would have been either a) two Cambodian judges willing to side with the two international judges, or b) a differently designed PTC structure of a majority of international judges and a minority of Cambodian judges, the existence of a majority vote rule, and a good guess that all of the international judges would have favored the views of Judges Marchi-Uhel and Downing in the existing PTC and voted affirmatively to uphold the Appeal. But the latter is a structural issue that one can only speculate about as a "what if" scenario, not one relevant to the structural composition of the PTC today and the super-majority rule that exists today.

Another reality in this decision is that the three Cambodian judges relied heavily on the fact that both the Cambodian and International Co-Investigating Judges agreed to reject the investigative request of the charged persons during their second review and they apparently found no political interference requiring action under Internal Rule 35(1) of the Court. Thus it was an international judge who, although supportive initially of bringing the witnesses before the court, joined with his Cambodian counterpart in the final analysis to deny the investigation—a joint decision that the dissenting international judges of the PTC strongly condemn. The International Co-Investigating Judge made a final decision that was aligned with his Cambodian colleague. The international judges on the PTC criticize the "repeated failure of the CIJs [including the International Co-Investigating Judge] to act," thus necessitating intervention by the PTC.

The three Cambodian judges of the PTC note in their separate opinion on September 9th that earlier, on June 8, 2010, the PTC had determined that the Co-Investigating Judges had erred in their interpretation of Internal Rule 35 and committed an error of law, and ordered them to "reconsider whether or not an investigation should be conducted, in light of the correct interpretation [of Internal Rule 35], into comments made by those named in the Request and others in the RGC that may have impacted upon the ability or willingness of those witnesses summoned by the International Co-Investigating Judge to participate in interviews." The Cambodian judges of the PTC rely heavily on the subsequent second review by the Co-Investigating Judges and those judges' unanimous decision not to order further investigations. And the three Cambodian judges on the PTC make the reasonable, though arguably unconvincing argument, that a further review of some of the evidence persuaded them of the wisdom of the Co-Investigating Judges' second decision not to investigate.

Their heavy reliance on the reasoning of the Co-Investigating Judges, one of whom is an international judge, might have been differently influenced if the International Co-Investigating Judge had held otherwise during his second review about the merits of a further investigation, and thus ordered such an investigation. For under that scenario, there would have resulted an order to investigate alleged governmental interference and the resulting disagreement between the Cambodian and International Co-Investigating Judges would have been subject to the super-majority rule if the PTC had been compelled to examine the impasse. The Cambodian judges on the PTC thus would have been unable to overturn the International Co-Investigating Judge's decision to proceed with the investigation if the two international judges on the PTC had held firm in the views they expressed on September 9th. (See Internal Rule 72(4)(d).) But those are not the facts that transpired.

Certainly the dissenting opinion by the two international judges of the PTC is a healthy sign that the strong arguments advanced by those judges are being transparently demonstrated even though such arguments did not prevail at this stage of the proceedings. It is always possible that the Trial Chamber or even the Supreme Court Chamber in Trial 002 will have an opportunity to revisit the issue and be persuaded by the dissenting judges' views.

Without knowledge of all of the evidence, it is difficult to say whether the court's structure has stood up to the political forces around it so far. That is why there remains merit to the investigation sought by Nuon Chea and Ieng Sary and by the international judges of the PTC. No one knows with certainty whether the sought-after witnesses in fact were influenced by Khieu Kanharith's statement that they refuse to appear. But the judges have ruled, first unanimously by the Co-Investigating Judges and then by the majority view of the PTC judges, not to pursue the matter. They offer a plausible albeit arguable interpretation of Kanharith's statement. I would not conclude that is a fatal defect in the court's structure by any means, but it may be fairly regarded as a flawed decision.

As a comparative note, I might add that in the United States, we are constantly astonished by the judgment of a bare majority of judges in some federal and state cases and wonder how in the world they ever arrived at such seemingly unfair and poorly reasoned judgments. We marvel at the wisdom of the dissenting judges, whose views sometimes prevail before the Appeals Courts or the U.S. Supreme Court. But we do not typically question the structure of our courts, even though, for example, some elected state judges may appear influenced by corporate interests that supported their elections.

The PTC second decision on September 9th is of profound importance and doubtless will invite further scrutiny in the months ahead. So far, the ECCC has acted within its mandate and provided reasoned decisions and dissents in the matter. In my view, the final chapter on this issue has not yet been written.