

An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia

Christopher Dearing, DC-Cam Legal Associate Summer 2008
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International law recognizes that everyone accused of a crime has a right to a fair, independent, and impartial trial. This principle forms the bedrock of democracy and it is every court's duty to inspire confidence in its judgments by adhering to these principles.¹ From its birth, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has committed itself to these values. For example, the Court's Internal Rules provide that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties"; every person "shall be presumed innocent as long as his/her guilt has not been established"; and ECCC judges shall recuse themselves in the event that they have or have had a personal or financial interest in the case or an association which might objectively affect his or her impartiality or "give rise to the appearance of bias."

Notwithstanding these provisions, a review of the Court's circumstances and its pre-trial decisions causes one to wonder how history will judge the ECCC. Every court must suffer public critique of its independence and impartiality. Informed criticism is the hallmark of a vibrant democracy. And it is with this principle in mind that this article analyzes three general areas of ethical concern at the ECCC: (1) corruption, (2) bias, and (3) the presumption of judicial impartiality.²

I. Corruption

Allegations of corruption surrounding the ECCC raise concerns that demand the international community and the Cambodian government's utmost attention.

The starting point for these allegations is the Cambodian legal system and culture, around which allegations of and concerns for corruption abound. According to the Berlin-based organization Transparency International, out of 180 countries, in 2007 Cambodia ranked among the highest — 163rd — in terms of government corruption.³ And according

¹ See, e.g., *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment, ¶ 182 (Appeals Chamber, 21 July 2000) ("Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society."); *Joseph Kanyabashi v. Prosecutor*, ICTR-96-15-A, 15 (Appeals Chamber, 3 June 1999) (regarding the real danger or likelihood of a lack of independence and impartiality, "[t]he issue is one of public confidence in the system of administering justice").

² *Prosecutor v. NUON Chea*, Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 15 (Pre-Trial Chamber, 4 February 2008) (stating that the presumption of independence and impartiality derives from the "oath to office and the qualifications for [his] appointment" on the part of Judge Ney Thol).

³ 2007 Transparency International Corruption Perceptions Index, at <http://www.infoplease.com/world/statistics/2007-transparency-international-corruption-perceptions.html> (2007) (drawing on 14 polls and surveys from 12 independent institutions, which gathered the opinions of businesspeople and country analysts).

to a World Bank study, “[W]hen private citizens have contact with the courts, there is a 68 percent chance that they will have to pay a bribe.”⁴ Given Cambodia’s status as a developing country and its relatively recent emergence from a violent past, this is not altogether surprising. One source states that criminal justice receives only a fraction of a percent of the national budget and judges are paid as little as \$20 per month.⁵ Also not surprising is the negative effect that such corruption has on the public’s confidence in their legal system.⁶

Corruption in Cambodia reportedly works in many ways. National court staff (and allegedly sometimes even judges), are said to obtain their position with the understanding that they will pay money to their sponsor. Candidates seeking a desirable government position solicit a loan from third-parties or sometimes the hiring agent to obtain or rather purchase a desired position. A financial obligation then exists informally between the employee and the hiring agent or third-party and can sometimes extend over long periods of time, depending on the type of employment and the employee’s personal situation. This practice raises serious questions for the independence of the legal system as a whole. Not surprisingly, it has been alleged that this culture has infected the ECCC — if not its actual independence then at least its appearance of independence in the public’s eyes.

In 2006, allegations surfaced that Cambodian staff of the ECCC were required to give part of their salaries to their bosses.⁷ On January 31, 2007, the Khmer-language paper *Voice of Khmer Youth* published a story claiming that “Cambodian ECCC officials — including judges — were paying 30 percent of their salaries to government officials to secure their positions” and the Open Society Justice Initiative called for an investigation and was temporarily banned from the office of the Court’s head administrator, Sean Visoth.⁸ Unrelated to these developments, the United Nations Development Program (UNDP) — the UN body responsible for dispensing left over UNTAC mission funds to the Cambodian-administered side of the Court — brought in Cadide Consulting, a Malaysia-based audit company to conduct an internal audit and performance review between January and March of that year.⁹ The internal audit report was shared with the Cambodian side, but it was not initially published due to its sensitive nature. With regard to the kick-back allegations, the report stated that because the allegations of payments

⁴ See Frontline World, “Battambang: The Judge” (October 2002), at <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>.

⁵ Sylvia de Bertodano, *Problems Arising From the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, 4 J. INT’L CRIM. JUST. 285, 286 (2006).

⁶ See INSEAD Business School Census Results (2007), available at <http://www.insead.edu/v1/gitr/main/analysis/showcountrydetails.cfm?countryid=319®ionid=26> (calculating country score on the basis of responses to the question, “is the judiciary in your country independent from political influences from members of government citizens or firms? 1 = No: heavy influence; 7=Yes: Entirely Independent. Cambodia ranked 114th out of 127 countries listed. The average rating listed was 2.41 for 2007).

⁷ United Nations Development Programme, “Update on UNDP Audit of the ECCC” (Mar. 12, 2008), available at http://www.un.org/kh/undp/index.php?option=com_content&task=view&id=127&Itemid=68.

⁸ See Cat Barton, “Kickback Claims Stain the KRT,” Phnom Penh Post (Feb. 23 – Mar. 8, 2007), available at <http://www.iilj.org/courses/documents/PhnomPenhPostArticleonCourtKickbackAllegations.pdf>.

⁹ UNDP Update, *supra* note 7.

pertained to persons beyond UNDP's mandate, a full investigation had not been conducted into the allegations.¹⁰

In a subsequent public statement on the audit, the head of the UNDP office in Cambodia said that "there has never been any issue with regard to the management of the ECCC's financial resources" and that there were "no questionable financial transactions, no misallocated resources, and no incomplete or missing documentation in support of disbursements made by the ECCC."¹¹ Nevertheless, key findings of the audit included:

- Staff hired without meeting the minimum job requirements;
- Low response rate to job vacancy announcements;
- Short-listing of applicants and interview of candidates not properly documented;
- Discrepancies in the selection of candidates;
- Weaknesses in the performance evaluation process; and
- Ineffective monitoring and oversight by the project's board.¹²

Kick-back allegations emerged again in 2008, and on August 6, 2008, UNDP announced that it was suspending payment of the funds it is responsible for transferring to the Cambodian side of the Court.¹³ The allegations were submitted to a U.N. official in Cambodia and were reviewed by the U.N.'s oversight and investigative services. On August 13, Keo Thyvuth, the Cambodian chief of personnel, was removed from his office. Tribunal press officer Reach Sambath stated that Keo was "transferred back to the Council of Ministers" but declined further comment.¹⁴ Helen Jarvis, head of public affairs for the Cambodian side of the Tribunal, claimed that it was a routine rotation, suggesting that it had nothing to do with the allegations.¹⁵

Cambodian officials consistently deny the kick-back allegations and on August 19, the head Cambodian administrator at the Court, Sean Visoth, pledged his resignation if any corruption allegations were proven true.¹⁶

The Tribunal has set up an instrument for reviewing such claims. Tribunal spokeswoman Helen Jarvis and one of the Court's judges, Kong Srim, President of the ECCC, head this new corruption watchdog group.¹⁷ However, because the committee is made up of high level Cambodian administrators at the ECCC, who may have a conflict

¹⁰ United Nations Development Programme, "UNDP Statement – Cambodia" (Sept. 25, 2007), available at <http://content.undp.org/go/newsroom/2007/september/undp-statement-cambodia-20070926.en.jsessionid=axbWzt...?categoryID=998963&lang=en>.

¹¹ Jo Scheuer, "UNDP Statement on the ECCC Resources Management Review" (Apr. 25, 2008), available at http://www.un.org.kh/undp/index.php?option=com_content&task=view&id=170&Itemid=68.

¹² UNDP Statement – Cambodia, *supra* note 10.

¹³ See Ker Munthit, "Cambodian Genocide Tribunal Faces Allegations," Wash. Post. (Aug. 6, 2008).

¹⁴ "Chief of Personnel Removed From KRouge Court," Macau Daily Times (Aug. 13, 2008), available at http://www.macaudailytimesnews.com/index.php?option=com_content&task=view&id=14379&Itemid=32

¹⁵ *Id.*

¹⁶ "Cambodian Tribunal Denies Corruption Charges," Bangkok Post (Aug. 19, 2008), available at http://www.bangkokpost.com/breaking_news/breakingnews.php?id=129778.

¹⁷ Vietnam News Agency, "Tribunal Defines Time for Complaints Against Khmer Rouge" (Aug. 16, 2008), available at <http://www.vnagency.com.vn/Home/EN/tabid/119/itemid/263403/Default.aspx>.

of interest, it does not have the appearance of impartiality.¹⁸ Moreover, the Cambodian authorities have requested that the original complaints be given to “the competent authorities” in Cambodia, calling into question the safety of complainants’ identities.¹⁹ On December 9th, UN and Cambodian officials reportedly came to an agreement on the need to enhance human resources management, including the anti-corruption measures of the tribunal, but the substance of the agreement is unknown.²⁰

Silvia Cartwright, an ECCC Supreme Court chamber judge from New Zealand, has called on the Court to spare no effort in dealing with any future corruption issues. At a planning meeting for the body, Cartwright described corruption as “one of the major issues that has been troubling for all the judges.”²¹

Probably the most disturbing development, yet one that has received little recent attention, is the allegation that one of the Cambodian judges selected to sit in the ECCC Trial Chamber has admitted to accepting bribes in Cambodian domestic cases prior to his appointment to the ECCC. On a PBS special, a reporter sat with Judge Nil Nonn. “He admits that, yes, he does take bribes — of course — but only after a case is over. After all, he earns only \$30 a month, not nearly enough to provide for his family. What else is he supposed to do?”²²

While the full scope of the corruption allegations within the ECCC remains unknown to the public, the circumstances surrounding such repeated claims demand the utmost attention. The Court must not only investigate these issues but set up *transparent* and *independently-reviewed* mechanisms for preventing their reoccurrence and ensuring that there is no taint on the Court as it moves into the trial stage of proceedings.

II. Bias

¹⁸ Opinion, “The Cambodian Tribunal’s Trials: Corruption Complaints at the Khmer Rouge War Crimes Tribunal”, Wall Street Journal (Oct. 2, 2008), *available at* <http://online.wsj.com/article/SB122288746654295045.html> (stating that the court spokesperson is one of the court monitors).

¹⁹ Complaints or opposition against civil authorities in Cambodia can be viewed as dangerous endeavors. For instance, an investigation by civil society organizations for the period of January 2008 – May 2008 found that there were 5 cases of political activist killings and 21 cases of harassment and threats against political activists. Political activism may be different from complaints of kickbacks and corruption, but both involve issues of a controversial nature and there is no reason to believe that such complainants will not be equally fearful of retaliation. *See* Asian Forum for Human Rights and Development, “Cambodian Civil Society Concerned over Violence During Election Campaigns” (Jun. 11, 2008) at 1, *available at* http://www.forum-asia.org/index2.php?option=com_content&do_pdf=1&id=1904.

²⁰ *See* “Cambodia, UN Agree on Need to Strengthen Court Trying Khmer Rouge Leaders,” UN News Centre (Dec. 10, 2008) at <http://www.un.org/apps/news/story.asp?NewsID=29252&Cr=cambodia&Cr1=court>.

²¹ “Cambodian Tribunal Worries About Corruption,” Int’l Herald Tribune (Sept. 1, 2008), *available at* <http://www.cambodiatribunal.org/CTM/Cambodian%20Tribunal%20Worries%20about%20Corruption%209.2.08.pdf>.

²² Frontline World, “Battambang: The Judge” (Oct. 2002), *available at* <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>.

Because the ECCC is a hybrid (international and Cambodian) court, it is necessarily rooted in a Cambodian legal system that was decimated under the Khmer Rouge and is reportedly governed by patronage. Following the fall of Democratic Kampuchea in 1979, the Cambodian legal profession no longer existed. By 2002, according to a PBS report, less than half of the country's judges had graduated from high school, let alone law school. Of the 171 judges and prosecutors working in Cambodia in 2000, only 33 percent had received any formal legal training.²³ In this context, it is not unsurprising that "who one knew" became an important determinant of upward mobility and placement into the key judicial positions.

Within this experiential vacuum, the executive branch has reportedly demonstrated a willingness to influence judicial decisions.²⁴ Indeed, former Secretary-General Kofi Annan has noted that: "...there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from the interference of the executive in the independence of the judiciary..."²⁵

The independence of the Cambodian judiciary is affirmed in the Cambodian Constitution and guaranteed by the King and the Supreme Counsel of Magistracy (SCM). However, in 2005 the SCM Secretariat was dissolved and SCM management was transferred to the Ministry of Justice.²⁶ The stated purpose of this move was to allow the Justice Minister Ang Vathana a clear path for dealing with corruption in the judiciary, since all complaints regarding judges, prosecutors, and those investigating them would

²³ *Id.*

²⁴ See Michael Lieberman, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, 186 MIL. L. REV. 164, 166 (2005) citing Report of the Secretary-General on Khmer Rouge Trials, U.N. DOC. A/57/769 (2003) at 11; Herbert D. Bowman, *Not Worth the Wait: Hun Sen, the U.N. and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51, 65 (2006). This article reports that following a human rights rally in Phnom Penh, several human rights advocates involved in the rally were arrested and charged with critically defaming Prime Minister Hun Sen. There was a significant public outcry by the government response and at first PM Hun Sen claimed no responsibility for the arrests. He asserted that it was the court that had independently decided to arrest and charge the men. "The government has never used any power to arrest or detain anyone." However a few days later, PM Hun Sen's senior advisor announced that PM Hun Sen was releasing the men as a "gift" to visiting U.S. Assistant Secretary of State, Christopher Hill, demonstrating the government's direct influence over the judicial process. Furthermore, PM Hun Sen reportedly ordered the men's release with the warning that the human rights advocates should "[j]ust let things go quietly," and "if you are rude, the court will summon you, so there will be another problem." See also International Republican Institute (IRI), "Cambodian PM Says Courts Will Not Dismiss Defamation Cases Against Critics" (Jan. 30, 2006), at <http://www.iri.org/newsarchive/2006/2006-01-30-News-AFP-Cambodia.asp>.

²⁵ Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 285, 288 (2006).

²⁶ Prak Chan Thul & Lee Berthiaume, "Power Shifts Puts Judiciary Under Government Control," *The Cambodia Daily* (May 9, 2005). This article reports that when the SCM Secretariat was originally created, it was controlled by then-Funcinpec minister Ouk Vithun. Ouk Vithun thereafter became a member of the SCM and CPP-member Ang Vong Vathana heads the Justice Ministry. See also Asian Human Rights Commission, "CAMBODIA: Code of Ethics for Judges Will Not Be Effective Without Compliance Mechanisms," AS-108-2007 (May 28, 2007). This report says that seven of the nine members of the SCM are judges and prosecutors and of these seven, three are openly known to be active members of the CPP. One SCM member is the minister of justice and controls the SCM secretariat. He is also said to be an active member of the CPP.

now go through the Ministry. However, the Ministry is controlled by a member of the Cambodian People's Party ("CPP"), which creates the appearance that the true intention of this move was not to increase the efficient investigation of such complaints, but to obtain a stronger grip on how such complaints were handled.

If Cambodian judicial officials are not independent, it is possible that they will not rule on the basis of law, but in support of the political preferences of the government. For example, the government might expect them not to act against the interests of the former Khmer Rouge cadre now employed within the government.²⁷ Because so many government personnel had ties with the Pol Pot regime, it is not unreasonable to believe that the Cambodian government has a strong interest in the ECCC investigations and the outcome of the trials. It is likely that facts could surface that could prove embarrassing to such individuals or their friends. While this point alone raises some concern, when placed in the context of a Court that is struggling with allegations of corruption, one cannot help but wonder whether such suspicions are more than just plausible.

Certain U.N. officials would appear to agree. "When asked if the UN-Cambodian government agreement would provide judicial independence, UN Under-Secretary-General for Legal Affairs and Legal Counsel, Mr. Hans Correll stated: 'As an international civil servant I have been given the task to negotiate this text and I have done so to the best of my ability. My personal opinion is a different matter'.²⁸ More recently, in August 2007, the UN expressed concern that "the [Cambodian] government's promotion of one of the Chambers' Co-Investigating Judges, J. You Bun Leng, to the presidency of the Cambodian Court of Appeals could threaten efficiency and the perception of judicial independence at the ECCC."²⁹ Yash Ghai, the UN secretary general's special representative for human rights in Cambodia, and Leandro Despouy, special rapporteur on the independence of judges and lawyers issued a joint statement criticizing the appointment as both a violation of the Cambodian Constitution and an interference with the Cambodian judiciary.³⁰ According to the UN officials, the judge's appointment was done at the request of the executive branch and outside of the

²⁷ See Herbert D. Bowman, *Not Worth the Wait: Hun Sen, the UN, and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51, 66 (2006). See also *id.*, 79-80 nn.151-55, citing JUSTIN CORFIELD & LAURA SUMMERS, HISTORICAL DICTIONARY OF CAMBODIA (2003):

Heng Samrin, Honorable President of the CPP and National Assembly member, was formerly Commander of the Eastern Zone of Democratic Kampuchea until defecting to Vietnam in 1978. Chea Sim, Chairman of the CPP and President of the Senate, was a Khmer Rouge Eastern Zone party secretary and military commander until he too defected to Vietnam in 1978. Keat Chlon, Minister of Economy and Finance was formally an aid to Pol Pot and roving ambassador for the Pol Pot regime. Sar Kheng, head of the Ministry of Interior, was permanent secretary of the communist party for the Northeast Zone in 1976 until he defected to Vietnam. Hor Nam Hong, Minister of Foreign Affairs, was Democratic Kampuchea's ambassador to Cuba.

²⁸ Herbert D. Bowman, *Not Worth the Wait: Hun Sen, the UN, and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51, 63 n.88 (2006).

²⁹ "U.N. Concerned at Appointment of Judge on Khmer Rouge Tribunal to National Court," U.N. News Centre (Aug. 16, 2007), available at

www.un.org/apps/news/story.asp?NewsID=23519&Cr=cambodia&Cr1=&Kw1=Cambodia&Kw2=&Kw3=

³⁰ Herald Tribune, "UN Envoys Slam Cambodia over Genocide Judge's Transfer" (Aug. 23, 2007), available at <http://www.ihf.com/articles/ap/2007/08/23/asia/AS-GEN-Cambodia-Khmer-Rouge.php>.

constitutionally-mandated procedures, inferring government interference in the judiciary. In addition, there was concern that this promotion (or transfer) implicated the ability of the Cambodian government to transfer ECCC judges who did not toe the government line.

It is also important to consider the position of the ECCC Cambodian judges in the context of Cambodian history and society. They must bear the weight of dealing with crimes that hit very close to home. As noted by the Group of UN Experts considering the establishment of a Khmer Rouge court, “[O]wing to the scale of the Khmer Rouge’s atrocities, it might well be impossible to find a judge free of at least the appearance of prejudice. It is our sense that, if not himself or herself a victim of the Khmer Rouge, each candidate would have friends or relatives who had been its victims.”³¹ A 2005 epidemiological report revealed that as a consequence of the Khmer Rouge era and subsequent fighting, “81% of Cambodians experienced violence, 40% suffer from anxiety disorders, 28.4% suffer from post traumatic stress disorder, and 11.5% suffer from mood disorders.”³² Given the extent of post-traumatic stress that still exists in Cambodian society today, one can presume that no Cambodian judge is entirely isolated by the horrors linked to the accused. This begs a question as to what extent a judge so close to the factual circumstances of a case can be expected to be impartial and presume innocence.³³

Taking into account the circumstances of Cambodian society and the role of the judiciary and its relationship to the regime, it is not surprising that allegations of bias have already come to the attention of the Pre-Trial Chamber (PTC). While it is unfair to criticize the Court for the circumstances in which it must work, it is quite fair to critique the Court’s decisions in handling such circumstances. The PTC’s decision on the Nuon Chea Defense motion to disqualify Judge Ney Thol speaks loudly for the problematic circumstances that the ECCC will have to contend with during its proceedings. Moreover, its ruling in this situation raises some concern.

On January 28, 2008, the Defense for Nuon Chea filed an urgent motion to disqualify Judge Ney Thol on the basis of (1) his position as an officer in the Royal Cambodian Armed Forces (the “RCAF”); (2) his “apparent willingness to inappropriately employ his judicial power at the behest of the Cambodian People’s Party (the ‘CPP’)”;

³¹ Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, ¶ 159, available at <http://www1.umn.edu/humanrts/cambodia-1999.html>.

³² Alex Hinton, Nela Navarro, & Tom La Pointe, “Truth, Trauma, and the Victims of Torture Project: Helping the Victims of the Khmer Rouge, Documentation Center of Cambodia” (Apr. 5, 2006), available at http://www.dccam.org/Projects/VOT/DCCAM_VOT_EVALUATION_FINAL.pdf.

³³ See Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV. 655 n.82 (2000), citing RICHARD MINEAR, VICTOR’S JUSTICE 81-82 (1971). According to this article, at the post WW-II Tokyo tribunal, Justice Jaranilla of the Philippines was a survivor of the Bataan Death March. He objected to the tribunal’s leniency and it is suggested that his experience had some effect on the other judges. *But cf.* Joy Gordon, *The Concept of Human Rights: This History and Meaning of its Politicization*, 23 BROOK. J. INT’L L. 689, 782 (1998) (discussing how Justice Pal of India acquitted all the defendants at the Tokyo Tribunal at least partly on the grounds that the tribunal was a political rather than a judicial entity).

and (3) his membership on the CPP central committee.³⁴ On February 4, 2008, the PTC denied the motion, deciding that there would be no apprehension of bias by an objective observer informed of all relevant circumstances of the matters regarding the questioned judge.³⁵ These circumstances include the facts that he sits in his personal capacity and not as an RCAF officer,³⁶ and that that impartiality is one of duties that Judges swear to uphold.³⁷

It appears that the Chamber held the defense to the burden of proving “actual bias” because, based on the circumstances, it seems quite reasonable that there could be an objective appearance of bias. First, Judge Ney Thol has been in the Cambodian army since 1979; he holds the rank of general; and while sitting as head of the RCAF Military Court, he was a member of the CPP central committee. From these factors a reasonable observer could objectively apprehend that Judge Ney Thol may be predisposed to following the orders of the Cambodian executive branch. In fact, a reasonable observer could likewise apprehend that unpopular decisions made while sitting as an ECCC judge might lead to a punitive reaction by the executive branch in terms of altering his pay and promotion potential.

Second, while the opinions expressed in one case do not usually give rise to an appearance of bias in another case, the Chamber unreasonably isolated some questionable decisions by Judge Ney Thol from the range of circumstances of which a “reasonable observer” would have knowledge. For example, Judge Ney Thol convicted Prince Norodom Ranariddh, leader of the opposition Funcinpec Party, for conspiring with the Khmer Rouge to overthrow the government after his ouster by the CPP. Associated Press reports alleged that the trial was mainly an attempt by the CPP (of which J. Ney Thol was a member) to neuter its main political rival.³⁸ Likewise, Judge Ney Thol convicted opposition Sam Rainsy Party lawmaker Cheam Channy of organized crime and fraud for creating an “illegal armed force.” The trial was criticized for falling far short of international standards and was viewed by many as a political attack on opposition to the CPP.³⁹ In addition, Judge Ney Thol was involved in the over eight year detention of KAING Guek Eav (alias “Duch”) before Duch was transferred to ECCC custody.⁴⁰

³⁴ Case of NUON Chea, “Urgent Application for Disqualification of Judge Ney Thol,” Case No. 002/19-09-2007-ECCC/PTC (PTC, Jan. 28, 2008).

³⁵ Prosecutor v. NUON Chea, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending The Appeal Against The Provisional Detention Order in the Case of Nuon Chea, ¶ 34 (PTC, Feb. 4, 2008).

³⁶ See *id.* ¶ 24.

³⁷ See *id.* ¶ 21.

³⁸ See Ker Munthit, “Cambodia Judges’ Credibility Questioned,” Associated Press (May 22, 2006), available at <http://www.genocidewatch.org/CambodijudgescredibilityquestionedMay06.htm>.

³⁹ Amnesty International USA, Press Release, “Amnesty International Prisoner of Conscience Cheam Channy Released in Cambodia” (Feb. 6, 2006), available at <http://www.amnestyusa.org/documentphp?lang=e&id=ENGUSA20060206001>.

⁴⁰ Case of KAING Guek Eav alias “DUCH,” Notification of Recusal of Judge Ney Thol, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), ¶ 2 (Oct. 13, 2008). Judge Ney Thol subsequently recused himself from participation in the “Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav ‘Duch’ dated 8 August 2008.”

All three of these cases received intense international scrutiny and condemnation. In particular, many viewed the trials of Norodom Ranariddh and Cheam Channy as proxy political actions to manipulate the Cambodian political landscape. Nevertheless, the ECCC Pre-Trial Chamber dismissed “much of the evidence produced by the Defence [as] that of commentary from third parties” that does not relate to an “apprehension of bias by Judge Ney Thol in this case.”⁴¹ Indeed, the Chamber went even further and said that “[t]hese general observations and assertions are *no evidence* in respect of an apprehension of bias,”⁴² despite the fact that the cited third parties (rumored to be UN officials, Amnesty International, and various foreign embassies) pointed out that these cases involved biased procedures, violations of due process, and politically-driven judicial decisions on the part of Judge Ney Thol.

The Pre-Trial Chamber is correct that such third party observations are “no evidence” of actual bias; nevertheless, they are relevant to a reasonable observer’s apprehension of bias. *Appearance* refers to the outward observable aspects of a person or thing. If the legal question is: “What is Judge Ney Thol’s appearance?” then third party observations are relevant to this question, even if they are based on his behavior in other cases.

The third allegation of bias — Judge Ney Thol’s membership on the CPP central committee — is less dispositive because he resigned this position upon his appointment to the ECCC. Nevertheless, combined with the other factors it lends weight to a reasonable observer’s apprehension of executive branch influence on the judge.

Disregarding Judge Ney Thol’s connections to the military, the executive branch, and the CPP, the PTC based its decision on a hollow assumption that “personal” and “official” duties can be easily distinguished and placed in separate boxes, as if a loyalty to one’s military and political regime can be isolated from one’s oath to judge the case on its facts. Perhaps in some cases, certain judges might possess this unmeasured skill of divorcing one societal role from another; but that is beside the point. The standard in this case was not proving “actual bias” but whether a reasonable observer informed of all the circumstances would apprehend bias.

In its decision, the PTC simply states the standard and renders its ruling, providing insufficient explanation for how it arrived at its judgment. Perhaps if the Chamber explained its analysis more fully, its decision would not appear so unreasonable. As it is, critics could say that the decision reached was not one based on the weight of the circumstances, but the weight of political considerations this situation invoked. This observation would comport with the awkward speed by which the ECCC ruled on this matter, refusing to even receive *amici curiae* opinions that may have led to greater inquiry and controversy over the matter.

⁴¹ Case of NUON Chea, Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol, Pending the Appeal Against the Provisional Detention Order in the Case of NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 32 (PTC, Feb. 4, 2008).

⁴² *Id.* (emphasis added).

Disqualification of Judge Ney Thol in this case presumably might have opened the “flood-gates” to a wave of motions to disqualify the other Cambodian ECCC judges. Even if none of the other ECCC judges possess similar backgrounds, the consequence of allowing this motion would probably have been an in-depth inquiry bringing potential embarrassment on the Court, or at least a period of distraction that the Court could ill afford.

A third troubling point in the Chamber’s decision is its view that the ECCC is a “separate and independent court with no institutional connection to any other court in Cambodia.”⁴³ This statement would not be problematic if it was only stated as an affirmation of the Court’s *de jure* grant of legitimacy. However, it was not stated in this manner; rather it was stated as a dispositive fact related to Judge Ney Thol’s circumstances. In effect, the Chamber extended a legal assertion describing an institution to an individual within that institution whose factual circumstances are arguably contrary to the assertion.

This perspective, at best, suggests an indifference to the societal context the Court sits within and the background of the Cambodian judges. At worst, it calls into question whether the ECCC is willing to fully address circumstances suggesting bias and corruption. While courts prove their fairness, independence, and impartiality in their adherence to rules of procedure and evidence, these principles must operate not as mere presumptions but also standards. If the Court presumes independence as a dispositive fact, then what is next if evidence of actual bias proves contrary?

III. The Presumption of Independence and Impartiality

The Pre-Trial Chamber’s Ney Thol decision was based on the principle that “the starting point for any determination of a [bias] claim is that ‘there is a presumption of impartiality which attaches to a Judge.’ This presumption derives from their oath to office and the qualifications for their appointment [...], and places a high burden on the party moving for the disqualification to displace that presumption’.”⁴⁴ According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), this high presumption is intended to prevent unfounded and unsupported allegations from undermining confidence in a court and the fair administration of justice.⁴⁵ For that reason, it must be “assumed that [the judges] can disabuse their minds of any irrelevant personal beliefs or predispositions.”⁴⁶

Based on the circumstances of the ECCC and the Cambodian judges, this presumption requires, if not a reconsideration, then at least greater scrutiny. The

⁴³ *Id.* ¶ 30.

⁴⁴ *Id.* ¶ 15, *citing* Prosecutor v. Furundzija, IT-95-17/1-A, Judgment, ¶ 196 (Appeals Chamber, July 21, 2000) & Prosecutor v. Karemera et al., ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, ¶ 10 (Trial Chamber, May 17, 2004).

⁴⁵ *See* Prosecutor v. Zejnir Delalic et al. (Celebici case), Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, ¶ 653 (Appeals Chamber, Oct. 25, 1999).

⁴⁶ Prosecutor v. Furundzija, IT-95-17/1-A, Judgment, ¶ 197 (Appeals Chamber, July 21, 2000).

presumption of impartiality rests on (1) the oath to office and (2) the qualifications for appointment. Should the presumption of impartiality hold such a high threshold when the judge's qualifications and experience are in question? Should the presumption of impartiality hold such a high threshold when the judge has been cited for judicial impropriety in past decisions?

The ECCC presumes that:

[J]udges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.⁴⁷

In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.⁴⁸

While these criteria serve a value for describing the judges that should occupy the ECCC, strong allegations of corruption, political influence and associations, together with questionable judicial decisions in past cases, should compel the Court to reconsider the high presumption of independence and impartiality.

The ECCC is dedicated to bringing justice, national reconciliation, and peace to the people of Cambodia. In this pursuit, it must adhere to the principles of fairness, independence and impartiality, not as unquestioned presumptions but as standards applied on the basis of sound reasoning and sufficient facts.

Ultimately, the ECCC's circumstances raise difficult questions for international law. To what extent must international standards of judicial competence be lowered in order to include national judges in a hybrid tribunal? To what extent can a court look past local circumstances and judicial histories without sacrificing international standards of impartiality? Equally important, one must ask: Is it realistic to expect the utmost adherence to international standards in a post-conflict society still dealing with the effects of war and atrocity? While these are not easy questions, they strike at the heart of how history will judge the Extraordinary Chambers in the Courts of Cambodia.

⁴⁷ Case of NUON Chea, Public Decision on the Co-Lawyers' Urgent Application For Disqualification of Judge Ney Thol, Pending the Appeal Against the Provisional Detention Order in the Case of NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 16 (PTC, Feb. 4, 2008).

⁴⁸ *Id.* ¶17.