

**Fair Trial Implications of Corruption Allegations
at the Extraordinary Chambers in the Courts of Cambodia**

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QUESTIONS PRESENTED:

1. Would corruption, defined as monetary kickbacks in exchange for employment, of members of the Office of Administration preclude an independent and impartial trial?
2. Would corruption, defined as monetary kickbacks in exchange for employment, of judges at ECCC preclude an independent and impartial trial?

BRIEF ANSWER:

Corruption, defined as monetary kickbacks in exchange for employment, of members of the ECCC Office of Administration on an individual level would not necessarily preclude a fair trial. However, if administrative corruption were widespread, the cumulative impact could preclude a fair trial if it were severe enough to directly affect judicial decision-making.

Corruption of judges at the ECCC would not impair impartiality unless it directly impacts judicial decision-making in a particular case. Corruption of judges could nevertheless impair independence of the court by improperly affecting judicial selection and preventing judges from exercising independence in the performance of their functions. Both forms of corruption should be addressed to ensure the integrity of the proceedings.

EXECUTIVE SUMMARY:

Corruption, defined as monetary kickbacks in exchange for employment, of members of the Office of Administration or of judges at the ECCC could preclude an impartial and independent trial. Administrative corruption is unlikely to threaten fair trial standards if confined to an individual level because there is no explicit requirement of independence or impartiality for ECCC administrative staff, and bias on the part of individual administrative staff members is unlikely to be imputed to the court. Administrative corruption on an individual level is thus not subject to a judicial remedy.

Widespread administrative corruption presents a greater threat to fair trial standards. The cumulative impact of widespread judicial corruption could directly impact judicial decision-making and would be detrimental to setting an example for best practices. Therefore, an appropriate response to widespread administrative corruption should include altered anti-corruption measures and possibly increased international oversight and a judicial remedy.

Judicial corruption at the ECCC is unlikely to threaten impartiality if confined to kickbacks in exchange for employment. In order to disqualify a judge for bias, the party moving for disqualification must overcome the presumption of judicial impartiality, meet the reasonable observer test, and demonstrate a nexus between the alleged corruption and the specific case at hand.

Judicial corruption could, however, impair independence. Corruption could create an improper motive for judicial selection, could prevent judges from exercising their functions with the requisite independence, and would be counteractive to setting best practice examples for domestic courts. Therefore, parties should move for the removal of affected judges and, when necessary, the invalidation of the proceedings.

BACKGROUND:

Corruption allegations concerning members of the administrative staff and judges at the ECCC have plagued the court since early 2007.¹ The charges center on the allegation that, “Cambodian employees, including some judges, were given lucrative positions at the court on the basis they would then pay a portion of their salaries every month to the government officials who secured them their jobs.”² These charges have raised national and international concern and undermined relations with the donor community. In response, both the international and national sides of the court instituted new anti-corruption mechanisms and the UN and Government of Cambodia entered into negotiations to develop additional measures. However, despite these developments, previous allegations remain unresolved and current procedures are alleged to be insufficient to prevent future corruption, threatening the impartiality and independence of trials at the ECCC.

¹ So Phal, *CPP Appointed Judges, Prosecutors in KR Court See 30% of Their Wages Deducted*, The Voice of the Khmer Youth, Jan. 31, 2007.

² Cat Burton, *Disorder in the Court*, The Wall Street Journal Asia, April 1, 2009.

DISCUSSION:

The right to a hearing before an independent and impartial court is a cornerstone of fair trial practice in both international and domestic law. An independent and impartial court or tribunal is a requirement of customary international law,³ as well as of all general universal and regional human rights instruments.⁴ Domestic legal systems contain similar requirements; most relevant to the ECCC is the Constitution of the Kingdom of Cambodia, which provides that the judiciary “shall be an independent power” that “shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”⁵ In accordance with these standards, ECCC law has incorporated independence and impartiality requirements.⁶ This memo will address the fair trial implications of administrative and judicial corruption if members of the Office

³ Universal Declaration of Human Rights, G.A. Res. 217A, at art. 10, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), (“(E)veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”).

⁴ University of Minnesota Human Rights Library, *Human Rights in the Administration of Justice*, 4.1, <http://www1.umn.edu/humanrts/monitoring/adminchap4.html#65>; See, e.g.: International Covenant on Civil and Political Rights, art. 14(1) (“in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”), African Charter on Human and Peoples’ Rights, art. 7(1) (“every individual shall have the right to have his cause heard,” including (d) the right to be tried within a reasonable time by an impartial court or tribunal”) and art. 26 (the States parties “shall have the duty to guarantee the independence of the Courts”); American Convention on Human Rights, art. 8(1) (“every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”); European Convention on Human Rights, art. 6(1) (“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

⁵ The Constitution of the Kingdom of Cambodia, art. 128; *Id.* art. 132 (“The King shall be the guarantor of the independence of the Judiciary. The Supreme Council of the Magistracy shall assist the King in this matter.”).

⁶ See, e.g. Law Establishing the Extraordinary Chambers (“Establishment Law”), art. 10 (“The judges of the Extraordinary Chambers ... shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international, including international humanitarian law and human right law. Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”).

of Administration and judges at the ECCC engage in a kickback system in exchange for employment.

I. Corruption of the administrative staff could preclude a fair trial if it is widespread.

This section will discuss the fair trial implications of possible corruption of members of the ECCC Office of Administration. 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.⁷ As such, the Office of Administration is responsible for meeting the security, physical and administrative requirements of the ECCC,⁸ serving as the official channel for internal and external communication of the ECCC,⁹ keeping a database of all case files of the ECCC,¹⁰ ensuring the preservation, storage and security of evidence,¹¹ and coordinating the training of ECCC personnel.¹²

This section will consider two possible forms of administrative corruption at the ECCC: (A) corruption of a small number of members of the Office of Administration on an individual basis, and (B) widespread administrative corruption that permeates the Office of Administration and implicates high-level officials. Under the first form, administrative corruption on an individual level would not preclude an impartial and

⁷ Internal Rules, Rule 9.

⁸ *Id.*, Rule 9(2-3).

⁹ *Id.*, Rule 9(4).

¹⁰ *Id.*, Rule 9(5).

¹¹ *Id.*, Rule 9(6).

¹² *Id.*, Rule 9(7).

independent trial because there is not a requirement of impartiality or independence of the ECCC administrative staff and bias on the part of an individual administrative staff member should not be imputed to the court. Therefore, bias on the part of an individual member of the Office of Administration is an administrative matter that is not subject to a judicial remedy.

Under the second form, widespread administrative corruption could preclude an impartial and independent trial. Widespread administrative corruption could have severe fair trial implications, impair the legitimacy of the ECCC, and would also fail to set best practice examples for domestic courts. A successful response to widespread administrative corruption requires alterations to anti-corruption mechanisms and possibly increased international oversight and a judicial remedy.

A. Corruption of members of the Office of Administration on an individual level would not necessarily preclude an impartial and independent trial.

Corruption of members of the Office of Administration on an individual level would not have direct fair trial implications. ECCC core documents and jurisprudence do not require independence, impartiality, or even the appearance of either quality in members of the administrative staff. Although ECCC core documents, ECCC jurisprudence, and international law mandate a requirement of independence and impartiality for judges, bias on the part of an individual member of the administrative staff would likely not be imputed to the court. Without direct fair trial implications,

corruption of individual members of the Office of Administration is an administrative matter that is not subject to a judicial remedy.

i. There is not an explicit requirement of impartiality or independence of the ECCC administrative staff.

A requirement of impartiality or independence of the ECCC administrative staff is not mandated by ECCC core documents, ECCC jurisprudence, or international law. Such a requirement is not stated in any of the ECCC core documents, including the Law Establishing the Extraordinary Chambers,¹³ the Framework Agreement between Cambodia & the United Nations,¹⁴ and the ECCC Internal Rules.¹⁵ Article 31 of the Establishment Law, concerning the Office of Administration, requires only that the Director of the Office of Administration “shall be a person of high moral character and integrity.”¹⁶ In contrast, the Establishment Law requires that the co-prosecutors and the judges not only possess “high moral character and integrity,” but also that they “be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”¹⁷ Additionally, Article 10 requires that the judges have “a spirit of impartiality.”¹⁸

Similarly, the Internal Rules do not include procedures for the disqualification of administrative staff for conduct in violation of fair trial standards. The Internal Rules

¹³ Law Establishing the Extraordinary Chambers (“Establishment Law”), (2004).

¹⁴ Framework Agreement between Cambodia & the United Nations (“Framework Agreement”), (2003).

¹⁵ Extraordinary Chambers in the Courts of Cambodia Internal Rules (“Internal Rules”), (rev. 3, March 2009).

¹⁶ Establishment Law, art. 31.

¹⁷ Establishment Law, art. 19, 10.

¹⁸ Establishment Law, art. 10.

provide for the referral to the appropriate national authorities of conduct in violation of applicable Cambodian law,¹⁹ but there is no procedure by which the court could address conduct contrary to fair trial standards. In contrast, Rule 34 provides for the recusal or disqualification of a judge “in any case in which he or she has, or has had, a personal or financial interest, or concerning which Judge has, or has had, an association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.”²⁰ Under Rule 38, the Co-Investigating Judges or the Chambers may address attorney misconduct by issuing a warning, imposing sanctions, or refusing audience to a lawyer whose “conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.”²¹

ECCC jurisprudence has not established a requirement of independence, impartiality, or the appearance of either quality for administrative staff. Moreover, the Co-Investigating Judges have been reluctant to read in similar requirements that are not explicitly included in the statutes. In response to a request for information regarding a potential conflict of interest concerning an investigator from the Office of the Co-Investigating Judges who had been previously employed by the Office of the Co-Prosecutors, the Co-Investigating Judges determined that, “the rules governing the

¹⁹ Internal Rules, Rule 6(5).

²⁰ Internal Rules, Rule 34(1).

²¹ Internal Rules, Rule 38(1).

incompatibility of function aimed at guaranteeing the independence and impartiality of the courts only apply to magistrates and not to investigators.”²² Since investigators not only fall under the supervision of the Office of Administration but also have been delegated “quasi-judicial authority,”²³ 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. In their analysis, the Co-Investigating Judges analogized investigators to the judicial police; similar to the administrative staff, the judicial police play a supporting role for other organs of the court, do not have an explicit requirement of independence or impartiality, do not have a procedure for disqualification, and cases of misconduct are to be forwarded to the competent Cambodian authorities.²⁴

The core documents and jurisprudence of international tribunals regarding administrative staff are consistent with that of the ECCC. The statutes of international tribunals “contain few references to the independence and responsibilities of their staff and in some cases, it is not clear that the staff are entirely under the control of the

²² 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.”); Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. of Int’l Crim. Justice 327, 328 (2006).

²³ Nuon Chea Defense Team, Case No: 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 19 (March 27, 2009).

²⁴ Internal Rules, Rule 15.

tribunal.”²⁵ The level of control that international tribunals maintain over their staff corresponds with the manner of appointment of administrative staff, particularly whether a political body retains appointment power. *Ad hoc* criminal tribunals tend to be subject to greater outside control over both the appointment and the supervision of administrative staff than are the permanent international courts.²⁶ ECCC practice is consistent with the appointment and supervision of administrative staff at other *ad hoc* criminal tribunals. At the ECCC, the Government of Cambodia appoints the Director of the Office of Administration,²⁷ the Secretary General appoints the Deputy Director,²⁸ and power to discipline the staff in cases of misconduct is maintained by the relevant political bodies.²⁹ As in the ECCC core documents, the statutes and internal rules of other *ad hoc* criminal tribunals do not contain a requirement for the independence, impartiality, or appearance of either quality in the administrative staff, nor do they include procedures for disqualification of administrative staff.³⁰ Therefore, the ECCC’s

²⁵ Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. of Int’l Cts and Tribunals 27, 47 (2003); The International Tribunal on the Law of the Sea is a notable exception and a good example of potential regulations, *See* Addendum 1.

²⁶ ICTY (registrar appointed by the UN Secretary-General after consultation with the President of the Tribunal); ICTR (similar to ICTY, but emphasized its independence in a dispute with the Association of Defense Advocates over plans to investigate the backgrounds of defense investigators to ensure that none of them are implicated in the genocide in Rwanda (Statement by the Registrar on the Independence of his Office, ITCR.INFO-9-3-11.EN, Arusha, 23 April 2003); SCSL (Registrar is a staff member of the UN appointed by the UN Secretary-General after consultation with the President of the Tribunal); The ICC has the most control over administrative staff (Article 38, Administration of justice governed by the Court, particularly the presidency); Power to appoint the registrar – ICJ (Article 21); American Convention (Article 58, Inter-American Court appoints own secretary); Iran-U.S. Claims Tribunal (individual judges engage legal assistants); Power to appoint the deputy or assistant registrar – ITLOS (Rules 32-33); European Court of Justice (employs its own staff of around 700 officers).

²⁷ Framework Agreement, art. 8(2).

²⁸ Framework Agreement, art. 8(3).

²⁹ Internal Rules, Rule 6(5).

³⁰ ICTY Rules of Procedure and Evidence, Art. 31, 32, 33; ICTR Statute; SCSL Statute and Rules of Procedure and Evidence; *But see*, Rules of Procedure and Evidence for the ICTR and SCSL, Rule 76 (“Before performing any

lack of requirements of independence and impartiality, lack of procedures for disqualification, and referral of cases of criminal misconduct to national authorities is consistent with the standards for administrative staff at the other *ad hoc* criminal tribunals.

ii. Bias on the part of an individual member of the Office of Administration should not be imputed to the court.

While judges must meet a requirement of independence and impartiality, bias on the part of a member of the administrative staff of the ECCC is unlikely to be imputed to the court or to become a basis for the disqualification of a judge. Defense counsel have argued that “the independence and impartiality of the judges is inextricably linked to the independence and impartiality of those who assist them.”³¹ However, although relevant precedent is limited, this is not consistent with international or domestic practices.

The extent to which bias on the part of court staff can be imputed to the court turns on whether the staff member in question had a significant and direct impact on the judicial decision-making process. While widespread and systematic corruption among the administrative staff could potentially taint evidence to the extent that it

duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently,[and] *impartially*...); Code of Ethics for Interpreters and Translators Employed by the SCSL, art. 5, *as adopted* on 25 May 2004 (“Interpreters and translators shall disclose to their supervisor any conflict of interest or appearance of such conflict that may arise during the performance of their duties, including but not limited to circumstances referred to in paragraphs (A) and (B) above.”)

³¹ Nuon Chea Defense Team, Case No: 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 19 (March 27, 2009).

impacts the judicial decision,³² an individual administrative staff member is unlikely to have a direct impact on the judicial-decision making process. For example, in the American legal system, bias on the part of staff members such as law clerks,³³ ad hoc advisors,³⁴ and special masters³⁵ can sometimes be imputed to the court, because, rather than serving as “merely the judge’s errand runners,” law clerks in particular act as “sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge’s thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.”³⁶ However, the deciding factor in these cases is the direct impact of the staff member on the judicial decision. Even bias on the part of a law clerk with significant impact on the judicial decision-making process is not always found sufficient to prevent a fair trial³⁷ and bias on the part of an administrative staff member is even less likely to be imputed to the court.

International law is consistent in not imputing to the court the biases of individual members of the court staff. For example, in the *Lubanga* case, the International Criminal Court Pre-Trial Chamber considered the Prosecutor’s application to separate the Senior Legal Advisor of the Pre-Trial Division from a case because of his

³² Such a situation should be addressed under the provisions relating to the Interference with the Administration of Justice. Internal Rules, Rule 35.

³³ *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

³⁴ *In re Kensington Int’l Ltd.*, 368 F.3d 289, 308-11 (3d Cir. 2004).

³⁵ *In re Kempthorne*, 449 F.3d 1265, 1270-71 (D.C. Cir. 2006).

³⁶ *Hall*, 695 F.2d at 179.

³⁷ *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) (“A judge’s clerk is forbidden to do all that is prohibited to the Judge. Similarly, when a judge’s law clerk has a possible conflict of interest or knows of other disqualifying factors it is the clerk, not the judge, who must be disqualified.”).

previous work at the Office of the Prosecutor. The Prosecutor made “insistent references...to the issue of the impartiality of the Judges of the Pre-Trial Chambers I and II, linking the issue pertaining to the Senior Legal Adviser to an alleged appearance of bias of the Judges of the Pre-Trial Chambers I and II.”³⁸ However, even though a Senior Legal Advisor advising the chambers would have a far greater direct impact on judicial decision-making than members of the administrative staff, the President of the Court determined, in consultation with the judges, that the application and response did not amount to a request for the disqualification of any judge.³⁹ Pre-Trial Chamber I held that it lacked jurisdiction to entertain the application, Pre-Trial Chamber II dismissed the application,⁴⁰ and the Senior Legal Advisor retained his position.⁴¹

iii. Bias on the part of an individual member of the Office of Administration is an administrative matter that is not subject to a judicial remedy.

Since corruption on an individual level of members of the administrative staff is not considered to have direct fair trial implications, it is not subject to a judicial remedy. Therefore, at the ECCC it should be dealt with under Cambodian law and the provisions of the Internal Rules regarding interference with the administration of justice. Rather than providing a judicial remedy, international criminal tribunals tend to treat corruption of court actors other than judges as an administrative matter external to

³⁸ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case, ¶ 20 (Oct. 27, 2006).

³⁹ *Id.*

⁴⁰ President Philippe Kirsch, *Internal Memorandum: Decision of the President on the Request of the President of the Pre-Trial Division*, Nov. 7, 2006. ICC-02/04-01/05-127-Anx 1

⁴¹ Benjamin N. Schiff, Building the International Criminal Court, 126-127 (2008).

trial proceedings. For example, in the *Nzitorera* case, the ICTR Trial Chamber considered the Accused's request that the Trial Chamber withdraw the appointment of his lead counsel and allegations of financial dishonesty on the part of the counsel in the form of altered fee claims. Although acknowledging that financial dishonesty "is a serious allegation," the Chamber determined that, "the allegation of financial dishonesty by Counsel is an administrative matter that falls under the power of the Registry, not a Trial Chamber."⁴² Accordingly, the Chamber referred relevant investigations to "the proper authority," the Registry.⁴³

Under the ECCC Internal Rules, the proper authority to address corruption of national personnel is the national authorities. All national personnel at the court are accorded immunity regarding words spoken or written and acts performed by them in their official capacity.⁴⁴ However, this does not extend to allegations of corruption. The Internal Rules provide that "the appropriate national authorities shall conduct any proceedings for misconduct or negligence of national staff members in the conduct of their duties in accordance with applicable Cambodian law."⁴⁵ Although the Cambodian Anti-corruption Law and Criminal Code are still forthcoming,⁴⁶ the appropriate response to corruption of national personnel at the ECCC would be analogous to that

⁴² Prosecutor v. Joseph Nzitorera, Case No. ICTR-98-44-T, Decision on Nzitorera's Motion for Withdrawal of Counsel, ¶ 21 (Oct. 3, 2001).

⁴³ *Id.*

⁴⁴ Internal Rules, Rule 6(2).

⁴⁵ Internal Rules, Rule 6(5).

⁴⁶ Vong Sokhen, *No Anti-corruption Law before end of year: CPP*, Phnom Penh Post, May 26, 2009.

for corruption of civil servants under the UN Transitional Authority in Cambodia (UNTAC) Law. Under the UNTAC Law, any person who corrupts or attempts to corrupt a civil servant in the execution of his or her duties, by promising property, service, money, staff, professional position, document, authorization or any benefit whatsoever in exchange for any one of these same benefits has committed the misdemeanor of intentional corruption and faces a punishment of one to three years in prison.⁴⁷ Similarly, any civil servant who, acting in an official capacity or while performing official duties, solicits or attempts to solicit or who receives or attempts to receive property, a service, money, staff, a professional position, a document, an authorization or any benefit in exchange for any one of these same elements is guilty of the crime of extortion and shall be subject to a punishment of three to seven years in prison and a fine of double the sum of money or value of the property extorted.⁴⁸

Alternatively, corruption of the administrative staff could be dealt with under Rule 35 of the ECCC Internal Rules, which provides for a series of responses to cases of interference with the administration of justice.⁴⁹ Since the Anti-corruption Law and Criminal Code, which have been an issue of contention since 1994, will most likely not be submitted to the National Assembly before the end of 2009,⁵⁰ this procedure could be preferable to working through the national courts. Rule 35 defines interference with the

⁴⁷ United Nations Transitional Authority in Cambodia Code (“UNTAC Code”), art. 54.

⁴⁸ *Id.*, art. 38.

⁴⁹ Internal Rules, Rule 35.

⁵⁰ Vong Sokhen, *No Anti-corruption Law before end of year: CPP*, Phnom Penh Post, May 26, 2009.

administration of justice as knowingly and willfully disclosing confidential information, failing to follow or preventing others from following an order of the Co-Investigating Judges or the Chambers, destroying evidence, interfering with a witness, or attempting or inciting any of this behavior. The Co-Investigating Judges may respond to interference with the administration of justice by dealing with the matter summarily, conducting further investigations to ascertain whether there are sufficient grounds to instigating proceedings, or referring the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations. Corruption on an individual level of members of the Office of Administration could perhaps be addressed under these provisions without resorting to a judicial remedy.

B. Widespread corruption of members of the Office of Administration could preclude an impartial and independent trial.

Corruption of members of the administrative staff would preclude a fair trial if it becomes so widespread as to directly impact judicial decision-making. Even without direct fair trial implications, widespread administrative corruption delegitimizes the court as an institution and works contrary to the aims of the court. If widespread administrative corruption has occurred, the ECCC should look to alternative means of resolving the issue, including a judicial remedy.

i. The cumulative impact of widespread administrative corruption could have severe fair trial implications.

While corruption on an individual basis of members of the administrative staff is unlikely to have fair trial implications, widespread administrative corruption could directly impact judicial decision-making. Although a kickback system in exchange for employment would not necessarily include behavior that favors one party over another, defense counsel have argued that a willingness to engage in a system of kickbacks indicates a propensity towards engaging in other forms of corruption. The *Nuon Chea* Defense Team has argued that that participation in the kickback system indicates that the individuals concerned do “not possess the requisite probity to ensure the fairness of the proceedings” and may be equally willing to follow improper instructions” or “may feel obliged to perform their official functions in accordance with the actual or perceived expectations of their paymasters.”⁵¹ The result would be “a tainted workforce” that “is potentially inconsistent with the notions of judicial and institutional independence.”⁵²

If widespread administrative corruption substantially affects the body of evidence, the cumulative impact could distort the course of justice and preclude an impartial and independent trial. All of the material available to the judges is “pre-processed” by the administrative staff, who could tamper with evidence or commit a

⁵¹ Nuon Chea Defense Team, Case No: 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 19 (March 27, 2009).

⁵² *Id.*

series of other “possible breaches” that would favor one party over another.⁵³ While individual bias on the part of an administrative staff member is not generally sufficient to be imputed to the court, widespread administrative corruption could impact a case exponentially and thus alter the case material to such an extent that it would bias the judicial decision. Altering the case material so as to give one side an unfair advantage over the other would prevent the equality of arms, or procedural equality of the parties. Just as a conviction before a judge who has accepted a bribe to secure a conviction is “extravagantly flawed” because it “upsets the adversarial balance and deprives a defendant of a fair opportunity to present a defense to the charged offense,”⁵⁴ basing a judicial decision on case material distorted so that it unfairly favors one party over another prevents the court from rendering an impartial or independent decision. Given the seriousness of the nature of the charges brought against the accused, the ECCC is particularly obligated to preserve the accused’s right to a fair trial.⁵⁵ Widespread administrative corruption could prevent the court from meeting this obligation.

ii. Impunity for widespread administrative corruption would impair the legitimacy of the ECCC and fail to set best practice examples for domestic courts.

In addition to potential fair trial implications, widespread administrative corruption would impair the legitimacy of the ECCC with the domestic and

⁵³ *Id.* (Regarding legal officers, investigators, greffiers, case-file officers, ICT staff, translators or interpreters, witness-handlers, security guards, and waste-disposal staff).

⁵⁴ Thomas M. DiBagio, *Judicial Corruption, the Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Actual Prejudice or Should we Settle for Justice in the Dark?*, 25 Am. J. of Crim. L. 595, 627 (1998).

⁵⁵ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 29 (Sept. 2, 1998).

international public and run counter to the goal of setting best practice examples for the courts. Since the ECCC is a hybrid court with both Cambodian and international judges and operates under the auspices of the Cambodian government, the “ECCC cannot function in a vacuum.”⁵⁶ As a hybrid court, the ECCC bears the burden of setting best practice examples for domestic courts.⁵⁷ 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.⁵⁸ As stated by Deputy Prime Minister Sok An, the ECCC must “not only meet our country's needs for justice in this egregious case, but will also assist the wider process of legal and judicial reform in our country, by providing a model court meeting international standards.”⁵⁹

Since the ECCC bears the burden of setting best practice examples, “the success of the court is not dependant solely on how smoothly Duch’s trial progresses but also upon the ability of the court to demonstrate that it is a competent and independent court of law.”⁶⁰ If the ECCC fails to address this issue and allows widespread

⁵⁶ Sophie Huntington, *The Khmer Rouge Tribunal as an Opportunity for more than Answers*, Genocide Watch, Aug. 2006, <http://www.genocidewatch.org/CambodiaTheKRTAnOpportunityForMoreThanAnswersAugust2006.htm>.

⁵⁷ Yuval Shany and Sigall Horovitz, *Judicial Independence in The Hague and Freetown*, *Leiden J. of Int’l L.* 21, 120 (2008).

⁵⁸ Asian Human Rights Commission, *Cambodia: Khmer Rouge trial a golden opportunity to advance judicial independence, not executive control*, May 25, 2006, <http://www.ahrchk.net/statements/mainfile.php/2006statements/552/>; U.N. News Service, *U.N. rights chief stresses vital need for independent judiciary in Cambodia*, May 19, 2006, <http://www.un.org/apps/news/story.asp?NewsID=18541&Cr=Cambodia&Cr1>; Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2009*, 96, <http://www.state.gov/g/tip/rls/tiprpt/2009/>.

⁵⁹ Sok An, *The Khmer Rouge Tribunal: What It Means for Cambodia*, Open Society Justice Initiatives: The Extraordinary Chambers, Apr. 18, 2006, 29-30, http://www.soros.org/resources/articles_publications/publications/justice_20060421/jinitatives_200604.pdf.

⁶⁰ Cambodian Defenders Project (CDP), Cambodian Human Rights Action Committee (CHRAC), Cambodian Human Rights & Development Association (ADHOC), Khmer Institute of Democracy (KID), Center for Social

administrative corruption to flourish with impunity, it will send “a signal to Cambodians that corruption is tolerated and, when required, accountability disregarded.”⁶¹ This would squander the opportunity to provide a model of a fair trial for the Cambodian legal system, legal community, and general public. Impunity for administrative corruption would also undermine the dignity and reputation of the ECCC, “which it must have in order to assert its authority, maintain its credibility and win the public’s trust. It casts doubt on the fairness of its trials, and this is unacceptable for a very costly tribunal which is expected to be ‘a new role model for court operations in Cambodia.’”⁶²

iii. A successful response to widespread administrative corruption requires alterations to anti-corruption mechanisms and possibly increased international oversight and a judicial remedy.

While the same procedures for addressing administrative corruption on an individual basis, either under applicable Cambodian law⁶³ or provisions of the Internal Rules regarding interference with the administration of justice,⁶⁴ could be applied to widespread administrative corruption, alternations must be made and additional measures should be considered in order to most effectively address the issue. Unlike the hypothetical in which corruption is isolated to a small group of individuals, widespread

Development (CSD), Cambodia Justice Initiative (CJI), Legal of Aid of Cambodia (LAC), *JOINT STATEMENT: Appealing to relevant stakeholders to uphold the Independence and Integrity of the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, Phnom Penh, April, 9 2009.

⁶¹ Cambodian Center for Human Rights and the Asian Human Rights Commission, *CAMBODIA: Tolerance of corruption at the Khmer Rouge Tribunal is unacceptable*, AHRC-STM-090-2009, April 17, 2009.

⁶² *Id.*

⁶³ Internal Rules, Rule 6(5).

⁶⁴ *Id.*, Rule 35.

corruption has the potential to permeate the Office of Administration and compromise high-level officials, thus precluding the possibility of a successful administrative remedy. In order to successfully address widespread administrative corruption, the ECCC should allow Cambodian staff members to report corruption to the national or international Ethics Monitor of their choice and should consider increased international oversight and the possibility of a judicial remedy.

Widespread administrative corruption compromises the ability of the Office of Administration to police itself. Although unconfirmed, reports of corruption at the ECCC depict an extensive kickback scheme that permeates the Office of Administration, implicates high-level officials, and is maintained by a climate of fear.⁶⁵ For example, multiple reports from staff members implicate the Director of the Office of Administration, Sean Visoth, in the kickback scheme.⁶⁶ Sean Visoth has been a vocal opponent of any investigation into the corruption allegations, rejecting the allegations as “unspecific, unsourced and unsubstantiated”⁶⁷ and blocking any attempts to confirm or disprove them. After the UN Office of Internal Oversight Services (OIOS) review reportedly found him to be “guilty of corruption,”⁶⁸ resulting in increased pressure

⁶⁵ Cat Barton, *Tribunal graft charges spread: German delegation exposes results of secret UN probe; staff concur*, The Phnom Penh Post, Feb. 27, 2009.

⁶⁶ *Id.*; *The Khmers Rouges and justice: The court on trial*, The Economist, April 1, 2009, at 31.

⁶⁷ *Cambodian genocide tribunal denies financial mismanagement*, AFP, April 25, 2008.

⁶⁸ Knut Rosendhaug allegedly told a visiting delegation from the German parliament that Sean Visoth had been found “guilty of corruption.” Bundestag Delegation, *(Draft) report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid*, Oct. 25 - Nov. 3, 2008; <http://www.bundestag.de/ausschuesse/a17/resisen/ASEAN2008.pdf>; Cat Burton, *Tribunal Graft Charges Spread: German delegation exposes results of secret UN probe*, The Phnom Penh Post, Feb. 27, 2009.

from the donor community, Sean Visoth left the ECCC on medical leave for unspecified health issues, but continues to serve as the acting Director of the Office of Administration.⁶⁹ Similarly, another senior official implicated in the corruption allegations, the court's Cambodian chief of personnel, Keo Thyvuth, was transferred to a position at the Council of Ministers.⁷⁰ Cambodian staff members at the court report that they fear retribution from these and other high-ranking officials if they refuse to participate in the kickback system. One administrative staff member explained, "I'm afraid, if they know I talk to you, they're not going to take a gun and shoot me in my face, but they will find some way [to fire me] ... or they [will hurt] my kids."⁷¹ In this environment, traditional administrative remedies are unlikely to succeed.

In order to successfully address widespread administrative corruption, anti-corruption mechanisms must allow Cambodian staff members to approach the Ethics Monitor of their choice, regardless of nationality. Current anti-corruption mechanisms require national staff members to report directly to Cambodian ethics monitors rather than UN officials.⁷² This procedure has a chilling effect on reporting by Cambodian staff members who may fear retribution from the very officials to whom they are required to

⁶⁹ Douglas Gillison, *Official: Rumors About ECCC Chief's Exit False*, The Cambodia Daily, Nov. 27, 2008.

⁷⁰ Craig Guthrie, *KRT appoints new chief of troubled personnel department*, The Mekong Times, Aug. 12, 2008.

⁷¹ *Id.*

⁷² Neth Pheaktra, *KRT Forms New Anti-Corruption Committee*, The Mekong Times Daily, Aug. 18, 2008; Georgia Wilkins and Vong Sokheng, *Govt to Review Future KRT Graft Complaints in Secret*, The Phnom Penh Post, Sept. 16, 2008.

report.⁷³ Disagreement over this issue led to the breakdown in negotiations over anti-corruption mechanisms between Deputy Prime Minister Sok An and Peter Taksoe-Jensen, UN Assistant Secretary-General for Legal Affairs. As stated by Taksoe-Jensen, “(T)he United Nations continues to believe that for the ethics monitoring system to be credible the staff should have the freedom to approach the Ethics Monitor of their own choice and put forward complaints without fear of retaliation. Such freedom of choice is an imperative element of a trustworthy ethics monitoring system.”⁷⁴ Since independent audits⁷⁵ and reports from staff members⁷⁶ indicate that administrative corruption at the ECCC is primarily confined to national staff, any policy that discourages national staff from reporting corruption or prevents an effective response is particularly detrimental to the court.

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 OIOS has been particularly effective in conducting investigations and issuing recommendations to ICTR and ICTY. For example, in 2001,

⁷³ Cat Barton, *Tribunal graft charges spread: German delegation exposes results of secret UN probe; staff concur*, The Phnom Penh Post, Feb. 27, 2009.

⁷⁴ Royal Government of Cambodia and the United Nations, *Joint Statement*, Phnom Penh, Feb. 23, 2009.

⁷⁵ Sallappan Kandasamy, OIC, OAPR, Report No. RCM0172, *UNDP-Cambodia – Special Audit of the Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, June 4, 2007, www.eccc.gov.kh/english/.../auditReports/oapr_audit_report.pdf.

⁷⁶ Douglass Gillison, *ECCC Reviews New Graft Allegations on Eve of Funds Drive*, The Cambodia Daily, Aug. 5, 2008.

OIOS conducted an investigation into fee-splitting arrangements between defense counsel and indigent detainees at the ICTR and ICTY and submitted a series of recommendations.⁷⁷ In the follow-up report, the OIOS “was pleased to note that both Tribunals have implemented most of the recommendations contained in its previous report and that both have also taken additional proactive steps.”⁷⁸ Similarly, in 1997, OIOS conducted an audit and investigation of the ICTR and discovered “serious operational deficiencies in the management of the Tribunal,” which were so pervasive that “not a single administrative area functioned effectively.”⁷⁹ The ICTR successfully implemented the recommendations, which included replacing high-ranking officials to resolve the hostile relationship between the Registry and the Office of the Prosecutor.⁸⁰

In contrast, the Government of Cambodia maintains the exclusive right to respond to corruption allegations that implicate Cambodian officials without international assistance.⁸¹ 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

⁷⁷ Dileep Nair, Under-Secretary-General for Internal Oversight Services, *Report of the Office of Internal Oversight Services on the investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia*, UN Doc. A/55/759 (Feb. 1, 2001).

⁷⁸ Dileep Nair, Under-Secretary-General for Internal Oversight Services, *Report of the Office of International Oversight Services on the follow-up investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia*, UN Doc. A/56/836 (Feb. 26, 2002).

⁷⁹ Karl Th. Paschke, Under-Secretary-General for Internal Oversight Services, *Report of the Secretary General on the Activities of the Office of Internal Oversight Services*, UN Doc. A/51/789 (Feb. 6, 1997).

⁸⁰ *Id.*

⁸¹ Douglas Gillison, *Government Asserts Jurisdiction Over KR Tribunal Graft Claims*, *The Cambodia Daily*, Aug. 9-10, 2008.

investigation.⁸² Similarly, the Government of Cambodia has declined the UN Development Programme's offer to provide international assistance for an investigation.⁸³ 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. International oversight could take many forms, 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.⁸⁴ The OIOS report is believed to have found many of the corruption allegations to be credible.⁸⁵

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

⁸² *Id.*

⁸³ Erika Kinetz, *Gov't Rejects UN Call to Probe ECCC*, The Cambodia Daily, Feb. 20, 2008.

⁸⁴ Douglas Gillison, *Gov't Receives UN Findings on KR Tribunal*, The Cambodia Daily, Sept. 18, 2008.

⁸⁵ Cat Barton, *Tribunal Graft Charges Spread: German delegation exposes results of secret UN probe*, The Phnom Penh Post, Feb. 27, 2009.

for procedural defect only where the defect infringes the rights of the party making the application.”⁸⁶ 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.

II. Corruption of the judges at the ECCC could preclude an impartial and independent trial, particularly if it affects judicial decision-making or judicial selection.

This section will address the fair trial implications of judicial corruption at the ECCC, focusing specifically on impartiality and independence. Judges at the ECCC are required 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. In other words, independence “connotes not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees,”⁸⁷ while impartiality refers to “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.”⁸⁸ Impartiality has both a subjective aspect, referring to actual bias, and an objective aspect, referring to the appearance of bias. Both requirements are explicitly incorporated in the ECCC core documents. Article 3.3 of the Agreement states, “judges shall be persons of

⁸⁶ Internal Rules, Rule 48.

⁸⁷ *Valente v. The Queen*, 2 S.C.R. 673 (1985).

⁸⁸ *Id.*

high moral character, impartiality and integrity who possess the qualifications required in their respective countries for their appointment to judicial offices. They shall be independent in the performance of the functions and shall not accept or seek instructions from any Government or any other source.”⁸⁹ These requirements are reaffirmed in Article 10 new of the ECCC Law.⁹⁰

However, while impartiality and independence are clearly required of Judges at the ECCC, it is less apparent what these requirements mean in practice or in the context of judicial corruption at the ECCC. Judicial independence is a “a theme familiar in domestic law that is relatively uncharted in relation to international courts and tribunals,”⁹¹ where “international judges exercise an avowedly judicial function on a wide range of socially, politically and economically sensitive topics.”⁹² This section will address this issue in two parts: (A) whether judicial corruption at the ECCC would be sufficient to preclude impartiality and thus support judicial disqualification, and (B) whether judicial corruption would be sufficient to preclude independence of the ECCC. Under the first part, judicial corruption could preclude impartiality if it is sufficient to

⁸⁹ Agreement, Article 3.3; *Id.* article 7.2 (Applies equally to the judges of the Pre-Trial Chamber).

⁹⁰ ECCC Law, Article 10 new (“the Judges of the Extraordinary Chambers shall be appointed from among the currently practicing Judges or are additionally appointed in accordance with the existing procedures for appointment of Judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law, Judges shall be independent in the performance of their functions, and shall not accept or seek any instruction from any government or any other source.”)

⁹¹ Ruth Mackenzie and Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L.J. 271, 271 (Winter, 2003).

⁹² *Id.*, 274.

objectively give rise to an appearance of bias in relation to the case at hand. Under the second part, judicial corruption could preclude independence if it creates an improper motive for judicial selection or if it prevents the judge from exercising judicial functions with independence. As with administrative corruption, judicial corruption should be addressed to preserve the integrity of the ECCC.

A. Corruption of the Judges at the ECCC would not impair impartiality unless it impacts judicial decision-making in a particular case.

If a judge at the ECCC engages in corruption that precludes an impartial trial, the judge would be subject to disqualification for bias. ECCC law provides for the disqualification of a judge “in any case 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.”⁹³ In order to meet this test, the party moving for disqualification must overcome the presumption of impartiality, meet the reasonable observer test, and demonstrate a nexus between the corruption and the case at hand.

i. The party moving for disqualification of a judge must meet a high threshold to overcome the presumption of impartiality.

The “starting point”⁹⁴ for a claim of bias on the part of a judge is the “presumption of impartiality which attaches to a Judge.”⁹⁵ This presumption is derived

⁹³ Internal Rules, Rule 34(2)

⁹⁴ Prosecutor v. Norman, Case No. SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Appeals Chamber, ¶ 25 (May 28, 2004).

from the judge's oath and qualifications for appointment and it creates a high burden of proof on the party moving for disqualification.⁹⁶ The reasoning behind this high threshold is that, although bias on the part of a judge could undermine confidence in the court, "it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias."⁹⁷ In other words,

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.⁹⁸

ECCC law is consistent with a high burden of proof on the moving party for disqualification applications. The Internal Rules require that an application for the disqualification of a judge "clearly indicate the grounds and shall provide supporting evidence."⁹⁹ The ECCC Pre-Trial Chamber considered the evidentiary basis for disqualification in relation to the application for the disqualification of Judge Ney Thol, which was based on his "position as a serving military officer and his participation in

⁹⁵ Prosecutor v. Furundiza, Case No. IT-95-17/1-A, Judgment, Appeals Chamber, ¶ 196 (July 21, 2000).

⁹⁶ Prosecutor v. Norman, Case No. SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Appeals Chamber, ¶ 25 (May 28, 2004); Prosecutor v. Karemera, Rwamajuba, Ngirumpatse, Nzirorera, Case No. ICTR-98-22-T, Decision on Motion by Karemera for Disqualification of Trial Judges, ¶ 10 (May 17, 2004).

⁹⁷ Prosecutor v. Delalic, Mucic, Delic, and Landzo, (Elebici Case), Case No. IT-96-21-A, Judgment, Appeals Chamber, ¶ 707 (Feb, 20, 2001).

⁹⁸ *Id.*

⁹⁹ Internal Rules, Rule 34(3).

highly questionably judicial decisions.”¹⁰⁰ Much of the evidence produced by the Defence took the form of commentary from third parties or related “in general terms to observations upon the alleged competence and motivation of the Cambodian judiciary as a whole”¹⁰¹ and none of the evidence provided was “demonstrative of any instruction from a political party having been given to Judge Ney Thol or of him acting at the behest of the CPP or any other person.”¹⁰² As a result, the Pre-Trial Chamber determined the quality of evidence submitted did not reach the “high threshold” for disqualification.¹⁰³

This is consistent with standards applied by international criminal tribunals. For example, the ICTY Appeals Chamber maintains “a high threshold to reach in order to rebut the presumption of impartiality” and requires that the “Appellant to adduce sufficient evidence” to do so.¹⁰⁴ The ICTR requires that “partiality must be established on the basis of adequate and reliable evidence.”¹⁰⁵ In the *Akayesu* Judgment, the ICTR Appeals Chamber rejected arguments that were “too general and abstract to rebut the presumption of impartiality” and arguments that were “neither substantiated nor

¹⁰⁰ 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, ¶ 14 (Feb. 4, 2008).

¹⁰¹ *Id.*, ¶ 32.

¹⁰² *Id.*, ¶ 33.

¹⁰³ *Id.*, ¶ 34.

¹⁰⁴ Prosecutor v. Furundiza, Case No. IT-95-17/1-A, Judgment, Appeals Chamber, ¶ 197 (July 21, 2000).

¹⁰⁵ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-TAkayesu, Judgment, ¶ 91 (Sept. 2, 1998).

detailed.”¹⁰⁶ Allegations of corruption of the judiciary at the ECCC must have sufficient adequate and reliable evidence to meet the high threshold necessary to rebut the presumption of impartiality that attaches to a judge.

ii. The party moving for disqualification of a judge must meet the reasonable observer test to establish an unacceptable appearance of bias.

In order to justify the disqualification of a judge of the ECCC, the moving party must establish either “actual bias or perceived bias.”¹⁰⁷ The ICTY Appeals Chamber established the relevant test in the *Furundiza* Judgment, which the ECCC Pre-Trial Chamber adopted in the Judge Ney Thol decision.¹⁰⁸ The *Furundiza* test combines both subjective and objective components and is consistent with the legal tenet that it is of “fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹⁰⁹ Under the *Furundiza* test,

- A. A Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
 - i. A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or
 - ii. The circumstances would lead a reasonable observer, properly

¹⁰⁶ *Id.*, ¶ 92.

¹⁰⁷ 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, ¶ 14 (Feb. 4, 2008) (referring to Internal Rules, Rule 34(2)).

¹⁰⁸ 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)).

¹⁰⁹ R v. Sussex Justice ex parte McCarthy, 1 KB 256, 259 (1924).

informed, to reasonably apprehend bias.¹¹⁰

If a Judge engages in a system of kickbacks unrelated to a particular case and without pressure to favor one side over another, there would not be actual bias, so the question becomes whether there is an unacceptable appearance of bias. Since the judge would neither be a party to the case nor have a financial or proprietary interest in its outcome and the Judge's decision would not lead to the promotion of a cause, the matter turns on whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Under the reasonable observer test, "the judge recuses himself not because he cannot exercise his judicial function, but to preserve the integrity of his court and the concept of law."¹¹¹ As established by the *Furundiza* decision and adopted by the ECCC, the reasonable observer test is consistent with similar tests for bias in international and domestic legal systems.¹¹² For example, the ICTY has defined the reasonable observer as "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised

¹¹⁰ *Id.*

¹¹¹ Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 A.J.I.L. 359, 366 (April, 2005).

¹¹² *Findlay v. United Kingdom*, 24 Eur. Ct. HR 221, ¶ 73 (1997); *President of the Republic of South Africa v. South African Rugby Football Union*, Judgment on Recusal Application, 7 BCLR 725 (CC), (June 3, 1999); *Webb v. The Queen*, 181 CLR 41 (June 30, 1994) (The court reasoned that "public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question."); *R.D.S. v. The Queen*, Can. Sup. Ct. (Sept. 27, 1997); *U.S. v. Bremers et al.*, 195 F. 3d 221, 226 (5th Cir. 1999). (Disqualification is governed by 28 USCS, Section 455 (2000), which provides that a Judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988); *But see, R v. Gough*, A.C. 646 (1993) at 661.

also of the fact that impartiality is one of the duties that Judges swear to uphold.”¹¹³

Justice Geoffrey Robertson of the Special Court for Sierra Leone additionally requires “a fairly hard-nosed appreciation both of how institutional pressures and ‘old boy networks’ can operate, and a feet-on-the-ground ability to exclude far-fetched or theoretical risk,” as well as “a recognition of the importance of efficient and expeditious prosecution of international crimes.”¹¹⁴

iii. The reasonable observer test requires a nexus between the alleged corruption and the case at hand.

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.”¹¹⁵ The ECCC has not delineated the nexus required between the activities or source of bias in question and the case at hand. In the Judge Ney Thol decision, the ECCC Pre-Trial Chamber noted that,

(T)he Defence has not referred to any authority for the proposition that a judge’s analysis in a different case could suggest bias in the case currently being heard. The Defence has not demonstrated that the opinions expressed in one case can give rise to any appearance of bias in another case.¹¹⁶

¹¹³ Prosecutor v. Furundiza, Case No. IT-95-17/1-A, Judgment, Appeals Chamber, ¶ 190 (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, ¶ 21 (Feb. 4, 2008)).

¹¹⁴ Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Geoffrey Robertson, ¶ 18 (March 13, 2004).

¹¹⁵ *Id.* ¶ 3.

¹¹⁶ 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, ¶ 31 (Feb. 4, 2008).

However, the Pre-Trial Chamber did not rule directly on the appropriate nexus required to establish bias.

International courts have considered this issue. In the *Norman* case, the SCSL considered whether the funding structure of the court, which provided for voluntary funding from donor nations, precluded an impartial and independent trial.¹¹⁷ Defense counsel argued that the funding structure created an incentive for judges to convict the accused in order to demonstrate the effectiveness of the court and encourage continued donations, thus creating an appearance of bias.¹¹⁸ In applying the bias test, the court determined that “to establish that novel arrangements affect judicial independence, there must be a realistic danger that they are or will be productive of pressure on the judges of the Court to decide cases in a particular way,” otherwise the accusation of bias would be a “far-fetched and difficult proposition.”¹¹⁹ The court held that the funding arrangements did not preclude an independent and impartial trial because “is impossible for any reasonable observer to identify any existing or potential financial temptation either to acquit or convict this Applicant, or all defendants from his faction, or all defendants... The funding arrangements give no cause for concern that the judges will perceive some financial advantage in finding verdicts of guilt which are not

¹¹⁷ Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Geoffrey Robertson, ¶ 1 (March 13, 2004).

¹¹⁸ *Id.*, ¶ 23.

¹¹⁹ *Id.*, ¶ 3.

justified by the evidence.”¹²⁰

Certain domestic legal systems require that a petitioner “establish a nexus between the activities being investigated and the trial judge’s conduct at trial” in order to support a claim of judicial bias.¹²¹ In the United States, even a judge who has been “shown to be thoroughly steeped in corruption” is not necessarily subject to disqualification. In *Bracy v. Gramley*, the judge in question was convicted of taking bribes from defendants in criminal cases during and around the time of petitioner’s trial and petitioner argued that the judge therefore had an interest in convicting him to deflect suspicion. In order to establish “good cause” for discovery on petitioner’s claim of judicial bias, the U.S. Supreme Court required the petitioner to base his request not only on the judge’s conviction for taking bribes in other cases, “but also to additional evidence ... that lends support to his claim that [the judge] was actually biased in petitioner's own case.” Similarly, in *Commonwealth v. Shaw*, a U.S. court considered whether a judge who failed to disclose bribe taking in other cases at the time of appellant’s trial had created an appearance of impropriety that requires a new trial.¹²² The court determined that “Appellant's mere speculation is not sufficient.” Since “no ruling of the trial judge and no specific event or incident which occurred during the trial gave rise to any question as to the trial judge's objectivity or to the propriety of his

¹²⁰ *Id.* ¶ 24.

¹²¹ *People v. Titone*, 151 Ill. 2d 19, 30 (Ill. 1992).

¹²² *Commonwealth v. Shaw*, 398 Pa. Super. 341, 342 (Pa. Super. Ct. 1990)

rulings,” appellant failed to establish “actual prejudice resulting from the trial judge's extrajudicial conduct” and the claim failed.¹²³

Following this reasoning, 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.”¹²⁴ 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.

B Corruption of the Judges at the ECCC could impair independence by compromising judicial selection and preventing judges from exercising their functions with independence.

i. If Judges of the ECCC engage in a kickback system in exchange for employment, it would create an improper motive for their selection and could preclude independence in the performance of their functions.

Judicial corruption at the ECCC could preclude judicial independence by compromising the judicial selection process and 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 “in accordance with the existing

¹²³ *Id.*

¹²⁴ Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Geoffrey Robertson, ¶ 24 (March 13, 2004).

procedures for appointment of judges.”¹²⁵ The Supreme Council of the Magistracy consists of nine members, appointed by the King, and has been criticized in the past for functioning as an auxiliary of the ruling party.¹²⁶ The first article of the UNTAC Law incorporates the Basic Principles on the Independence of the Judiciary (“Basic Principles”) into Cambodian domestic law.¹²⁷ Principle 10 of the Basic Principles provide that:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.¹²⁸

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.

¹²⁵ Agreement, Article, 11.

¹²⁶ ADHOC, *Human Rights Situation Report 2004*, Phnom Penh (January 2005), at 47; Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. of Int’l Crim. Justice 327 (2006) (The Supreme Council of the Magistracy “must be depoliticized, and its membership must reflect the separation of powers (specifically, the Minister of Justice must not be a member). The current situation, with the Ministry of Justice having taken over the Secretariat, may allow for even more political influence.”).

¹²⁷ UNTAC Code, art. 1.

¹²⁸ Basic Principles on the Independence of the Judiciary, Principle 10.

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” in violation of Article 3.3 of the Agreement.¹²⁹ 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.¹³⁰

The judicial appointment procedure at the ECCC is unique in comparison to international tribunals, so the ECCC should be particularly guard against undue governmental influence. Not since the failed 1907 Central American Court of Justice¹³¹ have international tribunals allowed states to directly appoint judges of their choice

¹²⁹ Agreement, art. 3.3; *Id.* art. 7.2 (Applies equally to the judges of the Pre-Trial Chamber); ECCC Law, art. 10 new (“the Judges of the Extraordinary Chambers shall be appointed from among the currently practicing Judges or are additionally appointed in accordance with the existing procedures for appointment of Judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law, Judges shall be independent in the performance of their functions, and shall not accept or seek any instruction from any government or any other source.”)

¹³⁰ Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. of Int’l Cts and Tribunals 27, 47 (2003).

¹³¹ M. Hudson, *International Tribunals: Past and Future* (1944), 157.

without the agreement of other states, which today is usually obtained in through a vote in a plenary body.¹³² For example, judicial appointments to the ICTY are made through election by the General Assembly, based on a list of options nominated by states and submitted by the Security Council.¹³³ The Special Court for Sierra Leone has a procedure that is more similar to that of the ECCC, in which the government of Sierra Leone appoints some of the judges and the UN Secretary-General appoints the others, based upon nominations by states. However, the majority of judges in each chamber are international judges.

International tribunals that allow member states the greatest control over judicial appointment have suffered from a lack of judicial independence. For example, the lack of independence was “one of the factors which wrecked the Central American Court of Justice.” More recently, the independence of the arbitrators on the Iran-U.S. Claims Tribunal has been questioned.¹³⁴ While “there is little evidence of pressure being directly placed on the judges of international tribunals,” the Iran-U.S. Claims Tribunal is the “one exception.”¹³⁵ Of the international tribunals, the Iran-U.S. Claims Tribunal provides member states with the most control over appointments, with the United

¹³² Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. of Int’l Cts and Tribunals 27, 47 (2003).

¹³³ ICTY, Article 13bis.

¹³⁴ See M. Pellonpaa and D. Caron, *The Uncitral Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Iran-United States Claims Tribunal* 138-219(1994), at 161.

¹³⁵ The U.S. government and claimant community have expressed doubts about the independence of the Iranian arbitrators. Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. of Int’l Cts and Tribunals 27, 47 (2003).

States and Iran appointing two-thirds of the arbitrators, who appoint the remaining third.¹³⁶ The tribunal has faced continued difficulties relating to the allegiance of arbitrators to their home states. For example, the U.S. sought to disqualify two Iranian arbitrators who had assaulted another arbitrator and the Iran withdrew these arbitrators and forced the resignation of several others.¹³⁷

i. Corruption of the judiciary would fail to set best practice examples for domestic courts.

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 state, handmaiden to the political rulers of the day and their political, ideological or personal agendas."¹³⁸ Today, this situation is compounded by a countrywide lack of resources and legal training; a recent study revealed that one in six of Cambodia's 117 judges and one in nine of the Supreme Court judges held law degrees.¹³⁹ The Cambodian judiciary suffers not only from problems of capacity, but

¹³⁶ Two thirds of arbitrators are directly appointed by member states and the remaining third are selected by these arbitrators. Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. of Int'l Cts and Tribunals 27, 47 (2003).

¹³⁷ See M. Pellonpaa and D. Caron, *The Uncitral Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Iran-United States Claims Tribunal* 138-219 (1994), at 141.

¹³⁸ Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. of Int'l Crim. Justice 327 (2006).

¹³⁹ World Bank, *Cambodia at the Crossroads*, Report No. 30636-KH, Nov. 2004.

also from a negative attitude towards judicial independence and impartiality that requires a “multi-generational project” to overcome.¹⁴⁰

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.

ii. Corruption should be addressed by the removal of affected Judges and, when necessary, the invalidation of the proceedings.

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”¹⁴¹ and, upon proposals by the Supreme Council of the Magistracy, the King shall sign decrees

¹⁴⁰ K. McEvers and P. Ana, *Disorder in the Court*, Cambodia Daily, March 4, 2000.

¹⁴¹ The Constitution of the Kingdom of Cambodia, art. 113.

appointing, transferring or removing judges.¹⁴² If the judicial selection process is in violation of the Basic Principles or if the judges are not independent in their functions, the King could 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.”¹⁴³ If judicial corruption becomes so severe as to preclude an independent trial, the judges may be required to annul the proceedings for procedural defect.

CONCLUSION:

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,”¹⁴⁴ but also to “assist the wider process of legal and judicial reform” in Cambodia.¹⁴⁵ If corruption of members of the Office of Administration or judges at the ECCC is permitted to flourish with impunity, it will

¹⁴² *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.”).

¹⁴³ Internal Rules, Rule 48.

¹⁴⁴ 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/jinitatives_200604.pdf.

¹⁴⁵ *Id.*, at 29.

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. Either way, the ECCC's performance "will have a major impact on both Cambodia and the future of international justice."¹⁴⁶

¹⁴⁶ James A. Goldston, *The Khmer Rouge Tribunal: What It Means for Cambodia*, Open Society Justice Initiatives: The Extraordinary Chambers, Apr. 18, 2006, 2, http://www.soros.org/resources/articles_publications/publications/justice_20060421/jinitatives_200604.pdf.

ADDENDUM 1: INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ITLOS

- (1.1) Members of the Registry are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the Tribunal only in view.
- (1.3) In the performance of their duties members of the Registry shall neither seek nor accept instructions from any government or from any other entity external to the Tribunal.
- (1.4) Members of the Registry shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Tribunal. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by the status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.
- (1.5) Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information coming to their knowledge by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Registrar. Nor shall they at any times use such information to private advantage. These obligations do not cease upon separation from the Registry.
- (1.6) No staff member shall accept any honour, decoration, favour, gift or remuneration from any government excepting for war service; nor shall a staff member accept any honour, decoration, favour, gift or remuneration from any source external to the Tribunal, without first obtaining the approval of the Registrar. Approval shall be granted only in exceptional cases where such acceptance is not incompatible with the terms of regulation 1.2 and with the individual's status as an international civil servant.
- (1.7) Staff members may exercise the right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants.
- (1.8) (a) The privileges and immunities deriving from the UNCLOS and Agreement on the Privileges and Immunities of the ITLOS ... are conferred in the interests of the Tribunal ...
(a) These privileges and immunities furnish no excuse to staff members who enjoy them for non-performance of their private obligations or failure to serve laws and police regulations. Whenever a question related to these privileges and immunities arise, the staff member shall immediately report to the Registrar.
- (4.3) Selection of staff members shall be made without distinction as to race, sex, or religion. So far as practicable, selection shall be made on a competitive basis.