

# POLITICAL INTERFERENCE AT THE ECCC?

*By Della Sentilles*

On 26 July 2010 the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is scheduled to announce its first verdict in the Khmer Rouge tribunals. The verdict for Guek Eav Kaing, alias “Duch,” the former head of S-21, one of the most notorious prisons under the Khmer Rouge, will be an historic occasion for both Cambodians and the international community. Not only will it be a sign of progress, as the war-ravaged country continues to rebuild itself, it may also mark a significant milestone for international human rights advocates who have worked tirelessly to bring this unique, hybrid tribunal into being.

The work of the ECCC is a new experiment in international law and it has generated its fair share of criticism. Recently, the Open Society Justice Initiative (“OSJI”) released a report alleging political interference by the Royal Government of Cambodia (“Cambodia”) in the court’s proceedings. The report supports its allegations with two principal examples: (1) the controversy over pursuing five additional suspects for cases 003 and 004; and (2) the refusal of six high-ranking government officials to submit to questioning by the office of the co-investigating judges.

While some criticism of the Cambodian justice system and the ECCC itself may be merited, and indeed useful, the OSJI report is flawed for a number of reasons. First, the report infers that political interference in the ECCC is inevitable based on studies that focus primarily on Cambodia’s domestic court system. Secondly, the dispute over cases 003 and 004 provides evidence that the tribunal’s internal rules are effective in checking political interference. Thirdly, the government officials’ refusal to cooperate is actually more an example of the United Nations’ (“UN”) inaction and even impotence rather than political interference. And finally, the OSJI report overlooks the significance of the ECCC in both the development of Cambodian law and international criminal law.

## **OSJI inferences of political interference based on studies are invalid**

The OSJI report uses studies on the inadequacy of Cambodia’s domestic courts as evidence of the ECCC’s short comings. Yet the report fails to cite a single study that supports allegations of political interference in the ECCC proceedings. In fact, most of the studies cited refer solely to Cambodia’s domestic courts and were written prior to February 2009, when the Duch trial began. For instance, a report from the Cambodian

League for the Promotion of Defense and Human Rights was completed in 2007.<sup>1</sup>[1] Two other reports, one from Human Rights Watch and another from Amnesty International, were published in April 2003.<sup>2</sup>[2]

Further, no reports from the United States Bureau of Democracy, Human Rights and Labor, two of which are cited by OSJI, allege bias or political interference in the ECCC proceedings. The US report from 2008 only mentions the ECCC in one paragraph under its section on public trials.<sup>3</sup>[3] The report from 2009 goes so far as to suggest that allegations of political interference in the ECCC are unfounded:

There were no allegations of corruption in the court's administration during the year. Some observers believed that public comments by government leaders on matters related to the ECCC's jurisdictional mandate constituted a form of political interference; however, there was no evidence that the work of the court was inhibited in any way, and national authorities successfully fulfilled their responsibility to apprehend and hand over to the tribunal all individuals indicted by the ECCC.<sup>4</sup>[4]

The OSJI report also cites an evaluation of the ECCC by Carolyn Dubay, associated editor of the *International Judicial Reporter*. Like OSJI, Dubay bases her criticism of the ECCC primarily on reports regarding the inadequacy of Cambodia's existing domestic court system. The article largely speculates that Cambodia's lack of an educated judiciary and fair trial practices in domestic trials will spill over into the ECCC. In fact, the only specific allegation of corruption at the ECCC refers to an internal audit from January 2007 investigating the use of UN tribunal funds as kickbacks for court employees. Additionally Dubay concludes her report by acknowledging that despite the potential domestic obstacles, "tangible effects of the presence of the Khmer Rouge Tribunal in terms of

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1[1] Cambodian League for the Promotion of Defense and Human Rights, *Human Rights in Cambodia: The Charade of Justice Report* (December 2007), available at <http://www.licadho-cambodia.org/reports/files/113LICADHOREportCharadeJustice07.pdf>.

2[2] Amnesty International, *Kingdom of Cambodia: Amnesty International's Position and Concerns Regarding the Proposed 'Khmer Rouge' Tribunal* (24 April 2003), available at <http://www.amnesty.org/en/library/asset/ASA23/005/2003/en/d8df2bf1-d6fc-11dd-b0cc-1f0860013475/asa230052003en.html>. Human Rights Watch, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (April 2003), available at <http://www.hrw.org/backgrounder/asia/cambodia040303-bck.html>.

3[3] United States Bureau of Democracy, Human Rights and Labor, *2008 Human Rights Report: Cambodia* (25 February 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.html>.

4[4] United States Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Cambodia* (11 March 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135988.html>.

domestic and international focus on accountability proceedings and investing in reforming the justice sector are positive.”<sup>5</sup>[5]

It is misleading to suggest political interference in the ECCC is inevitable because such interference is rampant in Cambodia’s domestic judiciary. It also tends to undermine the public legitimacy of the ECCC.

While technically the ECCC is part of the domestic judiciary, it is by no means the same. The whole point of establishing the ECCC was to make sure it was separate from and different than the rest of Cambodia’s legal system.

As the OSJI report acknowledges, there are substantial checks against political interference written into the *Agreement* between the UN and the Royal Government of Cambodia. Specifically, the report outlines three safeguards: (1) the requirement that judicial decisions be made by a supermajority vote; (2) a weighted dispute resolution procedure to resolve disagreements between the co-prosecutors and co-investigating judges; and (3) an express provision allowing the UN to withdraw its assistance if the Cambodian government fails to comply with the *Agreement*.

The OSJI report suggests that these three checks are inadequate. Yet it bases these assumptions largely on speculation and hypothetical situations. In fact, the report acknowledges that thus far the supermajority vote, which requires that at least one international judge side with the national judges, has not been a problem. The report concludes that during the Duch trial, the supermajority requirement “did not appear to prove an obstacle in the trial itself.”<sup>6</sup>[6] Furthermore, when the trial chamber judges failed to reach a unanimous decision on other trial-related matters, the split was not along national and international lines, which again suggests that political interference by the Cambodian government was not an issue at least on those points.

### **The Disagreement Over Cases 003 and 004**

The OSJI report is correct in asserting that the nature of the disagreement over whether to pursue cases 003 and 004 suggests political interference. Prime Minister Hun Sen and other government officials’ remarks in support of the national co-prosecutor’s refusal to refer cases 003 and 004 and the co-investigating judge’s delay in initiating the investigation of those cases further support this allegation.

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<sup>5</sup>[5] Carolyn Dubay, *Evaluating the Khmer Rouge Tribunal* (Summer 2009), available at [http://www.judicialmonitor.org/archive\\_summer2009/sectorassessment.html](http://www.judicialmonitor.org/archive_summer2009/sectorassessment.html).

<sup>6</sup>[6] Open Society Justice Initiative, *Report on Judicial Independence* (June 2010).

Yet the effect of that interference appears to have been minimized by the rules set up in anticipation of such disagreements. Rule 72 of the ECCC's internal rules states that when there is a disagreement between co-investigating judges "the action or decision which is subject of the disagreement shall be executed."<sup>7[7]</sup> Although You Bunleng, the national co-investigating judge, is not yet working on cases 003 and 004, Marcel Lemonde, the international co-investigating judge, is going forward. Lemonde's decision and ability to pursue cases 003 and 004 suggests that the tribunal's checks on political interference are actually effective.

It is also important to keep the dispute over cases 003 and 004 in perspective. It is no secret that there has been a major disagreement between the international community and the Cambodian government over the scope of the tribunal. While the UN has publicly stated it would like to try as many as twenty former Khmer Rouge leaders, the Cambodian government has stated it would prefer to limit the number to five.<sup>8[8]</sup> The refusal of national officials to charge or investigate more suspects should not be a surprise.

What should be surprising is that You Bunleng initially signed on to pursue the investigations of cases 003 and 004. While his reneging is unfortunate, his initial willingness suggests he may ultimately agree to investigate the crimes. In a letter to Lemonde, You Bunleng did not say that he was against the investigations only that he was not ready to make a decision until September 2010, when the closing order for case 002 is completed.<sup>9[9]</sup> You Bunleng's decision in September will be an important test of the efficacy of the tribunal's internal rules.

### **The Noncompliance of Government Officials**

OSJI is right to assert that the six high-ranking government officials' refusal to cooperate with the office of the co-investigating judges is problematic. It is also correct in admonishing the Cambodian government for its public support of the officials. Yet such meddling can and should be checked by both the UN and other international court officials. For instance, Rule 60(3) allows a co-investigating judge to order the judicial

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<sup>7[7]</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 72(3) (9 February 2010).

<sup>8[8]</sup> JOHN D. CIORCIARI, *History & Politics Behind the Khmer Rouge Trials*, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 33, 72 (John D. Ciorciari and Anne Heindel, eds., Documentation Center of Cambodia 2009).

<sup>9[9]</sup> The Extraordinary Chambers of the Courts of Cambodia, *Statement from the Co-Investigating Judges* (9 June 2010), available at [http://www.eccc.gov.kh/english/cabinet/press/156/PROCIJ\(JUne2010.pdf](http://www.eccc.gov.kh/english/cabinet/press/156/PROCIJ(JUne2010.pdf)

police to compel the witness to appear.<sup>10</sup>[10] No one has invoked such a provision.

The OSJI report does lay part of the blame on the United Nations and its inaction. What the report does not acknowledge enough, however, is that political interference is a two-way street: if and when the Cambodian government gets in the way of ECCC proceedings, the international community, especially ECCC officials, are obliged to step in and to use the resources provided in the *Agreement* and the internal rules to address the matter. As stated above, it is because of these safeguards that the ECCC should be differentiated from a regular domestic court in Cambodia.

### Placing the ECCC in context

Cambodia is a nation struggling to rebuild itself. And its judiciary is no exception. What is frustrating about the OSJI report, and others like it, is that it bases its evaluation on a few speculative examples and Cambodia's stunted past. While a healthy dose of valid criticism may be constructive, it is also important to remember that the ECCC is in large part an experiment in international criminal law.

Since the late 1990s, the international legal community has been advocating a shift away from larger and costlier tribunals toward smaller, hybrid tribunals like the ECCC in Cambodia. This movement is supported by the Rome Statute, which not only advocates victim participation but also limits the jurisdiction of International Criminal Courts so as to encourage domestic courts to take the lead. Specifically, the ICC jurisdiction is limited to trying alleged war criminals, if and only if, the domestic courts are unwilling or unable to try them -- the idea being that by locating war crimes tribunals within post-conflict societies, the tribunals not only offer the local population the opportunity to be active participants, but also provide practitioners, judges and lawyers alike, the opportunity to incorporate international standards into developing domestic law.

Like any experiment, the ECCC has had its fair share of setbacks – the thirty-year delay in justice, the derailed negotiations between Cambodia and the United Nations, the internal disputes between co-investigating judges and co-prosecutors. But experiments also carry an extraordinary amount of potential: it is quite possible the ECCC can change the way the international community thinks about the role and function of war crime tribunals today and going forward.

What is happening in Cambodia today is revolutionary: Never before have victims had the chance to be civil parties in the proceedings. Never before have over 30,000

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<sup>10</sup>[10] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 60(3) (9 February 2010).

nationals visited their nation's war crime tribunal.<sup>11</sup>[11] Never before have over 2 million nationals watched the proceedings on television.<sup>12</sup>[12] The ECCC has the potential, then, not only to deliver legal justice but also restorative, social justice to Cambodia and its people.

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OSJI

REPORT:

[http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf)

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<sup>11</sup>[11] The Extraordinary Chambers in the Courts of Cambodia, *Duch Trial Chamber Verdict to Be Pronounced* (24 May 2010), available at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=347](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=347).  
<sup>12</sup>[12] Brendan Brady, *A New TV Show is Rapidly Extending the Reach of the Khmer Rouge War Crimes Court to Cambodian Households*, GLOBAL POST *Global Post*, 20 November 2009, available at <http://www.globalpost.com/dispatch/asia/091116/cambodia-genocide-tribunal-television?page=0,0>.