

A PRIVATE SOLUTION:

THE POSSIBILITY OF PRIVATE DONATIONS

TO FUND THE ECCC

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I. INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (ECCC) received its first private donation on Wednesday, January 10, 2007, from Microsoft Singapore in the amount of \$100,000.¹ Such a donation, coupled with ongoing negotiations between the ECCC and the Bill and Melinda Gates Foundation about providing additional funding,² raises the possibility that the ECCC could turn to private donors to supplement its arguably inadequate budget.

In an era of increasing globalization and further concentration of wealth in a few countries (and within fewer households within those countries), it is not surprising that the private sector plays an ever-increasing role in global politics. Such a role must be under constant scrutiny, however, to ensure that international bodies and tribunals remain responsible to their member states and not to private parties and that any decisions made remain impartial. With no specific guidelines in the ECCC Law, the ECCC must be cautious in accepting private donations and vigilant in regulating them.

If the ECCC wishes to solicit private donations, this article proposes that an agency should be established within the ECCC to monitor how the funds are used. Such an agency could process all private donations, ensuring that large corporations do not gain too much influence in internal tribunal proceedings as well as preventing individual donations from becoming personal bribes. An agency could also track how the funds are used, providing more overall transparency for the activities of the ECCC. This article will begin with the present financial structure of the ECCC, explaining the unique hybrid nature of the court and how private donations would fit within this structure. Next, this article will examine the legal provisions of the ECCC Law regarding donations and analyze possible legal bars and other

¹ Erika Kinetz, *With \$100,000, Microsoft is 1st Private ECCC Donor*, THE CAMBODIA DAILY, January 11, 2007.

potential conflicts of interest. Finally, this article will conclude with a concrete proposal for an agency to accept private donations.

II. CURRENT FUNDING

A. Funding Structure

Currently, the ECCC receives its funding from the Cambodian government, foreign governments, and international bodies. The financial arrangement for the ECCC was the source of much consternation and was one of the topics during the four year negotiations that took place before Cambodia and the United Nations (U.N.) agreed on the ECCC's structure.³ The final agreement was to split the cost of the ECCC between the U.N. and the Cambodian government, but both parties have since received significant portions of their shares from foreign governments.⁴ The ECCC budget is managed by both the Royal Government of Cambodia's Task Force and the United Nations Assistance to the Khmer Rouge Tribunal (UNAKRT).⁵ In total, the U.N. has received donor pledges from eighteen countries as well as from the European Union (notably, the United States has not contributed), totaling \$42,758,190.⁶ Adding Microsoft's recent donation of \$100,000, this figure is quite close to the goal of \$43 million.

² Id.

³ Thordis Ingadottir, *Financial Challenges and their Possible Effects on Proceedings*, 4 J. INT'L CRIM. JUST. 294, 296, 299 (2006).

⁴ Id. at 295.

⁵ See http://www.unakrt-online.org/01_home.htm.

⁶ Japan, France, Australia, Canada, Germany, the Netherlands, Denmark, Luxembourg, Austria, Sweden, Norway, Republic of Korea, United Kingdom, Belgium, New Zealand, Ireland, Armenia, Namibia, and the European Union have all pledged funds. For a list of exact amounts donated, see http://www.dccam.org/Archives/Chronology/List_of_Pledging_Donor_Countries_For_UN_Share.pdf

Funds for the Cambodian share have progressed less successfully, with only \$3,725,000 of the required \$13,300,000 secured.⁷ Cambodia received donations to help with its financial obligation from India, Thailand, and the European Union.⁸ Cambodia itself has provided \$1.5 million.⁹ The outstanding balance is currently at \$9,575,000 for the Cambodian side. It is then no wonder that the ECCC, and particularly the Cambodians, are excited about this latest donation; even though it was designated for the U.N. side, it will hopefully be the first of many private donations that will ease the financial burden of the ECCC.¹⁰

B. Funding Shortcomings

Assuming that all of the required money is collected, the ECCC will operate (and is currently operating) on a budget of \$56.3 million.¹¹ This estimated budget, projected for three years, allows for less than \$20 million a year. While at first glance this sum may seem large for a single tribunal, it is miniscule compared to other international tribunals. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, for example, each currently cost over \$200 million per year.¹² The

⁷ Available at

http://www.dccam.org/Archives/Chronology/List_of_Pledging_Donor_Countries_For_Cambodian_Share.pdf

⁸ For a list of exact amounts donated, see *id.*

⁹ *Id.*

¹⁰ *Microsoft Becomes First Private Donor For Khmer Rouge Trials*, January 11, 2007.

Available at http://www.playfuls.com/news_10_8423-Microsoft-Becomes-First-Private-Donor-For-Khmer-Rouge-Trial.html

¹¹ Open Society Justice Initiative, *Memorandum to the Group of Interested States: Priority Issues for the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, October 2006.

Available at:

[http://72.14.209.104/search?q=cache:hwRFKK6tFaYJ:www.krtmonitoring.org/db/resource2/fs/%3Ffile_id%3D17498+Memorandum+to+the+Group+of+Interested+States:+Priority+Issues+for+the+Extraordinary+Chambers+in+the+Courts+of+Cambodia+\(ECCC\),&hl=en&gl=us&ct=clnk&cd=1&client=safari](http://72.14.209.104/search?q=cache:hwRFKK6tFaYJ:www.krtmonitoring.org/db/resource2/fs/%3Ffile_id%3D17498+Memorandum+to+the+Group+of+Interested+States:+Priority+Issues+for+the+Extraordinary+Chambers+in+the+Courts+of+Cambodia+(ECCC),&hl=en&gl=us&ct=clnk&cd=1&client=safari)

¹² Katherine Boyle, *Uncertain Future for War Crimes Tribunal*, Global Policy Forum, Nov. 3, 2006. Available at

<http://www.globalpolicy.org/intljustice/general/2006/1103uncertain.htm>.

Special Court for Sierra Leone (SCSL), which had an original budget similar to the ECCC, at \$57 million for three years, is now in its fifth year and has already cost over \$107 million.¹³ The SCSL has required more money than originally planned not because of poor oversight, but because the tasks involved in the tribunal were simply more costly than previously recognized.¹⁴

The ECCC similarly needs more money, not due to corruption or mismanagement, but because the current budget does not allow for certain necessities. Open Society Justice Initiative documented a list of inadequacies in the budget in October, 2006. Among other deficits, there is no money in the budget for: convening judges for a plenary session before the trial commences; travel for U.N. staff to engage in outreach; international witness protection outside of witness transportation; offices (or officers) to develop trial completion strategies; travel for prosecutors; scanners, visual or audio recording equipment; or online legal databases, such as Westlaw or Lexis.¹⁵ Against the backdrop of such shortcomings, the possibility of private donations looms large and promising.

C. Funding Disparities

Internally, ECCC employees receive salaries dependant on whether they are hired by Cambodia or by the United Nations. ECCC Law provides that the expenses of foreign officials and staff be covered by the U.N., while the expenses of their Cambodian counterparts are paid by the Cambodian government. Article 44 of the ECCC Law¹⁶ states:

¹³ Open Society Justice Initiative, supra note 11.

¹⁴ As well explained and documented by Open Society Justice Initiative, citing donor states, id.

¹⁵ Id.

¹⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Chapter XV, Expenses.

1. *The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;*
2. *The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations Trust Fund;*
3. *The salaries of the foreign administrative officials and staff, the foreign judges, Co-Investigating Judge and Co-Prosecutor shall be borne by the countries that contribute them at the request of the Secretary-General of the United Nations;*¹⁷

Though perhaps appropriate for a hybrid tribunal, such a division of finances inevitably leads to disparities in wages, with Cambodian prosecutors receiving roughly half of the international prosecutors' salaries. As Cambodian judges observe their international counterparts performing similar work but receiving twice the pay, this inequality in salary spurs differences in motivation and perceived self-value. One wonders if there is truth to the Cambodian prosecutors' quip that with only half a salary, the public can expect only half-justice.¹⁸ Private donations could potentially do much to lessen the disparity in resources (even if not in salaries) of the Cambodian and international employees while adding a psychological boost to the Cambodian officials, showing them that the world is indeed invested in their work.

III. PRIVATE DONATIONS

¹⁷ Translation by the Council of Jurists, September 6, 2001. Available at: [http://www.eccc.gov.kh/english/cabinet/law/2/KR_Law_as_promulgated_\(Eng_trans_6_Sept_2001\).pdf](http://www.eccc.gov.kh/english/cabinet/law/2/KR_Law_as_promulgated_(Eng_trans_6_Sept_2001).pdf)

Against the backdrop of such budgetary shortcomings and disparities, the possibility of private donations presents a potential alternative. In theory, it is a plausible solution; international bodies and tribunals have long accepted private donations.¹⁹ In practice, the procedure of receiving private donations will bring with it new complications, as agencies will have to be created to track the funds, monitor for conflicts of interest, and fundraise. Such agencies could bring additional benefits, however, such as increased transparency of ECCC finances and the opportunity for citizens, through financial investments, to become more emotionally invested in the trial.

The ECCC Law specifically allows non-governmental contributions in its Expenses Section:

*The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.*²⁰

While specifically permitting donations from non-governmental organizations and private parties, the clause does not mention any bar to accepting these donations. The operative word might be “*may receive*,” presumably allowing the ECCC to reject a donation if its receipt would create a conflict of interest. For a comparison, the Iraqi Special Tribunal

¹⁸ Interview with Youk Chhang, Director of Documentation Center of Cambodia, in Phnom Penh, Cambodia, (Jan. 11, 2007).

¹⁹ The U.N., for example, has worked with the private sector since its inception. See Stacy Williams. *A Billion Dollar Donation: Should the United Nations Look a Gift Horse in the Mouth?* 27 GA. J. INT’L & COMP. L. 425, 445 (1999). Private parties also gave significant donations to the United Nations International Criminal Tribunals for Yugoslavia and Rwanda. See Michael Johnson, Ralph C. Martin, II, & Robert M.A. Johnson. *American Lawyers in Rwanda Offer Tools to Tame Chaos*. A.B.A. 16 CRIM. JUST. 64 (2001).

similarly does not preclude private donations; the lack of criteria for private donations has nevertheless been interpreted to mean that donations can be accepted provided that they do not endanger the court's neutrality, which would violate the Tribunal Statute's impartiality requirement.²¹

The harder question is how to determine if a donation would affect a court's neutrality. Microsoft's recent donation was earmarked to be used for the U.N.'s share of the ECCC budget.²² Though Microsoft designated the money to be used to ease the U.N.'s financial obligation (as opposed to Cambodia's), the U.N., and in particular the ECCC, retains control over how that money is ultimately used. The situation might have been more complicated if Microsoft had directed that its funds be used for a specific ECCC activity, such as protecting witnesses. While such a donation is not legally prohibited, it has the potential to influence the internal ECCC agenda by prioritizing certain activities differently than the ECCC might have done if simply given the money. If such donations happened frequently, the U.N. (and the ECCC) could become tethered to private wishes.

Similar concerns have been raised regarding private donations to the U.N. in general. In 1997, Ted Turner pledged \$1 billion to the U.N.; at the time, this was the largest single donation ever made to any one organization.²³ The concern raised was that if the U.N. became reliant on private sources, it might become more responsible to private individuals than to member states.²⁴ Additionally, the act of encouraging individual donations was seen as a possible way of relieving U.N. member states of their financial obligations to the U.N.

²⁰ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Chapter XV, Expenses § 5.

²¹ Tribunal Statute, Articles 7(j) and 8(b). The Iraqi Special Tribunal for Crimes Against Humanity. 54 ICLQ 237 (January 2005).

²² *Microsoft Becomes First Private Donor For Khmer Rouge Trials*, *supra* note 10.

²³ Stacy Williams, *supra* note 19 at 426.

²⁴ *Id.*

and thus undermining membership accountability.²⁵ In part to alleviate such concerns, Turner established a United Nations Foundation (UNF) to distribute his donation in annual increments of \$100 million for ten years. The U.N. also established a foundation to receive the funds, the United Nations International Partnership Trust Fund Office (UNFIP) which made the decisions on which programs qualified for UNF money.²⁶

If the ECCC plans to encourage more private donations, a similar foundation would have to be established to accept the money. Though the ECCC Law, unlike the U.N. Charter, explicitly allows private donations,²⁷ the creation of an agency within the ECCC to disburse the funds would substantially decrease the influence individual donors would have over their funds. Even if the agency still acted under broad guidelines from donors (such as Microsoft's direction to give the money to the U.N. side of the hybrid tribunal), the agency could work with (and within) the ECCC to ensure that the money was being spent to fund projects the ECCC prioritizes (and not those that donors choose).

To assure donors that their money was being used efficiently, the agency could keep documented records of how, when, and where the donated money was spent. Such record-keeping would increase financial transparency of the institution and inspire confidence in its daily affairs. This financial documentation would be especially beneficial for an institution such as the ECCC, which, despite its relatively small budget, has already been lambasted by the Cambodian government as a poor use of money; as reported in The Cambodia Daily, "Assembly President Prince Norodom Ranariddh dismissed the tribunal's value Monday, saying its projected budget would be better spent improving the nation's agricultural

²⁵ Id.

²⁶ United Nations Foundation, Available at: <http://www.soros.org/un/unf/htm>

²⁷ Part of the impetus to create the foundation was also a desire to circumvent the U.N. Charter, Article 17, §2, which states that the U.N. shall be funded by members (and, implicitly, not by private parties).

sector.”²⁸ Meticulous financial records could show the public what is being accomplished by detailing the projects funded.

In addition to fears about private corporations having too much influence over the tribunal’s activities, an entirely different problem of conflict of interest arises when considering donations from private individuals. A private party might be interested in contributing funds not to persuade the U.N. to concentrate on certain issues, but rather to sway judicial decisions in a particular case. The ECCC Law does not specifically prohibit participants in the tribunal from donating money, but such a contribution would hopefully be rejected by the court. Attorneys, defendants, witnesses, and joined civil parties should be barred from donating to the ECCC in order to prevent any real or perceived bribery attempts. Although many victims of the Khmer Rouge understandably wish to contribute funds to the ECCC to ensure that the court succeeds, the idea of possible plaintiffs funding their own prosecutors and judges seems contrary to the system of law the ECCC is trying to implement; no one should have to pay for justice. Additionally, in order for the victims to receive justice, the judges must be impartial. To have victims pay to support their own court would paradoxically ruin the credibility that the court – and they themselves - will receive.

A more complicated case might arise if an individual were allowed to donate, and then later decided to join a suit as a civil party. Should an individual be barred from bringing a case (essentially losing the right to trial) because of a previous donation? The United States, for example, does not prohibit civil parties from donating to judicial elections and then presenting cases to the same judges whose campaign they financed.²⁹ While a slightly different situation, the potential for a conflict of interest is similar: judges hearing cases from parties who have given them money. Again, though there is no legal bar, the possibility of

²⁸ Yun Samean & Corinne Purtill. *Ranariddh: KR Trial Money Could Help Poor*, THE CAMBODIA DAILY, October 19, 2004.

²⁹ See Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. OF LEGAL ETHICS 597 (2005).

victims having financial influence over their future judges seems to present a significant conflict of interest. Since it is presently unclear whether the ECCC will even allow complaints from private individuals, this potential conflict might be moot.³⁰

In the event that such complaints are permitted, however, the agency could use its discretion under the ECCC Law (“*may receive*”) to reject donations from parties who might affect the court’s neutrality. Such an arrangement seems susceptible, however, to abuse of discretion.³¹ Alternatively, the agency could keep all donor information confidential; the agency could manage the funds and erect a Chinese Wall to prevent prosecutors and judges from knowing who contributed what.

Another option is that the ECCC could simply require that all donations be donations of goods specifically to be used for the tribunal and not money. In-kind donations have been successful in the past with international tribunals. In 2000, for example, a group of American prosecutors worked with IBM to deliver \$3 million in computers, technology, and training to the United Nations War Crimes Tribunals in Bosnia and Rwanda;³² this gift marked the largest private donation in the history of the tribunals.³³ Such a restriction on donations, however, is not in the best interest of either the ECCC or the donors. It is often much more beneficial for the ECCC to have money to spend as it pleases (on both technology and outreach projects, for instance); additionally, it is often much easier for private corporations and individuals to write a check than to ship expensive equipment overseas. Furthermore, accepting in-kind donations does not necessarily reduce the chances of donations being used to influence the court or bribe judges. Buying expensive cars for prosecutors (no matter how

³⁰ Interview with ECCC Co-Prosecutor in Phnom Penh, Cambodia (Jan. 11, 2007).

³¹ To avoid any potential conflict of interest, the court could also technically amend the ECCC Law to ban private donations altogether, but such an amendment not only seems excessive, but after the excitement over Microsoft’s donation, highly unlikely.

³² *NDAA Names in the News* 34 PROSECUTOR 12, 12-13 (Dec. 2000).

³³ Michael Johnson, Ralph C. Martin, II, & Robert M.A. Johnson, *supra* note 19.

much they are needed for transportation) could be just as powerful a corruption tool as paying them in cash.

The creation of an agency, however, such as previously mentioned to combat the financial influence of private corporate donors, could similarly neutralize individual donations. Conflicts of interest could be avoided by requiring that all individual donations be handled by an independent foundation. The same foundation that could disperse funds made by larger corporations to the tribunal could also accept and distribute individual donations. After being funneled through the foundation, individual donations would be part of a larger pool of money and rendered essentially anonymous.

IV. PROPOSAL

- If the ECCC is serious about soliciting private donations, it should establish an internal office to receive and disperse the funds.
- This agency should cooperate with the ECCC accounting office to stay informed of where gaps are in the ECCC budget.
- This agency should then work to match the financial needs of the ECCC with donors' directives (or restrictions).
- The agency should produce audit reports to keep donors and the public aware of how the ECCC is spending its money.

- If private complaints are allowed, donations from current civil parties should either be absolutely barred or accepted only as anonymous contributions through the independent agency.

End.