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Corrupt conditions surrounding the ECCC and their effect on judicial decision-making and the appearance of fairness

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: CORRUPT CONDITIONS SURROUNDING THE ECCC AND THEIR EFFECT ON JUDICIAL DECISION-MAKING AND THE APPEARANCE OF FAIRNESS

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I. INTRODUCTION

A. Scope [*]

This memorandum examines the issue of corrupt conditions within judicial institutions, the possible impact such corruption may have on judicial decision-making, as well as possible remedies a defendant may employ in the event he believes there has been a miscarriage of justice. The allegation of corruption and bias within an international tribunal is hardly a new concept, as previous courts have also dealt with the issue and acted in a manner to best maintain justice and appearance of fairness.[1] The hybrid nature of the Extraordinary Chambers of the Courts of Cambodia ("ECCC") has enabled the Cambodian Government's being more involved in the daily mechanisms of the Court than had other governments in traditional international criminal courts. A major issue that has arisen out of that involvement is the allegation that certain officials of the ECCC have been involved in a 'kick-back' scheme, giving portions of their salary back to government-hired Cambodian officials to obtain and secure their position at the Court. How deep that scheme runs within the ECCC and what might be its possible impact

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[*] "It has been reported that certain officials of the ECCC have been involved in corrupt practices including payment of monetary gratification to obtain and retain their positions at the Court. With this background, prepare a memorandum regarding the law relating to corruption in the judicial institutions and the ways other institutions have handled these issues. In particular, please analyze under what conditions corruption of the court officials (including or not including judges) can reflect on the judicial decision-making of its judges. Under such conditions, do defendants have remedies such as disqualification of judges, dismissal of indictments, etc.? If so, advise the likely responses to such challenges."

[1] *See, e.g.*, Prosecutor v. Sesay, Decision on Defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, SCSL-04-15-AR15, 13 March 2004 (Successful defense application, supported by the prosecutor, to disqualify Judge Geoffrey Robertson from adjudicating cases in the Appeals Chamber on the grounds of bias.) [reproduced in accompanying notebook at Tab 12].

on the decision-making of the judges are difficult to apprehend, as allegations of corruption are typically difficult or impossible to prove.[2] Because allegations are often unproven, a defendant's typical remedy against suspected corruption is limited to: 1) applying for the disqualification of a judge from his case (pre- or post-conviction); 2) moving that the tribunal inherently lacks jurisdiction because of corruption and bias; or 3) moving for a reversal of conviction on grounds of an unfair judicial process. This memorandum seeks insights that may help the Court anticipate, forestall, and deal with such situations. To do so, it examines case law, particularly at other international tribunals (International Criminal Tribunal for the Former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), Special Court for Sierra Leone ("SCSL")), as well as the limited case law at the ECCC, to determine conditions in which corruption may influence the decision-making of the judges and affect the appearance of fairness in the judicial process.

B. Summary of Conclusions

i. A defendant may apply for the disqualification of a judge in a case where he/she believes the judge cannot perform his/her duties without bias towards the defendant.

While there are several ICTY, ICTR, and SCSL cases of defendants' applying for the disqualification of judge on the grounds of bias, most often the motion is dismissed due to a lack of substantive evidence available to prove the claim. In order for a defendant to be successful in

[2] Report of the Secretary-General on the Implementation of Resolution 1050, S/1996/286, 15 April 1996, ¶ 7 (describing situation at ICTR "The evidence adduced did not confirm allegations of corrupt practices or misuse of funds. The review has, however, disclosed mismanagement in almost all areas of the Tribunal and frequent violations of United Nations rules and regulations") [reproduced in accompanying notebook at Tab 20].

such an application, he must satisfy not only a subjective, actual bias test, but also an objective reasonable apprehension of bias test. Most important for the appearance of fairness, the objective test must show that "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[3]

ii. The tenure of court officials and budgetary constraints may lead to corrupt conditions that influence the decisions of the tribunal.

As a result of a tribunal's operating for a limited duration and having difficulty in obtaining necessary operating funds, corrupt conditions can arise where a court employee believes that providing a kick-back to senior ranking government-appointed officials will secure future employment and salary. Consequently, it is beneficial for judges, as well as other court officials, to be contracted for set periods of time to avoid possible third-party interference in their actions. Guaranteed salary is also a critical issue, as employees who do not know the frequency and amount of pay may be tempted to circumvent justice for their personal gain. With judicial appointments set on terms that avoid political interference and an adequately financed and monitored budget, corrupt conditions that may influence judicial decision-making can be greatly reduced.[4]

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[3] Prosecutor v. Furundzija, Appeal Judgment, ¶189, IT-95-17/1-A, 21 July 2000. [reproduced in accompanying notebook at Tab 4].

[4] Robert Carmichael, *Avoiding Arusha- Lessons for Cambodia's Genocide Tribunal*, Phnom Penh Post (6 November 2003). [reproduced in accompanying notebook at Tab 34].

iii. The appearance of fairness of the ECCC's judicial process is crucial for the legitimacy and lasting legacy of the Court, both locally and internationally.

Despite the widespread allegations within the ECCC and the culture of corruption found throughout Cambodia, the local citizens and victims of the Khmer Rouge atrocities must be able to recognize a fair and independent judiciary throughout the proceedings. By allowing citizens to observe the trial, as well as understand the proceedings, Cambodian and international court officials can "hope that the ECCC will become a model court for future judicial systems."[5] The international legacy of the ECCC may ultimately be based not on the number of convictions obtained, but rather on its appearance of fairness and the strides it enables Cambodia to make towards a corruption-free and truly independent judiciary.

iv. While a corrupt judge may be disqualified from hearing a case due to bias, allegations against other court officials are investigated and can lead to criminal charges and/or loss of employment.

Because corrupt practices are not limited to those sitting on the bench, there is case law from previous international tribunals documenting allegations, some with substantive evidence, of corrupt acts committed by members of defense teams, investigators, and others in the administration of the court. Such as the ECCC is a hybrid court, any allegations of improper and/or corrupt practices are treated differently if they are levied against national members of the ECCC than if against international members of the Court. This investigative imbalance in the

[5] UN-ECCC Joint Statement, 23 February 2009. [reproduced in accompanying notebook at Tab 21].

ECCC can cause corrupt conditions to persist, particularly if little is done in regard to complaints filed against Cambodian national members of the Court.

II. BACKGROUND:

CURRENT ALLEGATIONS OF CORRUPTION IN THE ECCC

Almost as soon as the Cambodian tribunal was formed, there were allegations of corruption in its hiring practices. It has been alleged that the judges and other Cambodian court personnel were required to kick-back a significant portion of their salary to government officials as a condition of obtaining and keeping positions on the Court.[6] As the trials are set to commence in the ECCC, there has been little to no change in the perception that the Court is potentially composed of corrupt members who may have an effect its' judicial decision-making.

Upon the initial complaints from court employees of corrupt hiring practices within the ECCC, the United Nations conducted an investigation in 2007 to determine if there were any improprieties in the manner that Cambodian nationals received and maintained positions at the tribunal. Despite cries for complete disclosure from the international community and NGOs, after receiving the report from the UN, the Cambodian government has kept the findings confidential.[7] However, there have been some improvements made in the manner in which complaints of corruption are handled on the Cambodian side of the Court, most importantly

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[6] Lao Mong Hay, *Khmer Rouge tribunal must have autonomy*, UPI Asia Online (18 March 2009). [reproduced in accompanying notebook at Tab 26]

[7] Elena Lesley, *Cambodia Responsible for Graft Probe, officials say,* Phnom Penh Post (23 September 2008). [reproduced in accompany notebook at Tab 27]

structuring a system that would provide full confidentiality and protection of staff members against any possible retaliation for good-faith reporting of wrongdoing.[8] Before rules provided confidentiality to whistle-blowers, "those brave individuals who have come forward with allegations of corrupt practices lay dangerously exposed."[9]

In an attempt to place a cloud of illegitimacy over the entire tribunal, the defense team for Nuon Chea filed a complaint on January 8, 2009 in the Phnom Penh Municipal Court. That complaint urged investigation of the kickback allegations, as it claimed top administrative officials may have broken criminal laws by "perpetrating, facilitating, aiding and/or abetting an organized regime of institutional corruption at the ECCC during the pending judicial investigation".[10] This complaint, though subsequently dismissed by the municipal court, does name several individuals at the ECCC who are alleged to have taken part in the kick-back scheme. In fact, one party named in the criminal complaint, Sean Visoth, is a senior Cambodian government official within the ECCC who has been on leave since late 2008 when the UN report on the corruption allegations was delivered to the Cambodian government. An anonymous former staff member at the ECCC described Visoth's involvement in and knowledge of the kickback scheme:

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[8] UN-ECCC Joint Statement, 23 February 2009. [reproduced in accompanying notebook at Tab 21].

[9] John A. Hall, *Judging the Khmer Rouge Tribunal*, Far Eastern Economic Review (2 March 2009). [reproduced in accompanying notebook at Tab 35].

[10] Cat Barton, *KRT staff targeted by lawyers*, Phnom Penh Post (9 January 2009). [reproduced in accompanying notebook at Tab 28].

> For the first four months [of my contract], I paid 70 percent [of my salary in kickbacks], then it went down to 10 percent. Let's say you are the supervisor. You have 30 people under you, so the people under you know to give their envelope [containing the kickback] to you, and you hand it to Sean Visoth.[11]

Unfortunately, the Cambodian government has not achieved a level of transparency in its investigations and hiring practices that seems to meet the bar set by international standards. James A. Goldston, Executive Director of the Open Society Justice Initiative has urged that "the court must demonstrate that it is not a tool of the Cambodian government and ensure a fair and transparent judicial process."[12] Without careful regard to outsiders' views of the tribunal's appearance of fairness, the Khmer Rouge Tribunal might succeed in convicting all the accused, still fail to provide a sense of justice to the citizens of Cambodia and observers abroad. Based on precedent set by several other international criminal courts, the ECCC should recognize and, if needed, remedy the conditions when its decision-makers are alleged to be unable to render a fair and unbiased judgment.

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[11] Cat Barton, *Tribunal graft charges spread,* Phnom Penh Post, 27 February 2009. [reproduced in accompanying notebook at Tab 29].

[12] Justice Initiative, *Credibility of Khmer Rouge Tribunal Jeopardized by Corruption and Political Interference on Eve of First Trial, in* Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: February 2009, 12 February 2009. [reproduced in accompanying notebook at Tab 30].

III. LEGAL ANALYSIS

A. DEFENDANT'S APPLICATION FOR THE DISQUALIFICATION AND/OR REMOVAL OF A JUDGE UNDER CORRUPT CONDITIONS

i. International Tribunal Case Law

a. International Criminal Tribunal for the Former Yugoslavia

Furundzija: Unsuccessful Application for the Removal of Judge Mumba due to Involvement in Woman's Rights, Creation and Application of Bias Disqualification Tests

While the ICTY initially faced several challenges at the trial level from defendants for the removal of a judge as a result of bias[13], the ICTY Appeals Chamber did not formulate a standard to be applied in the cases brought under the ICTY Rules of Procedure and Evidence[14] until Anto Furundzija appealed his conviction for torture and rape, among other things.[15] The facts that Furundzija alleged gave rise to a charge of bias on the part of Judge Mumba, suggesting that she had a personal interest in the outcome of the original trial as a result of her membership on the

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[13] *See, e.g.*, Prosecutor v. Zejnil Delalic et al., Decision of the Bureau on Montion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, IT-96-21-T, 1 October 1999 [reproduced in accompanying notebook at Tab 5]; Prosecutor v. Zejnil Delalic et al., Decision of the Bureau on Motion on Judicial Independence, IT-96-21-T, 4 September 1998 [reproduced in accompanying notebook at Tab 6]; Prosecutor v. Dario Kordic et al., Decision of the Bureau, IT-95-14/2-PT, 4 May 1998 [reproduced in accompanying notebook at Tab 7], Prosecutor v. Radoslav Branin and Momir Talic, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, IT-99-36-PT, 18 May 2000 [reproduced in accompanying notebook at Tab 8].

[14] *See* ICTY Rules of Procedure and Evidence, Rule 15 [reproduced in accompanying notebook at Tab 40].

[15] Prosecutor v. Furundzija, Appeal Judgment, IT-95-17/1-A, 21 July 2000 [reproduced in accompanying notebook at Tab 4].

United Nations Commission on Status of Woman (UNCSW) and her ongoing campaign to promote the organization's goals.[16] The Appeals Chamber, cognizant that civil law jurisdictions require a judge to not only be actually impartial, but also appear impartial[17], set the following standard to be applied when interpreting and applying the impartiality requirements:

> 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 informed, to reasonably apprehend bias.[18]

Applying B(ii), the ICTY determined that the appropriate test on this issue is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that [the Judge in question]. . . might not bring an impartial and unprejudiced mind".[19]

Using this newly articulated standard of judicial bias review, the ICTY Appeals Chamber examined the possibility of whether the judge being an advocate for a particular issue is enough reason to have a disqualifying interest, as well as whether the judge's membership in the UNCSW would lead a reasonable and informed observer to apprehend bias under B(ii) (the

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[16] *Id.* at ¶ 166.

[17] *Id.* at ¶ 188 (citing *e.g.* German Code of Criminal Procedure, Arts. 22-24)

[18] *Id.* at ¶ 189

[19] *Id.* at ¶ 257 (quoting *Tadic*, ¶ 15).

defendant did not contend there was any actual bias on the part of the judge to disqualify her under Rule 15(A)[20]). In looking at the possibility of a disqualifying interest due to being a party to the cause, the Court determined the shared goals of the judge and the UN committee was not a basis for either the finding of partiality or appearance of bias.

As far as the claim for the apprehension of bias to a reasonable and informed observer, the Court emphasized the customary standard of the judge's position[21], which must be able to "disabuse their minds of any irrelevant personal beliefs or predispositions."[22] Giving deference to the esteemed panel of judges, the burden is placed on the appellant to bring forth enough evidence to show a judge's partiality.[23] The ICTY went on to dismiss Furundzija's claim under this analysis, particularly noting that Judge Mumba's participation in the UNCSW was as a representative of her country and she spoke on its behalf, rather than her own. Even if Judge

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[20] *Id.* at ¶ 171.

[21] *See* ICTY Statute, Article 13(1) "The Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including humanitarian law and human rights law." *See also* ECCC Law, Article 10 new "Judges of the Extraordinary Chambers shall be appointed 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 instructions from any government or any other source."

[22] *Id.* at ¶ 197.

[23] *See* Mason J, In Re JRL: Ex parte CJL, CLR 343, 352 (1986) ("disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established.'"). [reproduced in accompanying notebook at Tab 19].

Mumba shared the objectives of the UNCSW, in additional to merely participating, the Appeals chamber had determined that "[it] can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias."[24] [25]

Mucic: Unsucessful Application for the Removal of Judge Benito due to Expiration of Term and Election to Home Country's Executive Branch

Another case in the ICTY brought up the issue of a judge's possible bias and outside influences being used in their decision-making when Judge Benito was accused of improperly serving on the Tribunal as a result of her election and oath as Costa Rica's Second Vice-President, plus her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.[26] In dismissing this appeal, the Court noted that Judge Benito's election did not detract from the ability to perform independently or with the proper qualifications required of an international judge. A further question arose because while a trial was ongoing within the ICTY in Judge Benito's Chamber, her term as an ICTY judge has expired without renewal, thus drawing allegations from the defense that she was no longer qualified to serve as an impartial judge. However, as Security Council Resolution 1126

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[24] *Id.* at ¶ 201.

[25] *See also* The ECCC Court Report, Issue 10, p. 2 (February 2009) (noting Judge Florence Mumba has been sworn in as an International Reserve Judge of the Pre-Trial Chambers of the ECCC, by Royal Decree of His Majesty Norodom Sihamoni, King of Cambodia, on January 31, 2009). [reproduced in accompanying notebook at Tab 36].

[26] Prosecutor v. Mucic et al., Appeal Judgment, IT-96-21-A, 20 February 2001 [reproduced in accompanying notebook at Tab 9].

authorizes judges to extend his/her term in order to hear the end of a trial[27], the defendant did not suffer any miscarriage of justice.

Furthermore, under the interpretation of ICTY Rule 15(A), there had been no circumstances to suggest an actual bias on Judge Benito's part[28]. However, the Mucic defense claimed that the judge's dual positions as Costa Rican Second Vice-President and a Tribunal Judge would be enough for a reasonable person to believe there was an appearance of partiality under a Rule 15(B) analysis.[29] In looking at whether the 'reasonable minded observer' might believe that Judge Benito could not bring an "impartial and unprejudiced mind"[30], the Appeals Chamber referenced an earlier understanding memorialized between the Tribunal and Judge Benito[31]. In that letter, it was understood that Judge Benito would not assume any executive duties in Costa Rica prior to the completion of her duties as an international judge at the ICTY. As the ICTY elsewhere noted, "the mere fact that a person who exercises judicial functions is to some extent subject, in another capacity to executive supervision, is not by itself enough to

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[27] United Nations Security Council Resolution 1126 [reproduced in accompanying notebook at Tab 22].

[28] *Mucic* at ¶ 682.

[29] See *supra* notes 16-18 and accompanying text.

[30] *Mucic* at ¶ 682.

[31] Letter from His Excellency Miguel Angel Rodriguez E, President of the Republic of Costa Rica, to the President of the Tribunal, 7 July 1998 [reproduced in accompanying notebook at Tab 44].

impair judicial independence."[32] A reasonable observer, with knowledge of this fact, and of the underlying tenet that a judge is expected to act in an impartial manner without being corrupted by the influence or policy of a third party, would come to the conclusion that Judge Benito had acted in the utmost professional manner in maintaining her dual positions.

The Appeals Chamber noted the concern of the Mucic defense regarding the separation of powers between the Tribunal and Costa Rican government; however, it believed that "the application of the principle of separation of powers to the factual situation . . . is nevertheless misconceived. . . Where the relevant powers arise on separate systems or on different planes . . . the potential for there to be any convergence in the subject matter of the powers, and therefore a conflict of interest to arise, is greatly reduced."[33] In recognizing the ability of Judge Benito to exercise judicial independence, free from the influence of her national government of which she was elected as an executive member, the Tribunal seems to give broad allowance to an individual being employed by both a national government and an international court.

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[32] Prosecutor v. Delalic et al., Decision of the Bureau on Motion on Judicial Independence, 4 September 1998 [reproduced in accompanying notebook at Tab 5].

[33] *Mucic* at ¶ 690.

Seselj: Unsuccessful Application for the Disqualification of Judges due to Nationality and Religion

The ICTY has also dealt with the issue of whether the nationality and religion of a judge can introduce corruption or bias into a verdict against the defendant.[34] In alleging the religions and national allegiances of the judges rendered them actually biased under Rule 15, defendant Seselj (under his own representation) believed the whole panel of judges would be susceptible to the influences of both their national governments and the Catholic Church.[35] Dismissing the defendant's "frivolous"[36] claim, the court ruled that "the nationalities and religions of Judges are, and must be, irrelevant to their ability to hear the cases before them impartially." Additionally, the Court emphasized the irrelevance of policies of a judge's home country to the impartial decision-making ability of the judges: "[t]he policies of the government of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities."[37]

In discounting the nationality of a judge as relevant to the considerations of bias under an actual or apprehension of bias analysis, the ICTY recognized the inherent qualities with which some judges enter the Tribunal. Those qualities, drawn from experience within the judicial community as well as from the normative culture of their home country, should not disqualify a

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[34] Prosecutor v. Seslj, Decision on Motion for Disqualification, IT-03-67-PT, 10 June 2003 [reproduced in accompanying Notebook at Tab 10].

[35] *Id.* at ¶ 3.

[36] *Id.* at ¶ 8.

[37] *Id.* at ¶ 3.

judge from hearing a case unless the movant is able to adduce enough additional evidence to persuade the Court that those outside influences are so overwhelming as to present an apparent lack of fairness and to impact the decision-making ability of the judge.[38]

Milosevic: Unsuccessful Claim that International Tribunals suffer from inherent bias and corruption

In the preliminary motions of the Slobodan Milosevic trial[39], Milosevic alleged that the international tribunal was inherently biased and corrupt from the beginning, without the possibility of an acquittal even before the trial began. "[T]he very psychology of the enterprise is persecutorial. Few judges appointed to serve on a Tribunal created under such circumstances will feel free to acquit any but the most marginal, or clearly mistaken accused, or to create an appearance of objectivity."[40] Though Milosevic's motion was not supported by a proper rule, the ICTY felt that because the defendant alleged that there was no conceivable possibility for a fair trial at the level of an international tribunal, a proper analysis and response was required.[41] However, without supporting evidence of the Tribunal's bias that would satisfy the requirement for actual bias, the court looked to the defendant's insistence that he was virtually convicted before standing trial. Absent proof of actual bias, the "reasonable observer" scenario was again

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[38] Theodore Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 Am. J. Int'l L. 359, at 361 (2005). [reproduced in accompanying notebook at Tab 39].

[39] Prosecutor v. Milosevic, Decision on Preliminary Motions, IT-99-37-PT, 8 November 2001 [reproduced in accompanying notebook at Tab 11].

[40] *Id.* at ¶ 18 (quoting *Untitled Milosevic Motion*, 30 August 2001).

[41] *Id.* at ¶ 19.

employed.[42] At this stage the Appeals Chamber found that there was no evidence presented that would cause the reasonable observer to apprehend bias on the part of the international tribunal. Therefore it dismissed Milosevic's claim.[43]

Despite denying Milosevic's claim, the ICTY indicated that it would entertain motions regarding the independence and impartiality of the tribunal, regardless of the lack of procedural regulations. This accommodation is important to note, since it allows a formal challenge to a tribunal's impartiality to be recognized and addressed expeditiously to settle the matter, as well as to make any formal recommendations that will further advance the appearance of fairness within the judicial process.

b. International Criminal Tribunal for Rwanda

<u>Bagosora:</u> Unsuccessful Application for the Disqualification of Judges due to a pattern of bias in previous decisions

A recent decision of the ICTR addressed the issue of impartial judicial decisions, through an extraordinary case in which the defendant, Theoneste Bagosora, was seeking the disqualification of all three judges hearing his trial in the Trial Chamber.[44] Rather than attempt to establish any interest or associations of the judges' which might render them unqualified, this disqualification claim argued that "erroneous legal rulings rendered by the Chamber over the

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[42] *Id.* at ¶ 22.

[43] *Id.*

[44] Prosecutor v. Bagosora and ors, Decision on motion for disqualification of judges, ICTR-98-41-T, 28 May 2007 [reproduced in accompanying notebook at Tab 1].

past six months reveal a pattern of bias, actual or reasonably apprehended."[45] Claiming biased judicial decision-making on the part of the three judges (Erik Mose, Jai Jam Reddy, Sergei Alekseevich Egorov), Bagosora sought to have the decisions of the Trial Chamber set aside, a mistrial declared and a fresh bench seated for a new trial.[46]

The Bureau[47], conducting a Rule 15[48] review, dismissed the defendant's claim because the Bureau was unable to conclude that any evidence submitted by Bagosora established a trend of judicial pre-disposition against him. Rather than introduce subjective evidence to prove the decisions were a result of judicial misconduct, Bagosora represented that the Tribunal's lack of timely disclosure regarding the assassination of President Habyarimana, holdings in previous cases, and statements made in court documents by the judges comprised the reason he could not receive a fair and impartial trial.[49] However, after examining the claims, the Bureau found that there was no evidence of any actual bias against the accused, nor was there the appearance of bias that an objective, well-informed observer could apprehend.[50]

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[45] *Id.* at ¶ 9.

[46] *Id.*

[47] The Bureau is an office of the Presiding Judge in each Trial Chamber of the ICTR to hear matters pursuant to the Tribunal's Rules and Procedures. In this matter, the panel of judges comprising the Bureau consisted of Judges Navanethem Pillay, Erik Mose, and William Sekule.

[48] ICTR Rules of Procedure and Evidence, UN Doc ITR/3/Rev1, 1995, Rule 15 [reproduced in accompanying notebook at Tab 41].

[49] *Bagosora* at ¶¶ 12, 18, 26, 29.

[50] *Id.* at ¶ 31.

In setting a standard for reviewing the decisions of the Trial Chamber, the ICTR used the subjective and objective bias tests articulated in the ICTY case of *Furundzija.*[51] This combined standard sets a course of requirements that must be shown in the ICTR in order to overturn or stay proceedings previously adjudicated in a case adjudicated by a biased or corrupt trial bench.

Kanyabashi: Unsuccessful Application for the Disqualification of Judges due to the judicial composition arrangement

An additional issue in which a defendant has alleged a lack of impartiality and independence on behalf of the judge is in the assignment of judges to particular cases.[52] Raised by the defendant following the recomposition of a Trial Chamber after the trial had begun, this issue expressed the defendant's perception that "a change in the composition of the Chamber directly gives rise to a fear of lack of independence"[53]. The Court examined the issue looking at the objective prong of the Rule 15 test. In interpreting that standard, Judge Shahabuddeen noted in the dissenting opinion:

> As to whether there is an appearance of lack of independence and impartiality, this question is not to be answered by asking whether there is a real danger or likelihood of independence or impartiality. The issue is one of public confidence in the system administering the justice. But it is not the case that that issue is to be judged by the views of the hypersensitive and the uninformed. The test is whether the events in question give rise to a reasonable apprehension or suspicion

[51] *See* supra notes 16-18.

[52] Prosecutor v. Kanyabashi, Decision on the Defense Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber 1, ICTR-96-15-A, 3 June 1999 [reproduced in accompanying notebook at Tab 2].

[53] *Id.* at ¶ 82.

> on the part of a fair-minded and informed member of the public that the judge was not impartial.[54]

Upon their final analysis, the Tribunal's decision was that the recomposition was not a ground for dismissal of charges or disqualification of the newly formed Trial Chamber. In noting the importance of the public confidence in the judicial system, the Tribunal recognized the magnitude of influence of public perception on the appearance of fairness in trials of this nature. If they secure the respect and confidence of the nation in which the war crimes were committed and tried, international tribunals may be allowed to possess particular inherent flaws as long as these do not interfere in the administration of an impartial judicial decision-making process.

c. Special Court for Sierra Leone

<u>Sesay:</u> Successful Application for the Disqualification of Judge Robertson due to previously published comments regarding the guilt of defendants

While other international tribunals have encountered challenges to the independence and impartiality of their judges, only the SCSL has faced such a challenge that ultimately resulted in the disqualification of a judge.[55] In the trial of Issa Hassan Sesay, the defense sought the disqualification of Judge Geoffrey Robertson because of questions concerning comments he had made about the crimes committed by members of the Revolutionary United Front in a book he had written before joining the Tribunal. This challenge, brought by the defense under a Rule

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[54] *Id.* at 82.

[55] Prosecutor v. Sesay, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, SCSL-2004-15-PT-058, 13 March 2004 [reproduced in accompanying notebook at Tab 12].

15[56] motion similar to those composed in the ICTY and ICTR, was actually supported by the prosecution because of the potential ramifications of injustice. In the prosecution's response to the defense motion, the prosecutor's were willing to concede "that there could be a valid argument that there is an appearance of bias on the part of Judge Robertson. The material could lead a reasonable observer, properly informed, to apprehend bias."[57] After Judge Robertson declined to recuse himself following the defendant's motion, the Court made a determination based on the objective standards of bias generally recognized by the international tribunal jurisprudence. The comments made by Judge Robertson, while certainly within his rights to state his opinions, led the Appeals Chamber to rule that there would be legitimate fear that he lacked impartiality and a reasonable man could apprehend bias,[58] as per the requirements set out for the disqualification of a judge under the rules of the SCSL.

This removal of a judge reflected the SCSL's considerations of both the public's and the defendant's perceptions towards the appearance of receiving a fair trial. Though Judge Robertson did not feel disqualification from cases concerning members of the Revolutionary United Front, based on his published comments regarding their guilt was appropriate, the Prosecution viewed the outcome of this motion as critical to the lasting legacy of their Tribunal: "this motion and whatever resulting decision by the President and/or Appellate Chamber will

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[56] Rules of Procedure and Evidence, Special Court for Sierra Leone, 16 January 2002, Rule 15 [reproduced in accompanying notebook at Tab 42].

[57] *Id.* at ¶ 7 (quoting Prosecution Response to Defense Motion Seeking the Disqualification of Justice Roberston from the Appeals Chamber, 1 March 2004, ¶ 2).

[58] *Id.* at ¶ 15.

ultimately reflect upon the credibility of the Special Court for Sierra Leone and the integrity of the proceedings."[59] Though the SCSL may have been internally hesitant to remove a sitting judge, the recognition of the Prosecution that the legitimacy and lasting legacy of the trials were at least equally important with convictions proclaimed their desire that the Tribunal both act and appear to administer justice impartially.

Norman: Unsuccessful Application for the Disqualification of Judge Winters due to past experiences and qualifications

In a contrasting opinion issued by the SCSL, the Appeals Chamber decided on a motion to disqualify a judge based on alleged actual bias and pre-judging of an issue as a result of past experiences.[60] In this motion the defense in Prosecutor v. Norman found bias in the past experiences of Judge Winters, particularly her involvement as an expert in children's rights with UNICEF and with a university masters program where she sat on an expert panel. As a result of Judge Winters' involvement in those institutions, the defense claimed she should be disqualified under SCSL Rule 15[61] because of her personal interest with UNICEF and a desire to see a particular outcome in this trial.[62] As part of its determination that Judge Winters was not subject to disqualification in this instance, the Court indicated that her past involvement with children's

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[59] *Id.* at ¶ 8 (quoting Prosecution Response, ¶ 4).

[60] Prosecutor v. Norman, Decision on the motion to recuse Judge Winter from the deliberation in the preliminary motion on the recruitment of child soldiers, SCSL-2004-14-PT, 28 May 2004 [reproduced in accompanying notebook at Tab 13].

[61] *See* supra note 51 and accompanying text.

[62] *Id.* at ¶ 17-19.

rights organizations were examples of the qualifications she possessed to be an international judge, and "a distinction must be drawn between the requirements for a person to serve as a Judge of the tribunal and the issues relating to the grounds of disqualification of a Judge from sitting in a particular case."[63]

ii. Extraordinary Chambers in the Courts of Cambodia Jurisprudence on the Disqualification of a Judge

Despite the numerous allegations of corruption in Cambodia, there has been only one, ultimately unsuccessful, attempt to disqualify a judge.[64] The defense in the Nuon Chea case felt that there would be an objective appearance of bias on behalf of Judge Ney Thol if he were allowed to adjudicate any ECCC case against members of the Khmer Rouge regime because "as a serving military officer and his participation in highly questionable judicial decisions 'would lead a reasonable observer, properly informed, to reasonably apprehend bias' against Mr. Nuon and the Khmer Rouge and in favour of the CPP."[65] Similar to the Rule 15 review of the ICTR, ICTY and SCSL, the ECCC's Internal Rule 34 governs the applications for the disqualification of a judge.[66] Under that rule and applying the jurisprudence of the test for bias articulated in

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[63] *Id.* at ¶ 30 (citing Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, Decision of the Bureau on Motion to Disqualify Judge Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, IT-96-21-A, 25 October 1999).

[64] Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 002/19-09-2007-ECCC/OCIJ (PTC 01), 4 February 2008 [reproduced in accompanying notebook at Tab 15].

[65] *Id.* at ¶ 14 (quoting Defense Application for Disqualification, ¶ 24).

[66] *See* ECCC Internal Rule 34.

Furundzija,[67] the Court looked at both military and political participation of Judge Ney to determine if it satisfied the second prong of the objective test.

First applying the reasonable apprehension test to Judge Ney Thol's service in the RCAF as an officer, the Pre-Trial Chamber disagreed with the defendant's contention that the judge still takes orders from the Cambodian People's Party ("CPP") Prime Minister and would be subject to military discipline if any case were adjudicated in opposition to the CPP's policy.[68] The Court responded to the lack of evidence introduced to support the defendant's position by concluding that, occupying the position within the ECCC was in Judge Ney Thol's personal capacity and was not in relation to his position within the RCAF. The high level of deference accorded to the judge per his appointment at the ECCC[69] was not rebutted by the [lack of] evidence offered by the defense on this issue.

The defendant's second contention, that Judge Ney Thol is a member of the CPP and will look to advance their political agenda through his decisions, was also found to be unsubstantiated and without sufficient supporting evidence to cause a reasonable apprehension of bias on the part

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[67] *See* supra notes 14-18 and accompanying text.

[68] *Id.* at ¶ 23.

[69] *See* Agreement between the United Nations and the Royal government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Article 3.3 ("The judges shall be persons of 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.") [reproduced in accompanying notebook at Tab 43].

of a knowledgeable observer.[70] As Judge Ney Thol submitted a notice that he had resigned from the CPP upon his appointment to the ECCC[71], the Court stated:

> [T]he mere fact that a judge was a member of a political party does not give rise to the necessary inference that his decisions are politically motivated or influenced. When a judge takes his oath of office *it is assumed that he or she can and will disabuse their minds of any irrelevant personal beliefs or predispositions.*[72]

While the presumption is accurate, it is also optimistic in the sense that the Cambodian judiciary has often been seen as an additional arm of the government. However, without sufficient evidence to refute the presumption of independence in this case, the Pre-Trial Chamber properly denied the defendant's motion as to both allegations of corrupt influences.

IV. CORRUPT CONDITIONS RESULTING IN THREATS TO THE INDEPENDENCE OF THE JUDICIAL INSTITUTION

A. Lack of Guarantees Regarding Staffing and Compensation Pose Challenges to the Judicial Independence and the Appearance of Fairness of International Tribunals

i. Special Court for Sierra Leone

A major challenge facing international tribunals has been their inability to adequately maintain the funding and staffing of the court. With defendants facing long prison sentences that may essentially be life sentences for elderly convicts, the jurisdictional issues that have been raised are often nothing more than delaying tactic employed by the defense to drag out the

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[70] *Id. at* ¶ 34.

[71] *Id.* at ¶ 29.

[72] *Id.* at ¶ 28 (emphasis added).

proceedings. Nevertheless, such challenges must be treated seriously. When faced with a jurisdictional challenge in a preliminary motion in the Sam Hinga Norman trial, the SCSL Appeals Chamber set forth a guiding analysis as to the prerequisites for an independent and impartial trial.[73]

The Court, while recognizing that the procedural rules may lack specific provisions for dealing with such a particular challenge, took the prudent course in deciding to hear the motion:

> Notwithstanding that doubt may legitimately be entertained whether an allegation of real likelihood of bias is a challenge to the jurisdiction of the Court, the ground of the objection raised by the applicant's motion that the Court lacks judicial independence is sufficiently fundamental to make it imprudent to deny a hearing of the Preliminary Motion on the merits and not to determine the issues raised by the Preliminary Motion.[74]

On the basis of the funding arrangement of the Court, the defendant Norman's claim was that an independent tribunal is not possible where major donor states have the opportunity to withhold contributions to the tribunal if they are unsatisfied it's direction and decisions.[75]

Because they rely on expected donations throughout the course of the trials, the tribunals may run short of needed funds and look to the national government for assistance- thereby raising the suspicion that the executive branch is conducting the trials on its own agenda.[76] The establishment by the host country, with the assistance of the United Nations, to secure funding

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[73] Prosecutor v. Norman, Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence), 13 March 2004 [reproduced in accompanying notebook at Tab 14].

[74] *Id.* at ¶ 5.

[75] *Id*. at ¶ 18.

[76] *Id.* at ¶ 21.

throughout the duration of the tribunal prior to the commencement of the first trials, with proper accounting of finances, would limit instances where members of the judicial institution seek out operational and/or personal funding. In fact, "were the judiciary to run its operations and pay its judges from moneys generated from its judicial activities the apprehension of likelihood of bias would become more real and reasonable."[77]

In examining the funding situations of the tribunals to determine the likelihood that funding will have an effect on the judicial decision-making, the SCSL in Norman points to "such factors as the obligation, moral or legal, of the funding body or agency and the guarantee of payment of judicial remuneration, however the judiciary is funded. . ."[78] Though the Court recognizes "judicial independence rests on the twin pillars of security of tenure of the judge and guarantee of judicial remuneration and its protection from the whims and caprices of governments or bodies charged with the responsibility of funding the judiciary,"[79] it also acknowledges that not all inadequate funding situations will lead to the courts dispensing corrupt justice.[80]

The funding through voluntary donor states should be seen as the donor's global hope that "man will not be condemned without a fair and public trial and that there must be an end to

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[77] *Id.* at ¶ 22.

[78] *Id.* at ¶ 24.

[79] *Id.* at ¶ 26.

[80] *Id.* at ¶ 25.

impunity of serious violations of international humanitarian law,"[81] rather than with a pessimistic eye that governments will attempt to manipulate convictions in accord with their policies. While the Court found that Norman's challenge to its jurisdiction was "far-fetched and [had] no factual basis that [could] support the contention that the funding arrangement of the Court could reasonably occasion the denial of a fair hearing,"[82] it justified its position upon the fixed terms of employment and salary of its judges.[83]

In addition to denying the defendant's motion, the Norman Court cited two scenarios in American legal jurisprudence in which there were challenges to the likelihood of imputing bias to a judge. In the first instance, *Dugan v. Ohio,*[84] the functions of the mayor were limited to judicial functions and he received his fixed salary from a general fund that was constituted of fines levied in his court. There were, however, no bonuses for convictions or deductions for acquittals, and therefore it was held that "the mayor's relation to the fund and to the financial policy of the city were too remote to warrant a presumption of bias towards conviction in prosecutions before him as a judge."[85] In the opposing situation, *Tumey v. Ohio,*[86] a mayor's court had been set up in a remote village where, in addition to his regular salary, the mayor

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[81] *Id.* at ¶ 40.

[82] *Id.* at ¶ 37.

[83] *Id.*

[84] Dugan v. Ohio, 277 U.S. 61 (1928) [reproduced in accompanying notebook at Tab 17].

[85] *See* Prosecutor v. Norman, *supra* note 73, at ¶ 34 (citing *Dugan* at p. 65).

[86] Tumey v. Ohio, 273 U.S. 510 (1927) [reproduced in accompanying notebook at Tab 18].

would receive a portion of fees and costs in the event of a conviction of the defendant.[87] Finding the mayor's 'bonus' for a conviction was a denial of due process, the court held "With his interest as mayor in the financial condition of the village . . . might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"[88]

By analogizing the different payment systems of those mayor's courts with the uncertain funding situation at the tribunals, it can be seen that an incentive for convictions leading to additional judicial remuneration could violate a defendant's rights to a fair and impartial trial. However, the defendant is still able to enjoy a fair trial if the funding is fixed and guaranteed, like the tribunal contributions from donor states. If the decisions reached by the tribunal were to anger or displease a particular donor state, it "would have the same prejudicial consequences for the ability of the judges to dispense justice fairly as if they had direct pecuniary interest in the proceedings."[89] In a more blunt response to the allegations, Justice Geoffrey Robertson, in his Separate Opinion,[90] pointed out the problem with a judicial structure which lacks autonomy and independence:

> If the structure of any body purporting to exercise judicial power is so fundamentally flawed that its judges may realistically be perceived as puppets

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[87] *Id.*

[88] *Id.* at 533.

[89] *See* Prosecutor v. Norman, *supra* note 73, at ¶ 35.

[90] Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Separate Opinion of Justice Geoffrey Robertson, SCSL-2004-14-AR72(E), 13 March 2004 [reproduced in accompanying notebook at Tab 14].

> moved by the purse strings or the politics of their progenitors or paymasters, then it cannot be acknowledged as a 'court' at all. It will be an emanation of power, of the state or some conglomeration of states, but it will lack the defining qualify of legality, namely independence *from* the state. In international criminal law, there can be no such creature as a 'kangaroo court': entities which lack independence and impartiality are not courts at all and their decisions, however, portentous, do not have the quality of legality.[91]

By 'calling out' courts which simply act as an additional entity of the executive branch, Justice Robertson prominently notes that even a deserving conviction can be seen as unjust and illegal if the court issuing the decision is not independent and free from the strings of a third-party donor. Accordingly, he calls for the closing of any courts which are so lacking in funding that their only possibility of future donations is through carefully planned convictions.[92] However, there is a distinction that must be noted between donor states contributing to effectuate their own policies and donations being withheld due to a lack of financial integrity and accountability within the court system.

ii. International Criminal Tribunal for Rwanda

From the inception of the ICTR, there have been numerous difficulties in regards to acquiring adequate funding and obtaining competent staff.[93] Due to the "financial crisis"[94] at the

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[91] *Id.* at ¶ 1.

[92] *Id.* at ¶ 3.

[93] First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 Covering the Period from 8 November 1994 to 30 June 1996, Adopted at the Third Plenary Session of the Tribunal General Assembly, Fifty-First Session, Agenda Item

onset of the Court's establishment, there were financial constraints placed on the Registrar by the UN which restricted him from adequately staffing the Tribunal. Nearly 10 months after beginning to staff the Tribunal with inadequate resources, the Registrar finally received a satisfactory budget that would enable the Tribunal to recruit enough staff to carry out its mission.[95] In beginning the operations of the Tribunal, or any other court of such magnitude, an essential mechanism for it to function efficiently and impartially is a staff, both national and international, that are qualified for the posts they fill and are beyond reproach in considerations of corruption. However, this has not always been the case in the ICTR, where it has been alleged and/or established that several perpetrators in the Rwandan genocides actually were employees and investigators of the Tribunal.[96]

One such former ICTR employee is Joseph Kanyabashi, who posed as an investigator at the Tribunal so that he could gain access to protected information, such as witness lists, in an attempt to corrupt justice and prevent his future indictment.[97] Upon discovery of his inclusion in

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59, Security Council, Fifty-First Year, A/51/399-S/1996/778 (Annex), 24 September 1996 [reproduced in accompanying notebook at Tab 23].

[94] *Id.* at ¶ 71.

[95] *Id.*

[96] *See, e.g.* Thierry Cruvellier, Why Journalists Should be Worried by the Rwanda Tribunal Precedents, 10 July 2006, *available at* http://www.humanrightsblog.org/archives/cat_ictr_icty.html [reproduced in accompanying notebook at Tab 31]. *See also* ICTR Worker is Genocide Criminal- African Rights alleges, 20 January 2008, *available at* http://www.ari-rna.co.rw [reproduced in accompanying notebook at Tab 32].

[97] *Id.*

the militant genocidal activities, Kanyabashi was indicted by the ICTR and is currently facing charges relating to his involvement in the treacherous acts.

The lack of investigation into the background of such an applicant to the Tribunal is a gross error in judgment and can create means for a defendant to claim an unfair trial process. Because of the possible ramifications of future suspects being employed by the Tribunal, master lists of any possible intended targets of prosecution should be conceived prior to the commencement of a war crimes tribunal. If this practice were instituted, members of the current government who may or may not have played an active role in war crimes would be prevented from any employment or participation within the tribunal, lest it be seen that the current government is politicizing the tribunal with selective prosecution.[98] With adequate funding provided towards the administrative staffing of the court, proper background checks and relevant inquiries could be made into questionable individuals rather than excluding them from participation merely because of the cost of determining their independence.

Another example of a former ICTR employee who was eventually brought up on charges and convicted in the Tribunal is Joseph Nzabirinda.[99] While employed as a defense investigator in the ICTR, Nzabirinda traveled to Butare on official business and was recognized by a survivor

[98] *See id.* ("It implies in practice that the prosecutions were brought by officials whose motives were revenge or protection of their own interests").

[99] Prosecutor v. Joseph Nzabirinda, Sentencing Judgment, ICTR-2001-77-T, 23 February 2007 [reproduced in accompanying notebook at Tab 3].

of the genocide as a member of the formerly oppressive Rwandan Government.[100] Although Nzabirinda was eventually recognized, tried and convicted, the fact that he was able to apply for and receive a position within the ICTR emphasizes the serious concern that international tribunals face when investigating and trying war crimes in a court that is essentially built from the ground up.[101] The problems dealing with staffing qualifications within the ICTR, which can be imputed to other international tribunals dealing with financial restrictions and temporal mandates, is that the local staff often lacks the requisite background knowledge to properly perform their job.[102]

Where qualified individuals are able to be found to fill important posts, the financial restraint on the salaries that are offered is a major hurdle in keeping those positions staffed with the competent personnel. In addition to employee retention, the low levels of salary that the staff in the ICTR is often budgeted does not seem to be in line with the comparable positions at other tribunals. As a result, there is little motivation and attraction for potentially qualified staff to gain employment within the Tribunal.[103] Conversely, if a highly qualified staff member takes a position within an international tribunal which places him on a pay scale below that of his level

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[100] *See* Ibuka, *Recent Controvery with the International Criminal Tribunal for Rwanda* (2005), *available at* http://www.neveragaininternational.org/news/ibuka.html [reproduced in accompanying notebook at Tab 33].

[101] Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, General Assembly, Fifty-first Session, Agenda items 139 and 141, ¶ 9, A/51/789, 6 February 1997 [reproduced in accompanying notebook at Tab 24].

[102] *Id.* at ¶ 19.

[103] *Id. at* ¶ 20-21.

of expertise, an incentive in the employees mind can be created to seek additional funds from outside sources to supplement his income. If this becomes the case, then the employee may no longer act impartially in his employment functions and can become a puppet for a well-paying third-party. By creating parity amongst the salaries of the employees of the tribunals, the UN could decrease incentives to seek outside funds or mismanage internal fund, and the fairness of the proceedings would receive less scrutiny as to the possibility of corrupt outside influences impacting the court.

B. FUNDING AND STAFF ISSUES WITHIN ECCC AS THEY RELATE TO THE JUDICIAL INDEPENDENCE OF THE TRIBUNAL

As the allegations of corrupt staffing practices continue to hang over the ECCC, there are several important lessons that should be learned from the experience of earlier-established war crime tribunals. As shown in the above examples, the problems of filling the Tribunal with adequate and competent staff can be corrected- but they first must be revealed and acknowledged.[104] The negative impact of criminals working for the court to incompetent and suspect staff being fired,[105] the goal of an impartial and independent tribunal cannot be overemphasized. Particularly in a hybrid court system such as the ECCC, the use of national employees in the court should not be limited to trivial positions.[106] However, this is not a simple

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[104] *See id.* at ¶ 76-100 (Secretary-General Recommendations to correct the management, staffing, and funding issues, among others, plaguing the ICTR).

[105] Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 JICJ 950, at 959 (2005) [reproduced in accompanying notebook at Tab 38].

[106] *Id.* (quoting Personal Interview conducted with Gerald Gahima in Kigali, June 2000, "We use Rwandans now simply as janitors, security guards, and translators")

task; as the President of the ICTR points out, while he encourages the recruitment of nationals for his Tribunal (though it is not a hybrid court system), he also urges great caution in the choosing of that staff "to prevent the abusive sharing of fees among defence counsels and detainees or the hiring of individuals suspected of genocide."[107]

Allowing Cambodian nationals the opportunity to work in the ECCC results in the legacy of the proceedings being viewed on a more personal level. But as the Cambodians working for the Tribunal are allegedly required to kick back a portion of their salary to senior tribunal management or government officers, the interest in employment at the court by those seeking closure from the Khmer Rouge atrocities will diminish. Substandard payment levels for local staff, further reduced as a result of kickbacks, will result in few to no experienced and qualified Cambodian nationals applying for Tribunal positions.

As the ECCC is currently composed, there are five defendants subject to prosecution for their acts committed during the temporal restrictions of the Court. Where funding of the tribunal may be lacking from donor states, it will not likely be withheld as a result of ECCC decisions that are counter to the donor's international policies. For the ECCC to continue to receive adequate funding for its general functioning, it needs to prove to the international community

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[107] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Deliberation of 27 November 2001 (4429th meeting) [reproduced in accompanying notebook at Tab 25].

that it can overcome the allegations that have cast a black cloud over the initial operations of the Tribunal.

V. Conclusions

While the allegations of kick-backs may mar the views of the Court by those who are employed and subject to such requirements, the mere fact that an individual made a payment to secure a job does not necessarily mean that individual cannot do his job impartially. Nor does it imply that a defendant's right to a fair trial is violated as a result of the terms of the employment.

If the ECCC can work with the international community to effectively maintain standards of justice, "it is possible that the outcome of the tribunals will have an important impact on the lives of Cambodian citizens."[108] Cambodian and Tribunal cooperation with the United Nations and its investigations into the allegations of corruption within the ECCC has provided the Tribunal with new safeguards on both the national and international sides of the court in an effort to implement an effective system for 'cleaning house' and to ensure that future hiring practices of staff meet newly designed regulations.[109] Though the effects of the new mechanisms[110] put in

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[108] Sophie Huntington, *The Khmer Rouge Tribunal as an Opportunity for More than Answers*, August 2006 [reproduced in accompanying notebook at Tab 37].

[109] *See* supra note 4.

[110] Results of the Special Review made public, ECCC Human Resource Management passes scrutiny test successfully, *available at* http://www.eccc.gov.kh (reporting human resource practices in their current state are of acceptable standard). [reproduced in accompanying notebook at Tab 16].

place have yet to be determined, it should be obvious to observers that the ECCC and the UN are working diligently to ensure an actual and apparent fair trial for the accused.

Since the ECCC, although a Cambodian Court, is distinct from the rest of the Cambodian judicial system, the actions taken by the employees of the ECCC can have ramifications beyond their individual employment. If a defendant were to allege that the corrupt practices of hiring staff within the ECCC permeated all the way to the judges to affect their ability to independently make decisions, the appearance of fairness could disintegrate even without a shred of credible evidence. For the ECCC to respond to such challenges by the defense, the most appropriate route may be to analyze the specific situation under ECCC Rule 34, as the Court employed in its decision to keep Judge Ney Thol in the Pre-Trial Chamber decision of the Nuon Chea case.[111]

Under the Rule 34 category of challenges to remove a judge from adjudicating the matter, there would likely be little chance of success for the defendant unless he could show sufficient, credible evidence that would cause the reasonable observer, with knowledge of the situation, to apprehend bias in the case. Under that standard, with great deference given to the independence and presumed impartiality of the judges[112], both Cambodian and international courts would require a strong showing that there would be no chance for a fair trial to be had in their courtroom. However, it is not in the interests of the international community or Cambodian citizenry to see a suspected war criminal set free as a result of procedural error or suspicion of

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[111] *See* supra note 59 and accompanying text.

[112] *See* supra note 20.

judicial misconduct. Therefore, in the unlikely event that a defendant were able to succeed upon a Rule 34 motion to disqualify a judge, it would be critical for the Court to continue the case under the ECCC Internal Rules with a newly designated judge, particularly an individual beyond reproach who could hold up against a similar challenge in the future.

By "ensuring justice is not only done but seen to be done,"[113] both the UN and Cambodia can ensure that the legacy of the ECCC will be one of justice and fairness to the citizens of Cambodia, many of whom are victims of the Khmer Rouge atrocities. Additionally, the international community will feel more secure in their contributions to the Tribunal with the knowledge that the funds will go to the appropriate sources and will not be mismanaged or abused. A successful Cambodian tribunal can also potentially improve the functioning and confidence the citizenry place in the Cambodian judicial system as a whole. Through a country-wide educational program, the values and lessons learned in the proceedings of the Tribunal can be passed on to future Cambodian generations in the hope that the atrocities of the Pol Pot regime are never seen again. If the ECCC can succeed in maintaining the fairness of the judicial process and protecting the institution from corrupt activities, there will be little in the way of challenges that defendants will be able to employ to avoid responsibility for their crimes.

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[113] *See* supra note 50.