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Political Pressure and Political Interference in the function of the Judiciary

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: Political Pressure and Political Interference in the function of the Judiciary

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I. INTRODUCTION

A. Scope

This memorandum explores the question of whether political pressure on the judiciary must always amount to political interference.[*] It examines the foundations of judicial impartiality from a practical framework, exploring methods of analysis to determine the presence of an improper interference with judicial processes adopted through resolutions, treaties, and working groups around the world, as well as the domestic courts of the United States. The memorandum analyzes several cases from international tribunals to explore judicial independence in international context, including the Furundzija Appellate decision of the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone in the trial of Sam Hinga Norman, the Iraqi High Tribunal in the Al Dujail case, and Timor-Leste's Special Panels of the Dili District Court, which have all encountered accusations of political interference.

B. Summary of Conclusions

i. Difference between political pressure and political interference is a terminological distinction without a difference; both are used to describe breaches of the more important concept, judicial independence.

ii. "Perfect" Judicial Independence, free from all extraneous influences, may not be necessary for the guarantees of international due process under Furundzija, but appearance of bias is problematic in proceedings and public perception.

iii. Allegations of direct executive interference are not analogous to the IHT judge resignations, but instead reinforce questions of apparent bias.

[*] "Political pressure on the judiciary is often argued as political interference in the court process in legal terms. Provide examples of cases where political pressure was not to amount to political interference in the judicial process. Can a clear distinction be made between the two concepts of political pressure and political interference?"

iv. Statements by Cambodian Government Officials may be enough to cause an appearance of impropriety under the Furundzija test.

v. Judicial Interference from the Cambodian co-investigatory judge You Bunleng may appear improper as a violation of independence among judicial colleagues, it is most accurately framed as political interference from the executive.

vi. ECCC funding mechanism is not likely a violation of Judicial Independence since the contribution by the Cambodian Government is so small a percentage of total Tribunal funding.

II. BACKGROUND

Since November 2011, two judges have resigned from the Extraordinary Chambers in the Courts of Cambodia ("ECCC") under the shadow of political interference in the tribunal.1 The allegations have centered around government response to two cases known as "Case 003" and Case "004," which were opened in 2009, and focus on mid-level members of the former Khmer Rouge regime whose identities remain officially unannounced.2

In April 2011, the Co-investigating Judge Sigfried Blunk closed Case 003 following public comments by the Cambodian Minster of Information that "if they [the tribunal] want to go into Case 003 and 004, they should just pack their bags and leave," while the Prime Minister had stated the cases "will not be allowed."3 Further undermining the role of the international

[1] For a general, though critical, examination of the back story, *see generally* Stephanie Giry, Necessary Scapegoats? The Making of the Khmer Rouge Tribunal, NY REV. BOOKS, Jul. 23, 2012, http://www.nybooks.com/blogs/nyrblog/2012/jul/23/necessary-scapegoats-khmer-rouge-tribunal/ (last visited Nov. 20, 2013) [Electronic copy provided in accompanying USB flash drive at Source 46].

[2] *See,* EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, CASE 003, ("The identity of the two suspects in Case 003 remains confidential."), http://www.eccc.gov.kh/en/case/topic/286 [Electronic copy provided in accompanying USB flash drive at Source 16]; and EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, CASE 004, ("Thus far, no persons have been charged and the identity of the three suspects remains confidential."), http://www.eccc.gov.kh/en/case/topic/98 [Electronic copy provided in accompanying USB flash drive at Source 17].

[3] Press Release, Statement by the International Co-Investigating Judge, Extraordinary Chambers in the Courts of Cambodia, (Oct. 10, 2011), http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge (last visited Dec. 1, 2013) (*hereinafter* "Blunk Resignation Statement") [Electronic copy provided in accompanying USB flash drive at Source 18].

Tribunal, the Cambodian Foreign Minister also stated "On the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue… This issue must be decided by Cambodia."[4] In October, Judge Blunk announced his resignation from the Tribunal citing political interference from the Cambodian government.[5] In the press release announcing his resignation, Judge Blunk stated that although he "will not let himself be influenced by such statements, his ability to withstand such pressure by Government officials and to perform his duties independently, could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004."[6]

His successor, Judge Laurent Kasper-Ansermet, resigned his post less than half a year later. Although he reopened Case 003, Judge Kasper-Ansermet claims he encountered "active opposition" to the continued investigation of cases 003 and 004 by his Cambodian co-investigative counterpart, You Bunleng, which forced his resignation.7

Problems at the ECCC, or at least the perception of them, have persisted: the Cambodian government had been criticized for its extra-constitutional role in the selection and disciplining of judges in the normal court system.8 In addition, in September 2012, the Supreme Chambers

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Press Release, Press Release from the International Reserve Co-Investigating Judge, Extraordinary Chambers in the Courts of Cambodia (Mar. 19, 2011), http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge (last visited Nov. 6, 2013) [Electronic copy provided in accompanying USB flash drive at Source 19].

[8] A 2006 U.N. report found that of the judicial selection & disciplining committee, the SCM, to be heavily entwined with government. U.N. Econ. & Soc. Council, Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai, (E/CN.4/2006/110), para. 16, Jan. 26, 2006, ("all members but one belong to the Cambodian People's Party, and two members are on its Central Committee") [Electronic copy provided in accompanying USB flash drive at Source 47].

had to address potential for bias stemming from statements by the Prime Minister Hun Sen that it believed had the "potential" to prejudice the accused right to a fair trial, or at very least make the tribunal appear beholden to the government.9

This motion was one of several made under Rule 35 by Nuon Chea, one of the defendants of Case 002.10 Rule 35, among other things, bars improper interference in the Tribunal by outside sources,11 and is complemented by Rule 34(1), which concerns itself with the appearance of bias.[12] It states: "A judge may recuse him/herself in any case in which … the Judge has, or has had, an association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias."[13] These two rules are bolstered by the original United Nations-Cambodia Agreement which stipulates that judges and prosecutors shall be of "high moral character, impartiality and integrity … be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."14 Yet, in practice, the Tribunal has been beset by allegations that it has failed to live up to this

[9] *NUON Chea,* Case File No. 002/19/09-2007-ECCC-TC/SC(15), Decision on Nuon Chea's Appeal against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, Sept. 14, 2012, Doc. No. E176/2/1/4, para. 68 [Electronic copy provided in accompanying USB flash drive at Source 29].

[10] *See also, NUON Chea*, Case File No. 002/19-09-2007/ECCC/TC, Decision on Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs Hor Namhong, Nov. 11, 2012, Doc. No. E219/3 [Electronic copy provided in accompanying USB flash drive at Source 30]; *NUON Chea,* Case File No. 002/19-09-2007/ECCC, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, Sept. 9, 2011, Doc. No. E116 [Electronic copy provided in accompanying USB flash drive at Source 31].

[11] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, 2011 (Rev. 8), Rule 35 (*hereinafter* "ECCC Internal Rules") [Electronic copy provided in accompanying USB flash drive at Source 8].

[12] *Id..,* Rule 34.

[13] *Id.*

[14] 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, Res. 57/228, Dec. 18, 2002, Art. 9 (3) [Electronic copy provided in accompanying USB flash drive at Source 10].

language. In the future, the actions of the Cambodian Government and the judicial response to them could prove the future basis of challenges to the independence of the ECCC, both in and outside the Extraordinary Chambers.

III. LEGAL ANALYSIS

A. Treaties, Principles, Theory, and Comparative Jurisprudence on Judicial Independence

i. International treaties, resolutions and adopted principles

The necessity of an independent judiciary has long been recognized by judiciaries domestic and international in character. One of the cornerstones of modern international law, the UN Declaration of Human Rights, declares in Article 10 "Everyone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal" (emphasis added),15 a call echoed in the International Covenant on Civil and Political Rights, which states, similarly "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."16

Since then, the international community has grappled with defining an "independent and impartial" tribunal. In 1982, the International Bar Association proffered its take on the concept, publishing the "IBA Minimum Standards of Judicial Independence" ("IBA Standards").17 Organized by separately defining Executive Interference, Legislative Interference, Media Interference, and impermissible conduct by Judges themselves, the IBA Standards provided a comprehensive examination of what could constitute or appear to constitute political interference

[15] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [Electronic copy provided in accompanying USB flash drive at Source 4].

[16] International Covenant on Civil & Political Rights, Art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171 [Electronic copy provided in accompanying USB flash drive at Source 1]..

[17] INT'L BAR ASSOC., MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE (1982) [Electronic copy provided in accompanying USB flash drive at Source 12].

in the functions of an independent judiciary. Notably, the IBA explicitly denounces executive interference, stating: "The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole."[18] Equally important, however, is that the IBA Standards extend to the *perception* of impropriety as well as covering actual interference. They state: "a judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias,"[19] and, "a judge shall avoid any course of conduct which might give rise to an appearance of partiality."[20]

In 1985, the UN adopted the UN Basic Principles on the Independence of the Judiciary ("UN Basic Principles").21 It is similar in many ways to the IBA Standards: it protects against *ad hoc* tribunals,[22] guarantees the tenure and compensation of judges,[23] guarantees provision of adequate resources for the courts,[24] and most significantly, it provides that "judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[25] This is, to date, the only resolution on the independence of the judiciary adopted by the General Assembly.

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[18] *Id.,* para. 16.

[19] *Id.,* para. 44.

[20] *Id.,* para. 45.

[21] U.N. Basic Principles of the Independence of the Judiciary, G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985) [Electronic copy provided in accompanying USB flash drive at Source 3].

[22] *Id.,* para. 5.

[23] *Id.,* paras. 11-13.

[24] *Id.,* para. 7.

[25] *Id.,* para. 2.

Yet development of the principles of judicial independence did not stop with the UN Basic Principles: these previous efforts at codification laid the foundations for the 2002 Bangalore Principles on Judicial Conduct ("Bangalore Principles").26 The Bangalore Principles provide the most thorough codification yet of international expectations of judicial independence. They have been adopted directly by the American Bar Association27 and the UN Economic and Social Council,28 while the UN Office of Drugs and Crime and the UN Judicial Integrity Group has published commentaries extrapolating on the Bangalore Principles.29

The Bangalore Principles are organized into six "Values:" Independence, Impartiality, Integrity, Propriety, Equality, and Competence and Diligence,[30] which are explained in both principle and application. The values create a comprehensive framework for evaluating the conduct of judges, but it is the first value in particular, Independence, which deals specifically with the conduct of organizations outside the judicial body. In many respects the Bangalore Principles resemble the U.N. Basic Principles but for several crucial distinction, such as in the first "application" of the value: "A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any *extraneous* influences, inducements, pressures, threats or interference,

[26] Judicial Group on Strengthening Judicial Integrity, Bangalore Principles of Judicial Conduct (2002) (*hereinafter* "Bangalore Principles") [Electronic copy provided in accompanying USB flash drive at Source 13].

[27] AM. BAR. ASSOC. Res. Supporting the Adoption of U.N. Basic Principles on the Independence of the Judiciary, International Bar Association Minimum Standards of Judicial Independence, and the Bangalore Principles of Judicial Conduct, Aug. 13, 2007 [Electronic copy provided in accompanying USB flash drive at Source 14].

[28] E.S.C. Res. 2006/23, U.N. Doc. E/RES/2006/23 (July 27, 2006) [Electronic copy provided in accompanying USB flash drive at Source 5].

[29] U.N. Office of Drugs & Crime, Commentary on the Bangalore Principles (Sept. 2007) [Electronic copy provided in accompanying USB flash drive at Source 6].

[30] *See generally*, Bangalore Principles.

direct or indirect, from any quarter or for any reason" (emphasis added).[31] The paragraph echoes almost exactly the UN Basic Principle on the same topic, but the addition of the term "extraneous" ensures that there is a noted difference between those influences acceptable and proper, such as amicus briefs by government agencies, and those that are improper because they emerge from a non-judicial context.

The Bangalore Principles also codified and emphasizing the importance of public perception, stating "a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom,"[32] and that the appearance of independence is necessary to "reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence."[33] An equally important development was the inclusion of Principle 1.4, which states a judge must be "independent of judicial colleagues in respect to decisions that the judge is obliged to make independently."[34] The weakness of the Bangalore Principles, however is that they are "judge facing:" all of the principles stated therein are related to judicial conduct, and do not explicitly address the expectations of external actors in the way the UN Basic Principles had.

The Bangalore Principles, while widely accepted by institutions internationally, leave themselves to implementation by national judiciaries,[35] and have not been adopted by the General Assembly. Thus, other organizations have continued to promote judicial independence

[31] *Id.*, para. 1.1.

[32] *Id.,* para. 1.3.

[33] *Id.,* para. 1.6.

[34] *Id.,* para. 1.4

[35] *Id.,* "Implementation."

by creation and development of standards of their own, as in the recently developed Mount Scopus International Standards of Judicial Independence ("Mt. Scopus Standards"),36 created by the International Association of Judicial Independence and World Peace in 2008.

Like the IBA Standards and UN Basic Principles, the Mt. Scopus standards address the society and government in which the judiciary resides as well as the conduct of the judges themselves, but the Mt. Scopus Standards are special for directly addressing the independence of the *international* judiciary in addition to domestic courts. The Mt. Scopus Standards contain novel guidelines tailored for international jurists, such as addressing the security of tenure of the judges (suggested to be for long term contracts, with difficulty in removal),[37] that international jurists should be given Diplomatic Immunity,[38] and the Budget of the Tribunal, which the Standards merely suggested be "adequate" for the proper functioning of the court.[39]

ii. American Case Law:

Although by no means dispositive in the international context, American constitutional law presents an additional novel viewpoint of judicial independence. American courts have presented questions of judicial independence not as a question of whether the separation of powers have been violated, but whether the impartiality of the decision maker has been compromised, thus violating a petitioner's right to a fair trial.

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[36] International Association of Judicial Independence and World Peace, Mt. Scopus International Standards of Judicial Independence (2008) [Electronic copy provided in accompanying USB flash drive at Source 15].

[37] *Id.,* §12

[38] *Id.,* §14

[39] *Id.,* §15

The Supreme Court of the United States has found the violations of judicial impartiality to be an unconstitutional breach of the substantive due process due under the 14th Amendment rather than a "separation of powers" violation.40 The Court explained: "the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law… At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."41

Most often applied to arbiters falling outside of the scope of Article 3,42 the existing case law predominantly concerns questions of recusal,43 or some variety of self-dealing.44 There is a distinct lack of jurisprudence on when political pressure may run afoul of the Constitution's guarantee of due process. However, the Supreme Court, in *Caperton v. A.T. Massey Coal,* the leading case on the matter, stated broadly that "most matters relating to judicial disqualification

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[40] In the separation of powers line of cases, the Supreme Court has relegated the topic to little more than footnotes and dicta. *See,* Mistretta v. United States, 488 U.S. 361, 409 (1989) (Holding that while judicial independence must be "jealously guarded," that independence was not under threat from a delegation of sentencing power to an independent commission by the Congress) [Electronic copy provided in accompanying USB flash drive at Source 32].

[41] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982) [Electronic copy provided in accompanying USB flash drive at Source 33].

[42] Referring to Art. 3 of the U.S. Constitution, which allows for the creation of the federal judiciary. Those judicial organs outside Article 3 are created by acts of Congress or by the States. *See generally*, Gibson v. Berryhill, 411 U.S. 564 (1973) (Ruling over an Optometrist Examiners Board); Goldberg v. Kelly, 397 U.S. 254 (1970) (Ruling over a Family Aid Agency) [Electronic copy provided in accompanying USB flash drive at Source 35]; Schweiker v. McClure, 456 U.S. 188 (1982) (Ruling on an Insurance Company Claim Appeal Board) [Electronic copy provided in accompanying USB flash drive at Source 34].

[43] Caperton v. A. T. Massey Coal Co., Inc. 556 U.S. 868 (2009) [Electronic copy provided in accompanying USB flash drive at Source 36].

[44] In re Murchison, 349 U.S. 133 (1955) (The same judge cannot preside in a hearing for contempt of court and the case for which the contempt charge arose) [Electronic copy provided in accompanying USB flash drive at Source 37]; Tumey v. Ohio, 273 U.S. 510 (1927) (Mayor, acting as an inferior judge, is not independent if he gets paid based upon conviction) [Electronic copy provided in accompanying USB flash drive at Source 38].

[do] not rise to a constitutional level,"45 and that "personal bias or prejudice" alone is insufficient to raise a constitutional concern.[46] Yet, in the rare cases raising a substantive question of impartiality is raised, the Court states it must be examined with an objective standard: "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[47]

Thus, while American Constitutional Law provides limited specific guidance of under what circumstances political pressure itself may violate the due process of law, it does provide a helpful framework of analysis suitable for supplementing the analysis of the problems faced by international tribunals.

B. The Experience of International Tribunals

i. International Criminal Tribunal for the Former Yugoslavia: The Furundzija Appeal

The most notable case in international law on judicial impropriety emerged from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the Furundzija appeal.48 The decision rested on the dual requirements of judicial impartiality and the right to a fair trial enshrined in the ICTY's establishing statute,[49] which provided the basis for the defendant's appeal. The defendant asserted that a Judge in the trial chamber, while admittedly not actually

[45] Caperton, 876, (quoting FTC v. Cement Institute, 333 U.S. 683, 702 (1948)).

[46] *Id.,* p. 877.

[47] *Id.,* p. 881.

[48] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Decision on Appeal: Judgment, July 21, 2000 [Electronic copy provided in accompanying USB flash drive at Source 42].

[49] *Id.,* para. 177 (quoting Art. 13(1) & Art. 21).

biased, had given the appearance of bias, and therefore violated his duty of impartiality by being involved with the U.N. Commission on the Status of Women, which had filed an amicus curae brief for the prosecutor in the case against the defendant.

The Appeals court relied on European Court of Human Rights rulings to outline the scope of the requirement of impartiality, holding first that the test is objective, but objective for the purposes of demonstrating actual *or apparent* bias. They explain "a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society."[50]

Utilizing jurisprudence from both civil and common law countries, the court found in interpreting the impartiality requirement, the guiding test should be first, whether there is actual bias, which renders a judge not impartial, and second, whether there is the impermissible appearance of bias. For fair trial purposes, there is the appearance of bias if the judge has either an interest in the outcome of the case, or "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[51] The properly informed observer, the court held to be necessary, stating they must be thought of to have "knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the

[50] *Id.,* para. 182

[51] *Id.,* para. 189.

background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[52]

The defendant conceded that the trial judge was not actually biased, and thus the appeals court applied the "reasonable observer, properly informed" test, and found first that with the presumption of impartiality in favor of the judge.[53] Furthermore, in her role with the U.N. Commission, the judge acted as an agent of her country, while in her role as a judge for the ICTY she acted in an individual capacity, thus the two could be compartmentalized to a degree.[54] Finally, because the U.N. Commission on the Status of Women existed to promote established judicial principles such as prosecution of rape as a war crime, and promote human rights advocated by the United Nations generally, even if her role were not attenuated from the organization, the judge could not be held impermissibly biased for promoting the rule of law as it is accepted internationally.[55]

ii. Special Court for Sierra Leone: Norman Case

In the trial of Sam Norman, in *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*,56 the Special Court for Sierra Leone ("SCSL") addressed questions of Judicial Independence raised by the Defendant Sam Hinga Norman. Norman had argued that the independence and impartiality of the Court were compromised by the unique

[52] *Id.,* para. 190 (quoting *R.D.S. v. The Queen*, Can. Sup. Ct., (Sept. 27, 2007)).

[53] *Id.,* para. 198.

[54] *Id.,* para. 199.

[55] *Id.,* paras. 205-213.

[56] *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Mar. 13, 2004 [Electronic copy provided in accompanying USB flash drive at Source 43].

financing mechanism of the SCSL, whereby international donor countries and organizations would finance the court on a voluntary basis.57 Under Article 7 of the SCSL Agreement, these donor countries would also appoint members to a "Management Committee," which would assist in raising money and provide non judicial "advice and policy direction."[58]

Norman reasoned that since the SCSL was financed by voluntary contributions, international donors could exert pressure on the court via threats, explicit or implicit, to withdraw funding if "correct" verdicts were not rendered.[59] Furthermore, he argued that through their contributions which allowed for placement of agents on the Management Committee, donors could again exercise improper influence through that organ.[60] Since under Rule 13(1) and 15, judges of the SCSL were expected to be independent "in the performance of their functions"[61] and "impartial,"[62] Norman asserted these pressures would compromise that independence guaranteed by the operating rules.

The court rejected these assertions and ruled for the prosecution, finding that the funding arrangement did not compromise the independence of the judiciary. The court looked to traditions of judicial independence that, at least in the Anglo-common law tradition, date to the Stuart kings of England in the early 18th Century,[63] but relied primarily on recent cases from the

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[57] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Art. 6, Jan. 16, 2002, 2178, U.N.T.S. 137 [Electronic copy provided in accompanying USB flash drive at Source 9].

[58] *Id..,* Art. 7.

[59] *Prosecutor v. Norman,* Judicial Independence, *supra* note 55, at para. 18.

[60] *Id.,* para. 13.

[61] *Id.,* para. 14.

[62] *Id.,* para. 13.

[63] *Id.,* para. 27.

English,[64] Canadian[65] and American tradition,[66] in determining that the independence of the SCSL was not compromised. The court found that there was no factual basis for the defense's allegations, dismissing assertions that the judge's salaries were implicitly tied to the continued funding of the tribunal, since the judges receive salaries fixed by an ongoing contract.[67] Furthermore, the court starkly criticized assertion that the donor states of the international community would act with the outright hypocrisy of promoting the rule of law, due process, and judicial independence in their domestic courts and internationally, but would not do so in a tribunal they fund.[68] Finally, the court rejected the concept that the Management Committee might somehow exert undue influence on the judiciary since it has no powers or influence over the SCSL akin to an executive or legislative branch.[69]

In his concurring opinion, Justice Robertson noted in particular that the funding mechanism issue needed to be addressed by the court, since it did differ from the ICTR and ICTY and thus presented a novel question worth addressing.[70] He found, however, that though these provide models, so long as there are no unbalanced incentives towards one party or another, the exact funding mechanism does not matter.[71] He also placed a heavy emphasis on the

[64] I*d.,* para. 39.

[65] *Id.*

[66] I*d.,* paras. 27, 30, 33 & 34.

[67] *Id.,* paras. 37-38.

[68] *Id.*, para. 41.

[69] *Id.,* para. 42.

[70] *Id.,* at Judge Robertson Concurrence, para. 1.

[71] *Id.,* at Judge Robertson Concurrence, para. 23.

objective perception of impartiality and independence[72] that ought to characterize any court, but especially an international tribunal.[73] After resolving this issue in court, the SCSL has been largely free from accusations of compromised independence.

iii. The Iraqi High Tribunal: The Al Dujail Trial

The Dujail trial of the Iraqi High Tribunal serves as another case study of compromised judicial independence through political interference.74 The trial has attracted significant criticism from several fronts,75 some aimed at the tribunal's retention of the death penalty76 and the deteriorating security situation which led to the deaths of several attorneys involved in the case,77 but most significantly for the present analysis are the failure to provide due process in

[72] It is worth noting here that Justice Robertson also makes a point of distinguishing between the two concepts. Independence, he asserts, is a judge's freedom from outside pressure, while impartiality is a judge's disinterest towards the two parties. *Id.,* at Judge Robertson Concurrence, para. 2.

[73] *Id.,* at Judge Robertson Concurrence, para. 1.

[74] Al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Trial Opinion, *available at* http://www.iraq-iht.org/ar/doc/finalcour.pdf, *translated in* Grotian Moment: The Saddam Hussein Trial Blog, English Translation of Du-jail Judgment Parts 1-6 (Dec. 2006) [Electronic copy provided in accompanying USB flash drive at Source 40].

[75] *See generally,* Miranda Sissons & Ari S. Bassin, *Was the Dujail Trial Fair?*, 5 J. OF INT'L CRIM. JUSTICE 272 (2007) [Electronic copy provided in accompanying USB flash drive at Source 49]; AMNESTY INTERNATIONAL, IRAQ: AMNESTY INTERNATIONAL REPORT (2007) ("Political interference undermined the independence and impartiality of the SICT, causing the first presiding judge to resign and blocking the appointment of another"), http://www.amnesty.org/en/region/iraq/report-2007 (last visited Nov. 5, 2013) [Electronic copy provided in accompanying USB flash drive at Source 50]; Press Release, Expert on Judiciary Expresses Concern About Saddam Hussein Trial and Verdict and Calls for International Tribunal, Nov. 6, 2006, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=590&LangID=E (last visited Nov. 28, 2013) [Electronic copy provided in accompanying USB flash drive at Source 20].

[76] Press Release, Human Rights Experts Reiterate Concern Over Death Sentences Imposed by Iraqi High Tribunal, Special Rapporteur on the independence of judges and lawyers, Jan. 24, 2007, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1349&LangID=E (last visited Nov. 29, 2013) [Electronic copy provided in accompanying USB flash drive at Source 21].

[77] John F. Burns & Christine Hauser, Third Lawyer in Hussein Trial is Killed, N.Y. TIMES, Jun. 21, 2006 [Electronic copy provided in accompanying USB flash drive at Source 22].

line with international norms, particularly due to accusations that the court was hampered by political interference.78

The Dujail Trial was the trial of Saddam Hussein and seven co defendants for the torture, murder, and destruction of livelihoods of the residents of the small town of Dujail, Iraq following an assassination attempt against Saddam in 1982.79 It was tried by the Iraqi High Tribunal ("IHT"), an Iraqi domestic tribunal first established under the occupation of the American-led coalition government, and later ratified by an act of the Iraqi National Assembly.80 The IHT was specifically tasked with investigating international human rights violations in Iraq between 1968 and 2003. The IHT is one example of what Professor Michael Scharf81 has called a "new breed of domestic [tribunals] that combine elements of international and domestic war crimes courts."82 It is comprised entirely of Iraqi judges and exercised an Iraqi adaptation of international law, though administratively it was still largely ran by the Americans, who provided most of the financing, handled and secured the evidence, and administered training and advising along with international jurists. Additionally, the trial was conducted under the security of Coalition forces in the "Green Zone" in Baghdad.83

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[78] *See* Sissons & Bassin, *supra* note 74.

[79] Michael A. Newton & Michael P. Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein 29-33 (2008).

[80] Law of the Supreme Iraqi Criminal Tribunal, Official Gazette of the Republic of Iraq, Oct. 18, 2005 [Electronic copy provided in accompanying USB flash drive at Source 11].

[81] Michael P. Scharf is a professor of international law at Case Western Reserve University School of Law and the Director of the Cox Center for International Law therein. He is also the founder and director of the Public International Law and Policy Group NGO, with which he has advised on several international criminal tribunals, and a former council for the U.S. State Department.

[82] Michael P. Scharf, Lessons from the Saddam Trial, GROTIAN MOMENT BLOG (July 17, 2006), http://www.law.case.edu/saddamtrial/entry.asp?entry_id=156 (last visited Dec. 1, 2013) [Electronic copy provided in accompanying USB flash drive at Source 52].

[83] Newton & Scharf, p. 50-60.

Alleged political interference in the IHT took two distinct forms during the Dujail trial. The first, more easily recognized as a compromise of judicial independence, was the public political pressure exerted by the executive branch upon the judiciary. At numerous points in the trial, members of the executive publicly proclaimed their expectations or desires of the court.84 One notable example of this pressure occurred after the conclusion of the trial, while the appeal was still being decided, when Prime Minister Maliki stated he hoped to have hung Saddam before the start of the new year.85 This expectation was, at the time, considered unrealistic,[86] but the Court of Cassation returned a judgment on the appeal faster than most analysts had expected,[87] which did allow the execution to occur on December 30, 2006. This timely return of judgment, combined with the dubious quality of the legal analysis by the appellate court,88 created the perception, real or perceived, that Maliki's statements had exerted influence upon the inner workings of the judiciary.89

The International Council for Transitional Justice,90 in their analysis of the Dujail trial, noted that "other remarks by political leaders have eroded the presumption of innocence and

[84] For a cataloguing of these statements, *see* HUMAN RIGHTS WATCH, JUDGING DUJAIL 41-43 (Nov. 2006).

[85] Newton & Scharf, p. 186.

[86] *Id.,* p. 187.

[87] *Id.,* pp. 193-194.

[88] Sissons & Bassin, at 279.

[89] Newton & Scharf, 187.

[90] The International Center for Transitional Justice is a New York based Nonprofit that aids countries in transition. They aid and advise countries and other NGO's worldwide, including the World Bank, Peruvian NGO's, the governments of Burma, Tunisia, and Argentina. They also issue periodic reports on transitions worldwide.

given the impression that the trials are a foregone conclusion. It is difficult to think of a more blatant attack on the independence of the judiciary."91

Yet some have alleged that control of the judiciary in both appointment and removal has been one such blatant attack. M. Cherif Bassiouni92 notes the irony that judicial appointments to the IHT were made by the unelected governing council, a distinctly political organ, in an unaccountable and opaque manner that mirrored the Ba'athist selection of judges of the previous regime.93 As expressed by Mr. Bassiouni, this raised concerns of the independence of those judges from the organ and politicians who appointed them. However, by the end of the trial, it would be concerns over the removal power of political organs that would come to be the primary concern of observers.

For instance, Judge Amin, the original presiding judge over the trial, resigned supposedly "following criticism of his courtroom demeanor by senior political figures and the public."94 Eventually 4 of the original 5 judges would resign or retire throughout the course of the trial,95

[91] INT'L CENTER FOR TRANS'L JUSTICE, DUJAIL: TRIAL AND ERROR? 7 (Nov. 2006) (hereinafter "ICTJ Report") [Electronic copy provided in accompanying USB flash drive at Source 54].

[92] M. Cherif Bassiouni is a Professor of Law and President of the International Human Rights Law Institute at DePaul University College of Law, President of the International Institute for Higher Studies in Criminal Sciences, and Honorary President of the International Association of Penal Law.

[93] M. Cherif Bassiouni, Post Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 CORNELL INT'L L. J. 328, at 368-369 (2005) [Electronic copy provided in accompanying USB flash drive at Source 55].

[94] *Id.*; *But see*, Newton & Scharf, at 127-128 (Newton & Scharf relate, apparently from some degree of firsthand knowledge, that Amin's shaky command of Arabic was at least part of the reason for his voluntary resignation).

[95] ICTJ Report, at p. 8; Another judge, "Abdullah al-Amiri, who was presiding over the second trial chamber, was removed on September 19, 2006, following an outcry from the prime minister's office, parliamentarians, and the public at his comment that Saddam Hussein was "not a dictator." ICTJ Report, at footnote 25 (quoting Peter Beaumont, Judge in Saddam Trial Axed in Neutrality Row, GUARDIAN, Sept. 20, 2006).

including Saeed al-Hammashi, the replacement for Judge Amin, who soon fell victim to the De-Ba'athification Commission and was removed from the Trial Chamber.96

This latter removal of Saeed al-Hammashi exemplifies the more invidious tool of the executive when exercising power over the nominally independent Iraqi High Tribunal: the De-Ba'athification regime. The executive consistently used it to remove judges whose rulings or attitudes appeared out of line with their preferences.97 In the Statute establishing the IHT, former Ba'ath party members are disqualified from serving on the Tribunal.[98] This is impractical for Iraq, however, given that Ba'ath Party Membership was required for all judges in the Saddam regime.[99] Thus, for the Tribunal to have any previous judicial expertise and still retain its Iraqi character, it must accept judges who were former Ba'ath party members.[100] In practice, this led to the De-Ba'athification Group, controlled by the executive, to have the ability to dismiss judges at whim.

Sissons and Bassin,101 for example, recount that in 2005, the Commission attempted to remove 19 court personnel under the De-Ba'athification procedures to partial success. This, they

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[96] Kevin Heller notes that "Not only was Judge al-Hammashi the consensus choice of the IHT judges, the Chief Prosecutor at Saddam's trial was skeptical of the Commission's claims and insisted that it produce proof of al-Hammashi?s Ba'athist past. The Commission refused." Kevin J. Heller, Comparing the Trial to International Standards of Due Process, Saddam on Trial: Understanding and Debating the Iraqi High Tribunal 155 (Michael P. Scharf & Gregory S. McNeal, eds. 2006) [Electronic copy provided in accompanying USB flash drive at Source 53].

[97] HUMAN RIGHTS WATCH, *supra* note 83, at p. 38-39.

[98] *Id.,* p. 38.

[99] *Id.*

[100] *Id.,* p. 39.

[101] Miranda Sissons is the Deputy Director for the Middle East for the International Center for Transitional Justice. She monitored Tribunal developments and trial sessions over five Baghdad missions between 2004 and 2007, meeting extensively with Tribunal participants. Ari Bassin is a Consultant in the Prosecutions Division of the International Center for Transitional Justice.

note resulted in a threat from the US to relocate the tribunal.102 However, with the De-Ba'athification sword overhanging the heads of the judges, the effects may not always be so obvious as outright removal. Sissons and Bassin believe this resulted in several judges modifying their behavior, refusing positions of prominence, or not standing for reelection.[103] This fear was supported by Reports from both the International Center for Transitional Justice,104 and Human Rights Watch.105 This analysis was bolstered by a secret cable from the U.S. Embassy in Baghdad which acknowledged this potential for abuse of the De-Ba'athification commission, citing the threatened dismissal of 13 judges by Achmed Chalaibi in 2005.106

There were other problems with the administration of justice in Iraq. In addition to the influence exerted by public statements and the De-Ba'athification commission, the Prime Minister's office held control over the judicial salaries and provision of secure accommodations in the Green Zone, which in the deteriorating security environment of Baghdad, was undoubtedly influential.107 The threats to judicial independence were not only Executive in origin, however. In an exercise reminiscent of Clark's study of legislative influence on judicial decision making via "court curbing," the American Embassy in Baghdad feared that the Iraqi National Assembly

[102] Sissons & Bassin, at p. 278.

[103] *Id*.

[104] ICTJ Report, at p. 7.

[105] HUMAN RIGHTS WATCH, JUDGING DUJAIL, at 43.

[106] David M. Satterfield, Executive Pressure on Iraqi Special Tribunal Intensifies, Jul. 19, 2005, http://www.wikileaks.org/plusd/cables/05BAGHDAD2985_a.html (last visited Nov. 28, 2013) [Electronic copy provided in accompanying USB flash drive at Source 23].

[107] Newton & Scharf, at p. 101; the author would be remiss to not note that deterioration of the security environment in Iraq also posed a significant challenge in the conduct of a fair and just trial. Although not traditionally thought of in the judicial independence context, three defense lawyers were killed during the course of the trial, surely affecting public perception of the IHT, the Dujail trial, and the government. These killings, and their effects on the trial, though certainly notable and worthy of criticism, are more in line with denial of due process or access to the defense's council of choice than of political interference or political pressure, and are thus beyond the scope of this analysis.

may attempt to curtail the independence of the IHT by granting normal judiciary appellate power over the IHT's decisions, or at very least, threaten to change the appellate rules so as to influence the Tribunal.108

Not all analyses are so sharply critical, however. Newton and Scharf, in their 2008 book on the Dujail Trial posit that many of these fears were more theoretical than applied, reflecting more sensationalism in the media than in the politicization of the trial itself.109 For example, although the trial was occasionally construed as a missed opportunity to prosecute Saddam for much greater crimes such as the Anfal and Southern Marsh campaigns, Newton & Scharf explain that "once the investigative judge finds a prima facie case against a defendant, the individual must be brought to justice for those crimes."[110] They beg the critics be fair, and recognize the the ambit and full effect of the Dujail trial- it represented a radical attempt to integrate international legal standards into the Middle Eastern legal tradition, in a tragically violent environment, while many of the perceived problems they ascribe to the defense's disruptive tactics more than actual due process failures.[111]

Yet ultimately, the experience of the Iraqi High Tribunal exemplifies many of the possible means of exerting political pressure to control the decisions of a judiciary in ways that do raise strong concerns of due process violations. In an interesting parallel with the questionable independence of the IHT, one of the defendants, Awwad Hamad Al-Bandar, the judge of the Revolutionary Court who issued the guilty verdicts and prescribed the death penalty to the

[108] Satterfield, *supra* note 112.

[109] Newton & Scharf, p. 105.

[110] *Id.,* p. 89.

[111] *Id.,* p. 224-225.

residents of Al-Dujail, was held responsible for the killings because his court had effectively rubber stamped the cases before it. His judicial independence was so compromised he was acting less in response to political pressure than directly acting as the arm of the executive branch. The appeals court stated: "This evidence supports the conclusion that he was an executive employee for the regime, carrying out the duties of his job, without being an independent judge of the court deciding the fate of innocent people."112

In the Dujail trial, there was nothing so radical. Although public statements of the executive branch may or may not have had a serious effect on the performance of judges, at least in the case of the execution expectation statement by Maliki in 2006, they had the effect of creating the perception of a kowtowing judiciary, damaging the reputation of the tribunal and the expectations of justice from the public. Furthermore, the De-Ba'athification procedures use to mold the composition of the judiciary were an example of political interference in the functioning of the judiciary.

Finally, and perhaps most significant to the lasting impression of the Dujail trial, was the IHT's failure to address these concerns. Regarding the security situation which had caused the death of several defense attorneys and court personnel, the court merely brushed off concerns, saying "however, and despite all these infringing behaviors that violate the rules and regulations of the procedures in courts, it doesn't affect neither the transparency of the court procedures nor its credibility in the course of the lawsuit according to the reasonable procedural rules."113 In the end, this attitude may have done more harm than either the assassinations or the De-Ba'athification commission.

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[112] *Prosecutor v. Saddam Hussein et al.,* Appeals Court Decision, 29/c/2006, p. 16 (Dec. 26, 2006) [Electronic copy provided in accompanying USB flash drive at Source 41].

[113] Dujail Opinion, English Translation Part 1, *supra* note 73, at p. 24.

iv. The East Timor Tribunal

As was the case of the Iraqi High Tribunal, the U.N. created Special Panels of the Dili District Court ("East Timor Tribunal") was a unique mix of domestic and international elements. Yet, where the Americans, who funded, aided, and advised the IHT, made every attempt to remove themselves from the actual trial, the UN more formally embraced its role as an administrator of justice. The East Timor Tribunal was part of the UN Transitional Administration in East Timor (UNTAET),114 the administration that bridged the period between the end of Indonesian occupation in 1999 and formal Independence in 2002, and was tasked specifically with trying cases of "serious criminal offences" which took place during the independence referendum of 1999 and resulted in approximately 1,400 murders and the displacement and forced deportation of over 200,000 people.115 As custodians of a new state freshly emerging from colonialism and occupation, UNTAET and the East Timor Tribunal had a dual focus on both the administration of justice and capacity building of the East Timor State and its judicial system.116 In accordance with those dual aims, the Special Panels were each comprised of three

[114] S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) [Electronic copy provided in accompanying USB flash drive at Source 2].

[115] U.N. Secretary-General, Report of the International Commission of Inquiry on East Timor to the Secretary-General, U.N. Doc. A/54/726, (Jan. 21, 2000) [Electronic copy provided in accompanying USB flash drive at Source 56].

[116] S.C. Res. 1272, para. 2-3; Padraig McAuliffe, UN Peace-Building, Transitional Justice and the Rule of Law in East Timor: The Limits of Institutional Responses to Political Questions, 58 NETHERLANDS INT'L L. REV. 103, 114-116 (2011) [Electronic copy provided in accompanying USB flash drive at Source 57].

judges, with two international jurists to each Timorese.117 The Panels sat in the East Timorese capital, Dili, and were nominally a part of the Dili District Court.[118]

Despite these structural attempts to build capacity of an independent judiciary using the Tribunal, according to most analysts, the UNTAET is mostly seen as a failure in both the promotion of justice and in building capacity, leaving behind only a judicial system beholden to the executive powers, consequently denying justice for the victims both during the East Timor Tribunal and after its closure in 2005.119 In large measure this result can be ascribed to the failure to pursue any contentious senior, and importantly, international, suspects in the crucial first two years of the Tribunal.120 These cases were left to prosecute after full independence was attained in 2002, which would effectively scuttle future prosecutions due to, among other things, a lack of judicial independence.

Unlike in Iraq where judicial independence was compromised as a means of sectarian retribution through the judiciary, in East Timor, the cause was precisely the opposite. According to Padraig McAuliffe,121 David Cohen,122 and Caitlin Reiger and Marieke Weirda,123 in

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[117] U.N. TRANS'L ADMIN. IN E. TIMOR, ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES, at para. 22.1-22.2, UNTAET Reg. No. 2000/15 (June 6, 2000) [Electronic copy provided in accompanying USB flash drive at Source 7].

[118] *Id.,* para. 1.2.

[119] *See generally,* McAuliffe; David Cohen, Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor, East-West Center (June 2006) [Electronic copy provided in accompanying USB flash drive at Source 58]; Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect (ICTJ, 2006) [Electronic copy provided in accompanying USB flash drive at Source 59].

[120] McAuliffe, at p. 119.

[121] Padraig McAuliffe is currently a Professor of Law at Liverpool University with extensive publication of books and articles in the field of Transitional Justice.

[122] David Cohen is the Director and founder of the War Crimes Studies Center and the Asian International Justice Initiative, as well as a Professor for the Humanities at U.C. Berkeley, and a Senior Fellow in International Humanitarian Law at the East-West Center in Honolulu, Hawaii.

pursuit of "normalizing" relations with Indonesia, the East Timorese executive stifled the Office of the Prosecutor in attempts to pursue charges against Indonesian officials who were suspected of committing or ordering the human rights violations that occurred during the transition period in 1999. In fact, although there were serious international due process violations in some of the 83 convictions of the Tribunal,124 including inequality of arms, inadequate translation, victim protection, and convictions for crimes for which the accused was not tried, there appear to be no accusations of political pressure or compromises of the independence of the judiciary in these lower level cases.[125] Such compromises were restricted to more consequential and influential indictees, the clearest example of which was the indictment of General Wiranto.

In 2003, the East Timor Tribunal issued an indictment for General Wiranto, the officer in command of the Indonesian Armed Forces during the violence in 1999, and seven other high level Indonesian military figures. President Gusmao of East Timor immediately stated his priorities that would define the executive's relations with the Tribunal for the rest of its existence: "relations with Indonesia are of extreme importance, not only for current stability, but for the future of the country."126 Soon after, presumably due to pressure exerted by the President, according to Reiger and Weirda, the Prosecutor General backed off his own indictment.127 In May of 2004, this indictment was followed by an arrest warrant, however, it

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[123] Caitlin Reiger is the Deputy Director of Prosecutions at the International Center for Transitional Justice who worked in Timor-Leste from 2001-2002 for the Judicial System Monitoring Programme. Marieka Wierda is currently Director of the Prosecutions Program at the International Center for Transitional Justice, and has observed Tribunals for the ICTJ since 1997.

[124] *See* Cohen, at pp. 70-71, 86-88.

[125] *Id.,* p. 5-7.

[126] McAuliffe, at 123 (quoting *East Timor: Serious Crimes Unit Indicts 48 More Suspects*, U.N. WIRE, Mar. 1, 2003).

[127] Reiger & Weirda, at p. 33.

was never submitted to Interpol, nor acted upon. In fact, President Gusmao, only weeks after the warrant was issued, met General Wiranto in Bali, and in a physical rebuff of the independent judiciary, embraced him.128

Unfortunately, this practice of executive meddling did not end with the Wiranto case or even the rule of President Gusmao. Explicit interference in the role of the judiciary would also occur in his successor's reign, during the investigation of the 2006 violence that rocked the country, and following the 2008 assassination attempts on the President and Prime Minister. By exercising restraint of the prosecution via formal and informal control over prosecutorial decisions, and making liberal use of the pardon, the executive exercises an impressive, and procedurally troubling, amount of control over the judicial process. Following the 2006 Crisis, of the 60 investigations launched, McAuliffe notes that "not a single individual remains in detention after nine pardoned convictions and 43 acquittals."129 Furthermore, he fears that the unlikelihood of the sentence being carried through has further discouraged judges and prosecutors from properly pursuing cases.[130] This was highlighted when the judge hearing the appeals of the assassination case had to take the step of requesting the president to hold his pardon until after the appeal was heard.131

In 2010, in what amounted to an admission of the dire status of judicial independence in East Timor, the President requested an international tribunal to handle matters in lieu of domestic

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[128] DAVID COHEN, JUSTICE ON THE CHEAP REVISITED: THE FAILURE OF THE SERIOUS CRIME TRIALS IN EAST TIMOR, 80 EAST-WEST CENTER: ASIA PACIFIC ISSUES, 2-3 [Electronic copy provided in accompanying USB flash drive at Source 60].

[129] McAuliffe, at p. 131.

[130] *Id.*

[131] CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, TIMOR-LESTE, NO. 4 SECURITY SECTOR REFORM MONITOR, 4-5, (Jan. 2001) [Electronic copy provided in accompanying USB flash drive at Source 61].

courts.132 Timor-Leste continues to struggle with a culture of corruption wrapped in the language of reconciliation. In contrast to the fears of political interference in the judiciary curtailing American or international concepts of due process as exemplified in the Iraqi High Tribunal, the East Timor experience exemplifies judicial interference that can curtail the administration of justice itself, denying victims their rights and allowing perpetrators to walk free.

C. ECCC and Judicial Independence in Context

i. Difference between political pressure and political interference is a terminological distinction without a difference; both are used to describe breaches of the more important concept, judicial independence.

Functionally, there appears no practical distinction between political pressure and political interference. Academically, the focus of research has been on what constitutes judicial independence, and the line of line of impropriety between political pressure and political interference appears to be crossed when this nebulous concept is violated. According to the Bangalore Principles, in order to achieve independence, judges should be free from "free of any extraneous influences, inducements, *pressures*, threats or *interference*, direct or indirect, from any quarter or for any reason" (emphasis added).133 This language is repeated almost verbatim in the UN Principles on the Independence of the Judiciary,134 and the Mt. Scopus International

[132] Timor Leste President Would Support International Tribunal, AMNESTY INTERNATIONAL, Mar. 8, 2010[Electronic copy provided in accompanying USB flash drive at Source 24].

[133] Bangalore Principles, *supra* note 26.

[134] "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, *pressures*, threats or *interferences*, direct or indirect, from any quarter or for any reason," (emphasis added) U.N. Basic Principles, *supra* note 21, para. 2 .

Standards.135 This bundling of the two terms throughout these different agreements, and with the issue unaddressed in international courtrooms, leads to the conclusion that if they are functionally equivalent.

While one may argue that they are each included separately in these declarations because the two are different ideas, the fact that they are included in a single series of like concepts, under the overarching principle of breaches of judicial independence implies both that they can be read as functional equivalents. This is turn reinforces the idea that the operative framework for analyzing either political interference or political pressure *is* that of judicial independence and when it is breached, rather than the question of political pressures versus political interference.

ii. "Perfect" Judicial Independence, free from all extraneous influences, may not be necessary for the guarantees of international due process under Furundzija, but appearance of bias is problematic in proceedings and public perception.

According to the definition expressed in the bevy of international standards created since 1980, judicial independence can be violated under any number of specific circumstances, but the general principle of freedom from extraneous influences underpins all understanding of the concept. Specific ideas, such as the admonitions of media to be "fair"136 may differ in each set of standards promulgated over the years, but certain provisions are universal. In particular, the freedom to decide "free of any *extraneous* influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason"137 is mirrored universally

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[135] "The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason," Mt. Scopus Standards, *supra* note 36, at §8.4

[136] Mt. Scopus Standards, *supra* note 36, at §6.1.

[137] Bangalore Principles, *supra* note 26, para. 1.1.

across the various standards and resolutions, as are guarantees of independence from threat of removal or decrease in salary,138 banning of public statements by the executive branch which may bias the proceedings,139 and equally important, there must be freedom from actual *and apparent* appearance of bias by the court.140

Yet none of the international resolutions on the topic state explicitly when these violations of the independence of the judiciary become a colorable offense before the court which would allow a defendant to claim his due process rights have been violated. Here, the American legal tradition provides some guidance, stating that the question is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[141] This does give room for the presence of some political pressure or political interference before the objective appearance of bias appears. Although, with the exception of the SCSL in the narrow realm of funding, none of the hybrid tribunals have actually addressed the question of when judicial independence violations violate a defendant's due process rights, the ICTY's decision in Furundzija provides guidance for international tribunals generally.

The Furundzija appeal stands for the proposition generally that appearances of partiality by an arbiter can matter as much as reality. The Test of the Furundzija court,142 that absent

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[138] *See* Mt. Scopus Standards, *supra* note 36, at §§2.8, 3.2, 5.1, 5.3; IBA Minimum Standards, *supra* note 17 at paras. 15, 22; U.N. Basic Principles, *supra* note 21, at para. 11.

[139] Mt. Scopus Standards, *supra* note 36, at §§2.23-2.25 ; IBA Minimum Standards, *supra* note 17, at para. 16.

[140] Mt. Scopus Standards, *supra* note 36, para. 8.3; IBA Minimum Standards, *supra* note 17, paras. 44-45; U.N. Basic Principles, *supra* note 21, para. 8.

[141] *Id.,* at 881.

[142] The Court stated the test as:

A. A Judge is not impartial if it is shown that actual bias exists.

actual bias, there is the unacceptable appearance of bias if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." Although the Furundzija decision is not binding on the ECCC, and the rules that the Furundzija court based their ruling off differs from the internal rules of the ECCC, under Rule 34, many of the same guarantees apply,143 giving the decision strong precedential value.

Given the scrutiny of international tribunals by NGO's, media organizations, and donor and advisor countries, there are many more opportunities to lead a reasonable observer to infer bias. This gives statements by the executive more prejudicial power than would otherwise be the case, such as in the East Timor Tribunal and the indictment of General Wiranto, and Prime Minister Gusmao's subsequent embrace of the General, or in the IHT with Prime Minister Maliki's expectations regarding Mr. Hussein's impending execution date before the conclusion of proceedings. Both courts suffered immense criticism for these apparent improprieties, which, in the IHT's case, were compounded by the Appellate Chamber's failure to address the issue.

iii. Judicial Independence and the ECCC

a. Allegations of direct executive interference are not analogous to the IHT judge resignations, but instead reinforce questions of apparent bias.

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.

Furundjiza, para. 189.

[143] Rule 34(2) States: "Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias." ECCC Internal Rules, *supra* note 12, Rule 34(2).

The resignations by Judges Blunk and Kasper-Ansermet at the ECCC appear similar to the resignation and removal of judges in the Al-Dujail trial, particularly drawing parallels to the resignation of Judge Amin, who resigned under political pressure for his courtroom statements. Although the analogy is limited, as most of the resignations of the IHT came under the guise of De-Ba'athification, since here, as in Judge Amin's case, the two international judges' resignations are direct responses to executive interference and executive statements that the judges' fear could give the appearance of bias in the proceedings, the resignation of judges under these circumstances may provide further basis for finding that there is bias in the courts among the remaining judges, much as the resignation of Judge Amin resulted in a perception among some that the judges left on the IHT would be kept in line.

b. Statements by Cambodian Government Officials may be enough to cause an appearance of impropriety under the Furundzija test.

Statements by the government of Cambodia through the Prime Minister, Minister of Foreign Affairs, and Minister of Information have all given the appearance of influence in the proceedings of the ECCC. Assuming they do not cause actual bias among the international jurists, there are two questions: first, whether they cause, or demonstrate, actual bias on the part of the Cambodian judges. Given the presumption of unbiased judges, however, there may not be enough evidence to find bias, especially without narrowly tailored allegations. Thus the primary question shifts to whether these statements give the appearance of bias among *either* international or Cambodian jurists to a reasonably informed observer.

Even with the presumption of unbiased judges, this is a reasonable question for a court to investigate. On one hand, there are the statements themselves, which, in general give a perception of political pressure on the judiciary, as well as the resignation of international judges

in response which gives those allegations weight. However, on the other hand, a careful reading of the statements may give the impression that the judges, rather than kowtowing to pressure of the statements, of not investigating Case 003 and 004,144 for instance, is proof of resilience, as the investigations of both have proceeded.

c. Judicial Interference from the Cambodian co-investigatory judge You Bunleng may appear improper as a violation of independence among judicial colleagues, it is most accurately framed as political interference from the executive.

Both the Mt. Scopus and Bangalore Principles protect judicial integrity from interference from colleagues, though the two differ slightly. While Section 9.1 of the Mt. Scopus standards state "a judge must be independent vis-à-vis his judicial colleagues and superiors,"145 echoing the earlier Bangalore Principles which state "a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently,"146 the allegations affecting the ECCC are that the Cambodian co-investigatory judge, You Bunleng, obstructed the investigations of Case 003 and 004, prompting Judge Kasper-Ansermet's resignation. Unfortunately, none of the experiences with the ICTY, SCSL, East Timor Tribunal, or IHT provide direct guidance on this point of collegial interference, and nor do the ECCC Internal Rules expressly address the topic.147

However, if the allegations of the Cambodian co-investigatory judge's interference are viewed as stemming from biased behavior, whether originating from an improper link between the Cambo§§dian government and the judge, or arising from the pressure of statements by government

[144] Blunk Resignation Statement, *supra* note 3.

[145] Mt. Scopus Standards, *supra* note 36, §9.1.

[146] Bangalore Principles, *supra* note 26, para. 1.4.

[147] *See generally*, ECCC Internal Rules, *supra* note 12.

officials, the cause of action under the normal procedure of Rule 34(2)[148] overlaps with those discussed above.

d. ECCC funding mechanism is not likely a violation of Judicial Independence since the contribution by the Cambodian Government is so small a percentage of total Tribunal funding.

Unlike in the SCSL, the funding of the ECCC is not likely to be a primary issue, though it may be raised, especially as the court ages, and international donor states lose interest. Like the SCSL, the ECCC is supported by voluntary contributions by donor states. This question has already been addressed by the SCSL in the Norman case, examined above, which concluded that international donations, even if made on a voluntary basis, do not violate the judicial independence of the tribunals.

However, unlike in Sierra Leone, it is not the international donors who may be accused of exerting undue pressure on the Tribunal. The concern is that the Cambodian government itself will seek to influence the court, and a funding mechanism may be an effective method. According to the ECCC, at least $6.6 million for the Court has been paid by the Cambodian Government itself.149 Though the total cost of the tribunal is uncertain, estimated to top $150 Million by the end of 2011,150 to a projected $338 Million,151 in either case, these

[148] *Id.,* Rule 34(2).

[149] Though the ECCC website gives the figure at $4.8 million, it has not been updated since 2011. With the addition of the $1.8 Million pledged by the Cambodian Government in November 2013, this brings the bare minimum total to $6.6 Million. *See*, Extraordinary Chambers in the Courts of Cambodia, How is the Court Financed, http://www.eccc.gov.kh/en/faq/how-court-financed (last visited Dec. 1, 2013) [Electronic copy provided in accompanying USB flash drive at Source 25]; and, U.N. News Centre, Senior UN official urges donor support for Cambodia war crimes tribunal, Nov. 7, 2013, http://www.un.org/apps/news/story.asp?NewsID=46444&Cr=cambodia&Cr1=#.Up0Iw3B4y8A (last visited Dec. 1, 2013) [Electronic copy provided in accompanying USB flash drive at Source 28].

[150] Prak Chan Thul, One of the Darkest Chapters of the 20th Century up for Trial, REUTERS, Nov. 18, 2011, http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-cambodia/51023--one-of-the-darkest-chapters-of-the-20th-century-up-for-trial.html (last visited Dec. 1, 2013) [Electronic copy provided in accompanying USB flash drive at Source 27].

contributions by the government would amount to only between 3% and 1.5% of the total cost of the Tribunal since its founding.

This low contribution percentage may change, however, as the ECCC may look to the Cambodian Government for more funding as it ages, potentially raising this issue of compromised independence from influential funding sources in the future.152 This effect may compound as allegations of political interference in the tribunal continue to surface causing a waning of donor interest, which could increase the reliance of the Tribunal on the Cambodian government for its financing. Thus, at the moment, the ECCC is not susceptible to charges of interference stemming from its funding mechanism. However, if the ECCC is forced to rely on the Cambodian Government for more funding in the future, there may be grounds for a challenge to the independence of the Tribunal

V. CONCLUSION

At its best, political influence on the judiciary can be informative, providing a court with alternative arguments and rationales for the sides of cases it hears, as with amicus curae briefs; at its worst, it can diminish expectations of justice, compromise the public's faith in the rule of law, and even make a "court an instrumentality of terror,"153 allowing it to be beholden to despotic regimes and give the color of justice to the unjustifiable.

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[151] Stuart Ford, How Leadership in International Criminal Law is Shifting From the U.S to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts, 55 SAINT LOUIS L. J. 953, 961 (2011) [Electronic copy provided in accompanying USB flash drive at Source 62].

[152] On Nov. 7, 2013, the Cambodian Government pledged an additional $1.8 Million to keep the ECCC functioning. *See* Senior U.N. Official urges donor support, *supra* note 149.

[153] U.S. v. Alstoetter, Nuremberg Military Tribunal, Vol. 3, 1156 (1945) [Electronic copy provided in accompanying USB flash drive at Source 44].

This spectrum of political influence presents a valid question of whether pressure must always amount to interference. International resolutions and jurisprudence shows that it may not, necessarily, but that especially for the highly public international criminal tribunal system, the loss of legitimacy from the appearance of impropriety is especially damaging. As Justice Robert Jackson said during his opening statements at the Nuremberg Trials, "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."154 It is ultimately history that judges the actions of the tribunals, and it is for history, as much as the defendants, that judicial independence must be guaranteed.

[154] Robert H. Jackson, Opening Statement, Nuremberg Trials, Nov. 21, 1945 [Electronic copy provided in accompanying USB flash drive at Source 45].