Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

March 2010 Update

OPEN SOCIETY
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Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a regular report issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at *http://www.justiceinitiative.org/activities/ij/krt*.

Executive Summary

The most significant problems currently facing the Extraordinary Chambers in the Courts of Cambodia (ECCC) are related to political interference, a failure to adequately address corruption, and fundraising. Each requires intervention at senior levels of the government of Cambodia, the UN, and the diplomatic community. The UN should immediately appoint a permanent senior advisor at the Assistant Secretary-General (ASG) level to deal effectively with these issues.

Political Interference

The obligation of the court to visibly and vigorously pursue the additional investigations in Cases 003 and 004 must overcome concern that they will be quashed by inappropriate political interference. Cambodia's prime minister and other senior government officials have stated that these cases should not go forward for fear they will cause political unrest.[1] Against the background of these highly publicized statements and indications that Cambodian ECCC officials are not cooperating with proceedings, the investigating judges' delay in pursuing Cases 003 and 004 is widely seen as succumbing to political interference.[2] If Cambodian court officials continue to refuse to cooperate with the investigations, international officials must invoke the protections built into the *Agreement*[3] against such non-cooperation. The related problem of political interference in the court's calling and interviewing witnesses in the 002 Case remains unaddressed in any public way and continues to diminish the court's credibility.[4] The ECCC must address both situations immediately and publicly in order to renew public confidence in the court.

Corruption

The efforts of the Cambodian government and the UN to develop a robust anticorruption mechanism available to court staff, as pledged in an August 2009 agreement, have progressed significantly in recent months.[5] On February 17, 2010, the independent counsellor appointed by the government of Cambodia to deal with corruption and related concerns held a staff meeting at

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[1] *November 2009 Progress Report,* pages 5-6.

[2] See *November 2009 Progress Report,* and the Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, August 18, 2009, http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_(English).pdf.

[3] These protections include invoking dispute resolution mechanisms and presumptions that investigations move forward absent a super majority vote to the contrary. See the 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, July 2003, ratified October 19, 2004, at *http://www.eccc.gov.kh/english/agreement.list.aspx, (the Agreement).*

[4] In September 2009, the international investigating judge signed summons seeking to interview as witnesses six individuals who hold positions in the current government. The Cambodian investigating judge did not sign the summonses, and the prime minister and a government spokesperson indicated publically that the summonsed witnesses need not appear. None of the witnesses complied with the summonses.

[5] See *Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh/New York, August 12, 2009, at http://www.un.org/News/Press/docs//2009/l3146.doc.htm.

the ECCC to describe his mandate and exchange views. A formal protocol for the independent counsellor has been developed and was distributed to court staff on March 5, 2010. A representative of Cambodia's National Audit Authority advised the press on March 22, 2010 that the independent counsellor had received and was "investigating" three complaints from ECCC staff, two involving termination of employment and one alleging that funds were solicited from him by a superior.[6] These are important and long overdue actions, but additional and close monitoring is needed to ensure that the anticorruption mechanism is—and is seen to be—credible.

Budget

In December 2009, the court presented to the donor community a proposed budget for 2010-2011. Major donors to the court are said to have approved a budget in the total amount of $85 million for two years, with $42 million allocated to 2010 and $43 million to 2011, but it has not yet been published by the court.

Since the last Justice Initiative report on the progress of the ECCC was issued on November 23, 2009,[7] the following developments have taken place:

Case 001 – Closing Arguments

The court completed closing arguments in the trial against Kaing Guek Eav, alias "Duch," and the case is now in the hands of the Trial Chamber judges. The closing arguments were dramatic. Counsel for Duch reversed the position consistently articulated by the defense throughout the six-month public trial in which Duch acknowledged responsibility for the charged crimes and asked for mercy from the court and forgiveness from the victims. During the closing arguments, Kar Savuth, Cambodian counsel for Duch, and Duch himself surprised the full courtroom (as well as Duch's international counsel, Francois Roux) by requesting an acquittal and immediate release. The sudden turnabout revealed significant differences between Duch's international and Cambodian defense counsel. In the final moments of the argument, Duch confirmed that Cambodian defense counsel Kar Savuth spoke for him in requesting acquittal and immediate release.

Case 002 – Completion of Investigation Nears

The investigating judges announced on January 14, 2010 that they believe the investigation of Case 002, which includes charges against Ieng Sary, Ieng Thirith, Khieu Samphan, Nuon Chea, and Duch, is complete. This action triggered an opportunity for the parties to submit additional requests for investigation, and to appeal any denial of such requests. This is an important step in the civil law process of moving from the formal investigation to an actual indictment or dismissal of charges in the form of a "Closing Order." The investigating judges have stated they

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[6] See, James O'Toole, "Audit Office says Probes in Progress," *Phnom Penh Post,* March 23, 2010.

[7] See Open Society Justice Initiative, "Recent Developments at the Extraordinary Chamber in the Courts of Cambodia," November 23, 2009, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20091120/eccc_20091123.pdf for more detail on the statements of government officials. (*November 2009 Progress Report).*

hope to complete this process by September 2010 to avoid having to release the charged persons because of the expiration of the maximum three-year provisional detention period allowed under Cambodian law and the Internal Rules of the Court.[8]

Case 002 – Genocide Charges and Mode of Liability

The investigating judges ruled on December 8, 2009 that joint criminal enterprise, a mode of liability related to the commission of large-scale international crimes by a group of perpetrators, is applicable to crimes charged under international law by the ECCC. In December 2009 the judges also advised Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea that they have been charged with genocide. The genocide charges relate to crimes allegedly focused against Cham Muslims and Vietnamese populations. Genocide charges were not added against Duch, who, for technical reasons, remains under investigation in Case 002 despite the completion of his trial in Case 001.

Cases 003/004 – Delay in Investigation

Although six months have passed since the international prosecutor filed submissions seeking investigation and charges against five additional suspects (referred to as Cases 003/004),[9] there is no indication that the investigating judges, You Bunleng and Marcel Lemonde, have taken any substantial action to pursue these cases. In contrast, in Cases 001 and 002, the investigating judges issued arrest warrants and charged the accused within between two weeks (Duch) and four months (Khieu Samphan) of receiving the initial submission from the prosecutors. The workload of completing the investigation in Case 002 may have necessitated an initial delay in fully gearing up the Cases 003/004 investigations, but now that the Case 002 investigation is substantially complete, there is no justification for delaying the additional investigations.

Modified Rules for Civil Parties and Victims[10]

In a plenary session that ended on February 9, 2010, the court's judges adopted a substantially modified scheme for civil party participation by victims. Henceforth, civil parties will not be individually represented by their chosen lawyers at trial. Rather, they will be represented as a group by a single team of "co-lead lawyers" (one Cambodian and one international), who are hired by the court. The judges simultaneously expanded the mandate of the Victims Unit (renamed the Victims Support Section) to serve a broader range of non-legal interests of all victims.

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[8] Cambodian Code of Criminal Procedure, Article 210; Internal Rules, Rev. 5, February 9, 2010, Rule 63 (7), at http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf. (All references to the internal rules are to this version and referred to as "Rule___").

[9] Press Release, "Acting International Co-Prosecutor Requests Investigation of Additional Suspects," September 8, 2009, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310. See also Rule 53.

[10] In the ECCC internal rules, "victims" refers to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC, and "civil party" refers to a victim whose application to become a civil party and participate in the proceedings against an accused has been declared admissible by the court. See Glossary to Internal Rules, Rev. 5, February 9, 2010, at http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf.

Pre-Trial Chamber Sitting Full Time

In anticipation of a sharp increase in the number of appeals filed by the parties in connection with the closing of the investigation in Case 002, the Pre-Trial Chamber, which hears any appeals related to the orders of the investigating judges, began to sit full time in Phnom Penh as of February 2010.

Appointment of New International Prosecutor and Reserve Prosecutor

On December 2, 2009, Andrew Cayley (Great Britain) was formally appointed as the international prosecutor of the ECCC, replacing Robert Petit who resigned in September. Cayley has taken up residence in Phnom Penh. Nicolas Koumjian (United States) was appointed as the reserve international prosecutor.

Recommendations

To the United Nations, the Government of Cambodia, Donors, and ECCC Officials:

Take immediate steps to ensure that violations of the *Agreement*—in the form of political interference in judicial and prosecutorial decisions—are remedied and actively discouraged. Remedial steps should include public reaffirmation of the importance of prosecutorial and judicial independence. Greater involvement from senior international staff and political resolve from the UN and the donor community are needed to ensure that the government of Cambodia does not continue to improperly interfere with judicial and prosecutorial decisions. Senior prosecutorial and judicial investigative officers should be asked to verify on an ongoing basis the full, active, and independent cooperation of both international and Cambodian staff and officers.

Closely monitor implementation of an effective anticorruption program. Recent progress in the implementation of an anticorruption mechanism should be sustained by ongoing monitoring by the UN, the donors, and the court to ensure that it is in fact and perception credible to the staff of the ECCC. In addition the program should be refined to:

- Further define whistleblower and witness protection measures for those who report corruption;
- Institute measures to enhance transparency, including mandatory periodic public reporting by the independent counsellor charged with receiving corruption complaints; and
- Address existing corruption allegations.

Ensure the allocation of sufficient funds, staff resources, and leadership for implementation of robust outreach, victim participation, and legacy efforts to ensure that the expanded mandate of the Victim Support Section is fulfilled and increased outreach efforts are undertaken.

To the United Nations:

Immediately appoint a UN representative at the level of Assistant Secretary-General of the UN to make certain that the *Agreement* is complied with, fundamental fair trial principles are

protected, and budget and other high-level management issues are adequately addressed so as to ensure the court meets its goals efficiently and effectively.

With the successful conclusion of the Duch trial, the ECCC demonstrated that, with rigorous oversight, it can hold a credible trial that meets international fair trial standards and engages a large number of Cambodians in better understanding their history and the value of an independent judicial process. Yet the court's achievements in the Duch trial are at risk if due attention is not paid by the UN, a partner in the court, to the troubling issues that threaten its credibility and independence, including political interference, the need to fully implement an adequate anticorruption mechanism, and critical but time-consuming fundraising needs.

In order to address these challenges, the UN should appoint a permanent senior advisor at the level of a UN Assistant Secretary-General (ASG) with full authority to deal with Cambodian government officials, donor states, and ECCC officials.

Experience has repeatedly shown that progress in improving the ECCC's performance is marginal without the sustained involvement of high-level UN authorities. Representatives of the UN Office of Legal Affairs (OLA) have performed adequately as interlocutors. However, the press of other matters has not permitted ongoing, full-time engagement by an official with the requisite gravitas and skills to be effective. The political and diplomatic complexities of the issues to be tackled, and the Cambodian government's consistent failure to fulfill prior commitments agreed with a succession of UN interlocutors, make clear the need for more sustained, senior-level UN engagement. As the Justice Initiative recently noted in a Memorandum to the Secretary-General, the appointment of an ASG-level advisor, with adequate administrative support, is the most effective way to accomplish this.[11]

Progress and Ongoing Concerns

Political Interference in the Judicial Process

No visible progress has been made in tackling the political interference addressed in the Justice Initiative's *November 2009 Progress Report*. Political interference undermines the credibility of the court and its ability to meet international fair trial standards. In the past six months, improper interference has been manifest in the response of Cambodian government officials to the summonsing of high level officials by the investigating judges in Case 002, and to the initiation of an investigation into charges against five additional accused in what is referred to as Cases 003 and 004. Influential government officials, including the prime minister, have made clear their position that the summonsed witnesses will *not* appear, and that Cases 003 and 004 will *not* proceed.[12]

[11] Available at: www.soros.org/initiatives/justice/focus/international_justice/news/un-cambodia-20100212.
[12] See *November 2009 Progress Report*, pages 6-7.

The ECCC judges must take all steps available under the rules of the court to secure the testimony of the summonsed witness in Case 002.[13] If government officials or court officers refuse to cooperate with such steps, the UN, the donors, and the key international officers of the court must make it clearly and publicly known that such interference or refusal of cooperation is a violation of the *Agreement* and the principles that govern fair trials consistent with international standards. To date, it appears from publicly available information that Cambodian and international officers of the court are acceding to the political machinations seeking to prevent the high level witnesses from appearing. Recently, Judge Marcel Lemonde, the international investigating judge, reportedly determined that employing coercive measures to gain the cooperation of the high level witnesses who refused to appear would be ineffective.[14] This conclusion appeared in the press, but no explanation has been provided as to why the evidence of political interference was not addressed.

Aside from undermining the court's overall credibility, failure to pursue efforts to interview the summonsed witness, may adversely affect the fair trial rights of each accused, who may successfully assert that the testimony of these witnesses is vital to their defense.[15] This concern is heightened by the apparent position of the investigating judges that the defense is prohibited from doing its own investigation and must leave all requests to interview witnesses and perform other investigative tasks to the investigating judges.[16]

The investigating judges have a professional and legal duty to pursue diligently the investigation of Cases 003/004.[17] Now that the investigation for Case 002 is substantially completed, there is no justification for failing to move forward with the investigation and possible arrest and charging of suspects pursuant to the submissions of the international prosecutor in Cases 003/004.[18] The submission from the prosecutor to the investigating judges relating to the

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[13] See for instance Rule 60(3) that allows the court to issue an order to the judicial police to bring a witness to the court to provide testimony if the witness fails to appear after being summonsed. The process differs significantly from the procedures for arrest warrants in Rule 42, which can only be issued against a suspect, a charged person, or an accused person. There is no indication that the parties intended any parliamentary or other immunity to apply to this process, although that argument has been raised as a rationale for failing to take this next step provided by the rules.

[14] See Julia Wallace, "Ieng Sary Defense Team Alleges Witness Intimidation at KRT," *The Cambodia Daily*, February 25, 2010.

[15] *See International Covenant on Civil and Political Rights,* adopted for signature and ratification by the General Assembly, Resolution 2200A (XXI), 16 December 1966, acceded to by the Royal Government of Cambodia in 1992, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, ("ICCPR"), which articulates international fair trial standards applicable to the ECCC. Article 14, 3(e) protects the right of an accused person "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[16] See Order (of Co-Investigating Judges) Issuing Warning under Rule 38, February 25, 2010, para. 8 at http://www.eccc.gov.kh/english/cabinet/courtDoc/556/D367_EN.pdf

[17] See Rule 55 (1), which provides that a judicial investigation is compulsory for crimes within the jurisdiction of the court. Although not expressly set forth that the investigating judges "shall" conduct an investigation when they receive an introductory submission from the prosecutors, this is certainly the underlying intent of the rules and of establishing the Office of the Co-investigating Judges.

[18] The introductory submission to initiate a formal judicial investigation in Cases 003/004 was signed only by the international prosecutor following the divided decision of the Pre-Trial Chamber resolving the disagreement between the international and the Cambodian prosecutor about whether to file the submission. The Cambodian prosecutor and each of the Cambodian judges on the Pre-Trial Chamber objected to the additional submission. It

additional five suspects was made over six months ago, on September 7, 2009.[19] Although the details of the investigation are confidential under the rules of the court,[20] the public is entitled to be informed about the general status and progress of the cases.[21] The failure of the investigating judges to provide any information about Cases 003/004 raises suspicions that the instructions of the prime minister and other government officials that those cases *not* precede are being heeded.

The *Agreement* anticipated the possibility of interference in the court's decision-making about whom to investigate and charge with crimes, and it provides a process for insuring that investigations would proceed in spite of improper attempts to stop them.[22] While this process can be defeated by either the refusal of the international side of the court to invoke it or by a decision by the Cambodian government to defy it, it nonetheless provides a critical test of the integrity of the ECCC. Judgments about whether the ECCC meets international standards for judicial and prosecutorial independence will likely depend on how faithfully the international officials of the court invoke this process when presented with evidence of improper interference. If, in spite of such efforts, the government of Cambodia refuses to honor mandates of the court—including orders to the judicial police to bring witnesses to the court to be interviewed, or to arrest accused persons—it will be in direct violation of the *Agreement*.

Concern about the cooperation of Cambodian court officials in the investigation of Cases 003 and 004 should be addressed directly and conclusively. If the Cambodian side of the Office of the Investigating Judges withholds cooperation in the investigation and processing of the cases, the international investigating judge can file a notice of the disagreement with the *greffiers* of the court. Once that is done, he can proceed with needed investigative actions unless the objecting judge initiates a formal disagreement process to be decided by the Pre-Trial Chamber. Throughout this process, the requested investigation shall proceed, with the exception that notification of charges and orders for arrest or detention or must await decision by the Pre-Trial Chamber on the disagreement before being executed.[23] The Pre-Trial Chamber must decide such disagreements with a supermajority vote, and the rules and *Agreement* provide that in the absence of at least four out of five votes to the contrary, the investigation shall proceed and the requested investigative actions shall take place.[24] The only exception to this super majority requirement is for orders of provisional detention.[25]

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was only due to the presumption in the *Agreement* and internal rules that in the event of such a dispute an investigation goes forward, that the cases were submitted to the investigating judges for further processing.

[19] Press Release, "Acting International Co-Prosecutor Requests Investigation of Additional Suspect," September 8, 2009, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310.

[20] Rule 56.

[21] See Sok Khemara, "Tribunal Expected To Probe Further Suspects," *VOA Khmer,* March 12, 2010, at http://www.voanews.com/khmer/2010-03-12-voa5.cfm, quoting a court spokesperson acknowledging that active investigation has not begun on the case, "investigators have started studying the case files for Case 003 and Case 004. . . [c]oncrete investigative steps are expected to start in some weeks' time."

[22] *Agreement,* Articles 5 and 7(4) and Rule 72 (4). See also David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, International Criminal Law, Third Edition, Volume III, International Enforcement, Martinus Nijhoff Publishers, The Netherlands, 2008, at page 246.

[23] Rule 72 (3).

[24] Ibid.

[25] This exception protects the presumption of innocence and the provision that detention of an accused is only appropriate when specific findings are made. See Rule 63.

Following a ruling by the Pre-Trial Chamber mandating that an investigation proceed and that investigative orders be carried out, the investigating judge who had objected must then cooperate in the execution of the orders. If he or others, such as judicial police, choose not to—or are prevented from doing so by political actors—it would constitute a clear breach of the *Agreement*'s requirement that the government of Cambodia cooperate with the work of the ECCC.[26] For example, if the international investigating judge determined it was appropriate to issue an arrest warrant and charge suspects with crimes pursuant to the introductory submission from the prosecutors, this action would go forward absent a supermajority ruling by the Pre-Trial Chamber that it was not appropriate. Under such circumstances, an arrest warrant could be issued to the judicial police in spite of the objection of the Cambodian investigating judge. If the judicial police refuse to execute the warrant because of political interference, the government of Cambodia will be in violation of the *Agreement*. At this point, when political interference is likely to become embarrassingly public, there is an increased likelihood that the interference will cease. Regardless of whether it does, it is critical to the credibility of the court that the measures in the *Agreement* to protect against improper interference be fully exercised. If they are not, observers will conclude that the court is a victim of political manipulation and that the international involvement is too weak to ensure compliance with international fair trial standards.

The international officials of the court have an important role to play in addressing the political interference that appears to be affecting Cases 003/004. If the Cambodian officials in the Office of the Investigating Judges are unwilling to participate in an investigation of Cases 003/004 because they have received contrary political instructions, or for any other reason, the international officials in that office still have a responsibility to proceed with the investigation and let the process run its course. They must bring such facts to the attention of the Pre-Trial Chamber through the formal disagreement process provided in the *Agreement* and the rules, or to the UN, the donors, and the government of Cambodia to prevent the interference from affecting the judicial process.[27] The safeguards against political interference included in the *Agreement* are useless if international officials do not implement them when they are most needed.[28]

An alternative strategy of completing Case 002 before addressing the evidence of interference in Cases 003 and 004 risks endorsing and giving effect to the interference. Delay in addressing the evidence of interferences increases the chances that it will be successful and will infect the overall fairness of the court and, thus, the integrity of Cases 001 and 002.

Moving forward diligently with the investigation of Cases 003/004 also serves important administrative needs of the court. Postponing investigation and processing of Cases 003/004 will mean that the full investigative staff of the court will be underutilized now that the Case 002 investigation is closed, and the delay could significantly lengthen the life and cost of the ECCC.

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[26] *Agreement,* Articles 24 and 28.

[27] *Agreement,* Article 7; Rule 71, Settlement of Disagreements between the Co-Prosecutors.

[28] These safeguards include the requirement for supermajority voting at Article 4, the provisions for settlement of disagreements in the event of disputes between the investigating judges or prosecutors with presumptions allowing investigations to proceed in the absence of a super majority vote to the contrary at Article 7, and language that the court will respect international standards at Article 12, that judges will operate independently of any outside instruction at Articles 3, 5, and 6, and that the guarantees of Articles 14 and 1 of the International Covenant Civil Political Rights will be respected at Article 14.

More generally, a recommitment to full judicial independence must be made by the Cambodian leaders and staff of the ECCC to assure the Cambodian public that the ECCC is not merely a tool of political interests. The UN and the donor community should play a more visible role in seeking these reassurances.

Implementation of an Effective Anticorruption Mechanism

The Justice Initiative's *November 2009 Progress Report* lamented the lack of any material progress in the development of a credible anticorruption mechanism since August of 2009. This situation has improved, but ongoing monitoring is needed. On February 17, 2010 the independent counsellor appointed by the government of Cambodia to deal with corruption and related concerns held a staff meeting at the ECCC to describe his mandate and allow an exchange of views with the staff. A formal protocol describing the responsibilities of the independent counsellor has been developed and was distributed to the court staff on March 5, 2010. A representative of the National Audit Authority advised the press on March 22, 2010 that the independent counsellor had received and was "investigating" three complaints from ECCC staff, two involving termination of employment and one alleging that that funds were solicited from him by a superior.[29] These are important and long overdue actions.

After two years of efforts, significant progress has been made in dealing with systemic corruption practices on the Cambodian side of the court. To maintain this progress, it is essential that the court have in place a credible and effective mechanism to deal with any resurgence of corrupt practices. Obtaining cooperation from the government of Cambodia on such a mechanism has proceeded at a snail's pace and has required repeated trips to Cambodia by the UN Office of Legal Affairs. The agreed mechanism of using a Cambodian independent counsellor to deal with staff reports of wrongdoing, flawed as it is, will provide a deterrent to reemerging corrupt practices only if it is: 1) implemented (to date some steps toward implementation have taken place); 2) actively monitored by a high-level UN representative who can deal with government officials if problems arise; and 3) reinforced by active and united engagement of the donor community in preventing corruption.

The court's anticorruption program must be sufficiently substantive and credible that staff who suffer from or witness corruption will believe that: 1) they can safely report the problem without fear of retaliation; and 2) credible action will be taken. The existing program does not yet meet those criteria. In order to accomplish this goal, the UN, the government of Cambodia, the court's donors, and the ECCC must urgently build upon the framework of the new anticorruption mechanism to ensure its effectiveness, including:

- fortifying whistleblower and witness protection measures for those who report corruption;

[29]Uth Chhorn, head of the National Audit Authority, was appointed as the independent counsellor in August 2010 to serve in his personal capacity. It is not clear why the deputy national auditor, rather than Uth Chhorn himself, addressed these issues with the press and the UN. The independent counsellor must act in his personal capacity so as not to lead staff of the ECCC and others to believe that it is the National Audit Authority, under the control of the government, which is in charge of receiving and acting on complaints regarding corruption.

- instituting measures to enhance transparency, including a public reporting requirement for the independent counsellor charged with receiving corruption complaints;
- providing a standing independent investigative capacity as a fall-back if the independent counsellor's interventions are insufficient;
- addressing existing corruption allegations;
- publicizing anticorruption programs and measures to the court's staff and to the public;
- engaging court staff in ongoing discussions and education about practices or requests that amount to corrupt practices or are otherwise improper; and
- obtaining feedback from court staff about their views as to the credibility of the mechanism.

Approval of Budget for 2010-2011

The donors have approved a budget for ECCC operations for 2010 and 2011 of $85 million, with $43 million allocated to 2010 and $42 million to 2011. The approved budget reflects the budget recommendation submitted by the court with only minor modifications. However, the court has not released the final detailed budget to the pubic.

The budget contemplates the full time presence of the Pre-Trial Chamber during 2010 and 2011, the beginning of the Case 002 trial in the first quarter of 2011 (with projected conclusion in mid to late 2012), and the full time presence of the Supreme Court Chamber beginning in mid-2010. It also contemplates a third trial, to begin in early 2014. The budget provides for considerable increases for the salaries of international judges and for defense costs associated with the Case 002 trial and defense counsel for the 003/004 Cases, to conform to salaries in other internationalized courts.[30] The budget support documents indicate that the court is expected to close in 2015 with as many as ten Khmer Rouge suspects tried.[31]

The court is seeking pledges from donor states for years 2010 and 2011. The government of Japan has provided over half of the court's budget through 2009. However, Japan has indicated that it does not intend to continue to fund at the same level through the life of the court. With a budget that increases each year and the likelihood that proceedings will last at least through 2015, it is critical for the court to expand the number of states contributing to the budget and ensure that the existing contributors increase their support. It appears that the court has funds to support the international and Cambodian side of the existing budgets until May/June of 2010, but will need an influx of cash to cover salaries and general operating expenses immediately after that. Although other internationally supported courts, most particularly the Special Court for Sierra Leone, have operated with little security about long term funding, doing so creates uncertainty for key staff,

[30] Douglas Gillison, "UN Judges at Khmer Rouge Tribunal Seek 40% to 60% Raise," *The Cambodia Daily,* February 9, 2010. According to Gillison, and confirmed by other parties with knowledge of the matter, the budget forecasts national staffing level increases totaling 23 posts, from 321 in 2009 to 344 in 2010. This is a net increase of 23 posts: 51 new posts will be added, including 29 additional posts for the Victims Support Section, and 28 existing posts will be eliminated. The overall UN staffing level increases from 160 posts in 2009 to 181 in 2010.
[31] Ibid.

inhibits planning, and increases the susceptibility of the court to political maneuvering.[32] A court with secure and adequate funding is in a much stronger position to operate with independence and integrity by making decisions based on the legal issues before it rather than on changing budget constraints or inappropriate pressure from governments to take certain measures.

The funding issues for the Cambodian portion of the budget are further complicated by the decision of United Nations Development Programme (UNDP) to discontinue the administration of donor funds for the Cambodian side of the budget, which includes salaries for Cambodian staff and officials. Donors such as the European Union, which have contributed funds to the Cambodian side of the budget in the past, are seeking another agency to administer donations in lieu of a direct contribution to the Cambodian government.[33] Among the major donors to the court, Japan is the only one to have provided funds directly to the Cambodian government without requiring that the funds be administered by an agency of the UN.

Closing the Investigation of Case 002

On January 14, 2010, the investigating judges issued a notice that they considered the investigation into Case 002 closed. The judges noted that the investigation began in July 2007 with an introductory submission from the prosecutors, and since then tens of thousands of pages of documentary evidence were collected; over 800 statements were taken from witnesses, civil parties, and charged persons; and 53 national or international rogatory letters were issued.[34]

This announcement triggered a thirty-day opportunity for the defense, prosecution, and civil parties to submit requests for additional investigative action. The judges can either conduct the requested investigation or deny the requests. The parties have a thirty-day period following the denial of any requests to file an appeal with the Pre-Trial Chamber. It is anticipated that there will be a number of investigative requests that are denied by the judges and likely appealed. At least 30 new investigative requests were filed following the announcement of the close of the investigation.[35] It is anticipated that when the investigating judges rule on these and other pending requests, approximately 50 appeals to the Pre-Trial Chamber will result.

Recent rulings by the investigating judges regarding genocide, joint criminal enterprise, and torture are discussed below in the section on recent jurisprudence from the court.

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[32] See Marlise Simons, "Test for a Court as Prosecutors Face Liberia's Ex-Ruler," *The New York Times,* December 20, 2009, reporting: "budget problems continue to haunt the Special Court for Sierra Leone which is backed by the United Nations but financed through voluntary contributions. Eight other defendants have been tried and sentenced by the court, and Mr. Taylor's is the last case. But in recent days anxious court officials said the Taylor case could come to a standstill for lack of money early next year because so far they had pledges for less than half of the $18 million needed for 2010."

[33] Douglas Gillison and Julia Wallace, "KRT Donors Offered a 2015 Exit Strategy," *The Cambodia Daily,* February 4, 2010.

[34] Press Release, "Conclusion of Investigation in Case 002," January 14, 2010, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=330http://www.eccc.gov.kh/english/news.view.aspx?doc_id=330.

[35] Julia Wallace, "Tribunal Parties File Requests for More Investigation," *The Cambodia Daily,* February 16, 2010.

In their announcement, the investigating judges indicated that they hope to issue the final closing order—containing either indictments or orders of dismissal—in September 2010. This timing would allow any trial in the case to begin in early 2011.

Time Limits on Detention of Accused

The court's rules do not set a time limit for the Pre-Trial Chamber to resolve appeals by the parties related to the close of the investigation. But the chamber is under considerable pressure to do so quickly so that the case can move through the next steps toward a closing order, which will either indict the accused or dismiss the charges. The rules limit provisional detention for genocide, war crimes, and crimes against humanity to three years.[36] In the last quarter of 2009, the investigating judges issued orders renewing the provisional detention of Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea for a third and final year.[37] The provisional detention orders expire as follows: Nuon Chea on September 15, 2010; Ieng Sary on November 10, 2010; Ieng Thirith on November 12, 2010; and Khieu Samphan on November 17, 2010. If a closing order is not issued before these expiration dates, each of the accused will have to be released. While such release has no effect on any charges against these defendants, it would be an embarrassment to the court, which has insisted on the importance of ongoing detention to ensure the safety of the accused and the public, and to ensure each defendant's presence at trial. If the accused are in custody when the closing order is issued and there is an appeal of the order to the Pre-Trial Chamber, provisional detention can be extended for no more than four months.[38] The rules are ambiguous, however, as to whether this four-month period can be used only if it is within the overall three-year limitation on provisional detention. If the accused are released because of the expiration of the three year provisional detention period but subsequently indicted, the Trial Chamber can order their detention if they fail or refuse to attend the proceedings.[39]

Pre-Trial Chamber Proceedings

Due in large part to the expected spike in appeals presented to the Pre-Trial Chamber following the announcement of the close of the Case 002 investigation, the court decided that the Pre-Trial Chamber judges should sit full time in Phnom Penh beginning in February 2010. Previously, the international judges did not reside in Phnom Penh and the chamber convened every few months on an as needed basis. The time from filing an appeal to receiving a written decision from the chamber often took four to six months. The decision of the chamber on the disagreement between the prosecutors regarding investigation of additional suspects took nine months to

[36] See Rule 63(5) and (6), which allows an initial provisional detention period of one year, with the possibility of two one-year extensions.
[37] Order on extension of Provisional Detention of NUON Chea, September 15, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/434/C9_6_EN.pdf; Order on extension of Provisional Detention of IENG Sary, November 10, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/467/C22_8_EN.pdf; Order on extension of Provisional Detention of IENG Thirith, November 10, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/468/C20_8_EN.pdf; Order on extension of Provisional Detention of KHIEU Samphan, November 18, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/473/C26_8_EN.pdf.
[38] Rule 68, Effects on Provisional Detention and Bail Orders.
[39] Rule 81, Presence of the Accused and Defence Lawyers.

resolve.[40] In the last six months, the chamber's response time has substantially improved and at least 14 decisions have been issued since mid-September, 2009. Nonetheless, as of March 1, 2010 there were over 30 appeals pending before the chamber. Having the chamber meet full time was needed to ensure appeals are resolved in time to permit the investigating judges to file a closing order in September 2010. In addition, it will be essential that the Pre-Trial Chamber have sufficient support staff assigned to assist during this spike in its workload.

To accommodate the Pre-Trial Chamber's meeting full time in Phnom Penh, there has been a change in the assignment of judges to the chamber. Judge Catherine Marche-Uhel (France), previously a reserve judge on the Supreme Chamber, moved to the Pre-Trial Chamber. Judge Kantinka Lahuis (Netherlands), formerly a sitting judge on the Pre-Trial Chamber, became a reserve judge on that chamber, and Judge Florence Mumba (Zambia), formerly the reserve judge on the Pre-Trial Chamber, became the reserve judge on the Supreme Court Chamber.

Information regarding the Health of the Accused

The court has released no recent information about the health of the accused, other than periodic statements that routine medical exams have taken place.[41] Nonetheless, hints about medical conditions that may interfere with a trial were evident at recent hearings held by the Pre-Trial Chamber regarding by appeals by the accused of the latest extensions to their provisional detention. The chamber held a public hearing on February 11, 2010 regarding Ieng Sary's appeal of the most recent detention extension. It was necessary for the court to adjourn several times during the morning session to allow breaks for Ieng Sary, who used a cane and wore a back brace and left due to fatigue before the hearing was completed. His attorney stated that Ieng Sary is unable to sit for more than half an hour at a time.[42]

At a similar public hearing held on the provisional detention appeal of Ieng Thirith on February 15, 2010, Ieng Thirith's lawyers argued that she could not be considered a flight risk because of her poor health. She appeared frail and confused during the hearing, stated she forgot the number of children she had and could not remember the name of her husband, Ieng Sary.[43] The prosecutors referred to Ieng Thirith's volatility, stating that she had threatened guards and fellow detainees "on at least 70 occasions." Although questions have been raised about the mental fitness of Ieng Thirith to stand trial, Judge Ney Thol stated at the hearing that a recent medical

[40] The Disagreement Notice was filed with the Pre-Trial Chamber on December3, 2008, and the ruling of the Chamber was dated August 18, 2009. See Public redacted version - Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, August 18, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_(English).pdf.

[41] See for example, James O'Toole, "Ieng Sary Appeals Detention," *The Phnom Penh Post,* February 12, 2010.

[42] Other Tribunals have dealt with frail or sick accused in a variety of ways. See for instance, in the ICTY, *Prosecutor v. Stanisic and Simatovic*, Trial Chamber Decision on Urgent Defense Request for Further Submissions of Psychiatric Medical Expert, August 6, 2009, Case no. IT-03-69-T, where the court details the accommodations made during trial as a result of the health of the accused. These included the possibility of reduced court sessions, more and longer breaks on hearing days, and allowing the accused to make use of a video-conference link in order to follow and participate in the proceedings from the United Nations Detention Unit. Similar accommodations will likely be necessary in any trial of the accused in Case 002 because of their age and medical problems.

[43] Julia Wallace, "Quieter Ieng Thirith Again Asks the KR Tribunal for Bail," *The Cambodia Daily,* February 16, 2010.

examination had found Ieng Thirith fit to appear before the court.[44]

Khieu Sampan appeared alert and coherent at the public hearing related to his appeal of the most recent extension of provisional detention. The public filings of the court indicate that Nuon Chea did not file an appeal to the extension of his detention.

Recent Jurisprudence from the Court

Admissibility of Evidence Obtained under Torture

The Pre-Trial Chamber issued a ruling on December 18, 2009, dismissing Ieng Thirith's request for a ruling that statements obtained through torture are inadmissible except to show that a statement under torture was made, and then only against the alleged torturer.[45] The investigating judges had earlier denied the request.[46]

The Pre-Trial Chamber held that Ieng Thirith's appeal was inadmissible, finding that the investigating judges' order refusing a blanket exclusion of such evidence was not an action subject to appeal under the rules.[47] Further, the chamber found that the lack of a right to appeal the order did not violate the requirements of fundamental fairness protected by Rule 21 of the internal rules. The chamber concluded that it had no authority to rule on basic evidentiary issues as that task fell to the trial chamber. Noting that the remedy for any improper use of evidence obtained by torture was though an objection at the trial stage, the chamber pointed out that the Trial Chamber had ruled clearly in the Duch case that "[t]he relevance of [confessions obtained under torture] is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents."[48]

The Pre-Trial Chamber's decision included a message of disagreement with the ruling of the investigating judges. The investigating judges had stated in the order under appeal that "[t]he reliability of the statements is at issue when it comes to using them for the truth of their contents. The Co-Investigating Judges are fully cognizant of the fact that information obtained by torture, is, as a rule, unreliable. However, regardless of the circumstances in which the information within the confessions was obtained, it is not possible at this stage to affirm that no element of truth can ever be found in the confessions. The reliability of the statements will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with

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[44] James O'Toole, "Release sought for Ieng Thirith," *The Phnom Penh Post,* February 16, 2009.

[45] Decision on the Admissibility of the Appeal against Co-Investigating Judges' Order on use of Statements which were or may have been Obtained by Torture, December 18, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/492/D130_9_21_EN.pdf. (*Pre-Trial Chamber Decision on Torture Evidence).*

[46] Order of Co-Investigating Judges on Use of Statements which were or may have been Obtained by Torture, July 28, 2009, para. 28, at http://www.eccc.gov.kh/english/cabinet/courtDoc/386/D130_8_EN.pdf. (*Order of Investigating Judges on Torture Evidence).*

[47] The rule allowing appeal of decisions of the investigating judges is different for the prosecutors and the defense. Rule 74 provides that the prosecutors can appeal *all* orders or decisions of the investigating judges, while the defense can only appeal orders or decisions that fall within one of the nine specific categories designated.

[48] Trial Chamber Decision on Parties' Requests to Put Certain Documents before the Chamber Pursuant to Rule 87(2), Case 001, October 28, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/460/E176_EN.pdf; and *Pre-Trial Chamber Decision on Torture Evidence*, para. 27.

utmost caution given the nature of the evidence and the manner in which it was obtained."[49] In apparent reference to these remarks, the Pre-Trial Chamber concluded, "notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the CAT [UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[50]] is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture."[51]

Genocide Charges against Four of the Accused

The prosecutor's introductory submission in Case 002 recommended charges of genocide against all five named accused.[52] However, the investigating judges declined to bring genocide charges against any of the accused when they were arrested and initially charged in 2007. Pursuant to a recent request by the prosecutors, the investing judges held meetings with each of the accused persons in December 2009 to clarify the charges against them. These meetings were confidential; however, the court spokesperson acknowledged that the investigating judges formally notified Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan that genocide charges were being brought against them based on alleged attacks against Cham Muslims and Vietnamese. The genocide charges relate to the treatment of Vietnamese in Prey Veng and Svay Rieng provinces and during military incursions into Vietnam. The charges related to Cham Muslims cover broad swaths of the country, particularly Kampong Cham province.[53]

Including genocide charges in the case against the four surviving senior leaders has created controversy among historians of the Khmer Rouge. When interviewed about the decision, David Chandler, a noted authority on the Khmer Rouge, said that genocide charges further complicated a case that is already so complex and politicized it may never go to trial.[54] Philip Short, author of a biography of Pol Pot, stated that the additional charges were "misconceived and unhelpful."[55] They argue that genocide charges are inappropriate because the atrocities committed by the Khmer Rouge were directed against political enemies and not against an ethnic group. Proponents of the genocide charges—including some legal scholars, Khmer Rouge historian Ben Kiernan, and the vast majority of victims—are equally adamant that the Khmer Rouge did target ethnic groups, noting that Vietnamese and Cham Muslims were killed in disproportionate numbers.[56]

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[49] *Order of Investigating Judges on Torture Evidence.*

[50] UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, February 4, 1985, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85 at http://www.hrweb.org/legal/cat.html.

[51] *Pre-Trial Chamber Decision on Torture Evidence*, supra, para. 28.

[52] Press Statement of Co-Prosecutors, July 18, 2007, at http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf.

[53] See Julia Wallace, "Ieng Thirith Fourth Former KR Leader Charged With Genocide," *The Cambodia Daily,* December 22, 2009.

[54] See Jared Ferrie, "New Genocide Charge in Cambodian Khmer Rouge Trial, *Reuters,* December 18, 2009 at http://ca.reuters.com/article/topNews/idCATRE5BH0VJ20091218?pageNumber=3&virtualBrandChannel=0&sp=true.

[55] Ibid.

[56] See reference to evidence supporting genocide claims in the Report of the Group of Experts appointed by the UN to initially evaluate the factual and legal feasibility of a tribunal to seek justice for perpetrators of atrocities during the Khmer Rouge period, paras. 63 and 64. UN General Assembly, "Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135" (A/53/850/S/213/Annex), Report dated February 18, 1999, with cover letter from Kofi Annan Dated March 15, 1999, paragraph 63 and 74 at

The genocide charges did not encompass crimes against persons of the Khmer Krom minority group. "Khmer Krom" is a term for ethnic Khmer from the Mekong Delta of Vietnam. The court spokesperson indicated that Khmer Krom were not included in the genocide charges because crimes against the Khmer Krom were not specifically outlined in the prosecutors' introductory submission, and the investigating judges were thus not permitted to widen the scope of the investigation to pursue them. The court was careful to point out that the judges' decision did not reflect a historical judgment that the Khmer Krom were not victims of genocide, but was made for procedural reasons.[57]

The failure to include Khmer Krom as victims of genocide has caused protest by Khmer Krom victims of the Khmer Rouge seeking recognition as civil parties. These applicants had been allowed to participate in the investigation until the recent order denying their status as victims. The investigating judges have stated in a recent order denying investigative requests "that in the course of their investigation, Khmer Krom victims have been interviewed as witnesses relating to the crime scenes falling under the facts in the Introductory and Supplementary Submissions. Aside from assisting in the investigation of those particular crime scenes, the Co-Investigating Judges confirm that the investigation of Khmer Krom as a group is also relevant in determining jurisdictional elements of the crimes charged and the potential applicable modes of liability of the Charged Persons."[58]

This situation, while of understandable concern to Khmer Krom civil party applicants and victims, illustrates an inherent limitation of tribunals that address mass atrocities. In spite of the generally wide-ranging nature of the crimes addressed, practical considerations create the need to limit the investigation to discrete crime scenes.[59] Necessarily, significant crime sites and large numbers of victims who have suffered from Khmer Rouge crimes will be excluded from detailed examination in any trial and from participating as formal civil parties. Assuming decisions about the scope of the investigation are made for judicial rather than political reasons, they must be respected. However, sensitivity to this issue is required from all units of the court, but particularly from the Victims Support Section, which is charged with dealing with the interests of victims. In this regard, the judges' February 2010 decision to broaden the mandate of the section to include all victims, and not only civil parties, is a positive development.[60]

Investigating Judges Accept Joint Criminal Enterprise as a Mode of Liability

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http://cambodia.ohchr.org/Documents/Reports/Other%20UN%20Reports/English/209.pdf, and citations to work of Ben Kiernan on Cambodia and genocide at the Cambodia Genocide Program, Yale University web site at www.yale,edu/cgp/index.html.

[57] See Julia Wallace, "KR Tribunal Judges Will Not Pursue K Krom Genocide Charges: Decision Turns on Prosecutors' Failure to Provide Proper Documentation," *The Cambodia Daily,* January 20, 2010.

[58] Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, January 13, 2010, para. 37, at http://www.eccc.gov.kh/english/cabinet/courtDoc/514/D250_3_3_Redacted_EN.pdf .

[59] For a discussion of the advantages of narrowing charges when prosecuting mass atrocity cases, see Patricia M. Wald, *Tyrants on Trial: Keeping Order in the Courtroom*, New York: Open Society Institute (2009), at www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/tyrants_20090911.

[60] See Rule 12. As modified at the February 2010 plenary, this rule includes a greatly expanded mandate to serve the needs of a broad range of victims. The prior version of the rule limited the scope of the Victims Unit to services for civil parties.

Counsel for Ieng Sary, Ieng Thirith, and Nuon Chea requested a ruling from the investigating judges as to whether they would apply the form of liability known as joint criminal enterprise (JCE) in connection with the charges in Case 002.[61] While this was not a typical request, the investigating judges chose to exercise their discretion to respond because the motion raised the "matter of providing due notice to Defendants on modes of liability."[62]

JCE is a mode of liability that imposes individual criminal responsibility on a person for actions perpetuated by more than one person in furtherance of a common criminal plan. It is related to concepts of co-perpetration and conspiracy in some domestic criminal systems and was first articulated under the name of JCE by the International Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case.[63]

JCE requires: 1) multiple persons; 2) a common purpose or plan which amounts to or involves the commission of a crime; and 3) that the accused contribute to the common plan. Three forms of JCE have been articulated in the jurisprudence of international courts. JCE I, the "basic" form, requires that the accused share the intent of the co-perpetrators in the common plan and intend to perpetuate the crimes committed. JCE II concerns a common, concerted system of ill treatment (such as a prison camp) where the accused has knowledge of the nature of the system and intends to further the common system of ill treatment. JCE III concerns acts that, although outside the common plan for which the accused held a shared intent, are a natural and foreseeable consequence of the common plan. The accused must be aware that the crimes are a natural and foreseeable consequence of the plan and must have willingly taken the risk that they would be committed.[64]

At the ECCC, defense counsel argued that the application of JCE would be a violation of the principle *nullum crimen sine lege*[65] because they assert JCE was not acknowledged as customary international law in 1975-1979, nor is it presently recognized as such. In addition, defense counsel for Ieng Sary argued that JCE could not be applied because it is not specified in the

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[61] IENG Sary's Motion against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, July 28, 2008, at http://www.eccc.gov.kh/english/cabinet/courtDoc/274/D97_EN.pdf, (I*eng Sary Motion to Investigating Judges re JCE),* and IENG Thirith Submissions on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, December 30, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/272/D97_3_2_EN.pdf; Submission of NUON Chea regarding the Applicability at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, December 30, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/271/D97_3_3_EN.pdf.

[62] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, December 8, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/482/D97_13_EN.pdf. (*Investigating Judges' order on JCE).*

[63] See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-A, ICTY Appeals Chamber, October 2, 1995 (*Tadic Appeal Judgment)*; and subsequent jurisprudence on JCE from other international and hybrid tribunals,,e.g. for Rwanda: *Prosecutor v. Rwamakuba* Interlocutory Appeal Decision on JCE and Genocide, ICTR- 98-44C, October 22, 2004; *Ntakirutimana* [Appeals Chamber] Judgment, ICTR-96-10/17, December 13, 2004, paras. 461-468; at the Special Court for Sierra Leone: *Prosecutor v. Brima et al.*, [Appeals Chamber] Judgment, SCSL-2004-16-A, February 22, 2008.

[64] See generally, *Tadic Appeal Judgment* and *Prosecutor v. Milutinovic, Sainovic, and Ojdanic*, Case No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise*, 21 May 2003.

[65] The legal concept that holds that a person shall not be criminally responsible under a penal law unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.

ECCC Law,[66] is not part of Cambodian law, and is not recognized by any international convention enforceable by the ECCC.

In their ruling, the investigating judges noted that while JCE was not mentioned in either the *Law* or the *Agreement* that establish the ECCC, those documents recognize a variety of modes of liability for the commission of crimes. Since the *Tadic Appeal Judgment* of the ICTY recognized JCE as a form of commission for international crimes based on jurisprudence dating back to the 1945 Nuremberg trials, the judges concluded that JCE could be legally applied by the ECCC.

The judges first assessed whether any of the three forms of JCE violated the legal principal that prohibits finding criminal liability for any act or omission which did not constitute a criminal offense under national or international law at the time it was committed.[67] The judges applied the test of whether "the criminal liability in question was sufficiently foreseeable and that the law providing for such liability . . . sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing.…"[68] They concluded that "considering the international aspects of the ECCC, and considering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, the Co-Investigating Judges find that there is a basis under international law for applying JCE."[69]

The investigating judges expressly ruled that JCE would not be applied to national crimes within the jurisdiction of the ECCC, finding no precedent within domestic law for such mode of liability.

Appeal to Pre-Trial Chamber of JCE Ruling

Lawyers for Ieng Sary, Ieng Thirith, and Khieu Samphan have appealed the *Investigating Judges' Order on JCE* to the Pre-Trial Chamber. The appeal filed on behalf of Ieng Sary claims boldly that the ECCC is a fully domestic court with only capacity-building assistance being provided by the international officials and, therefore, cannot apply concepts of international law such as JCE that are not expressly adopted by the ECCC *Law* or otherwise into Cambodian jurisprudence.[70] They criticize the investigating judges' ruling for its lack of independent analysis of whether JCE could be considered customary law in Cambodia in 1975, and for its conclusion that because the precedent relied upon in *Tadic* predated 1975 JCE must have been customary international law during the jurisdictional period covered by the ECCC.

A further basis for Ieng Sary's argument against JCE is that, even if international customary law can be applied at the ECCC, the concept of JCE as initially articulated in the *Tadic* case by the ICTY is highly controversial and so discredited that it cannot be used as mode of liability in the ECCC. The fact that the International Criminal Court (ICC) Statute does not codify JCE as a

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[66] Law on the Establishment of the Extraordinary Chambers as amended, October 27, 2004 at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf. (the *Law).*

[67] International Covenant on Civil and Political Rights, adopted for signature and ratification by the General Assembly, Resolution 2200A (XXI), 16 December 1966, acceded to by the Royal Government of Cambodia in 1992, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, ("ICCPR") at Article 15.

[68] *Investigating Judges Order on JCE,* para. 19.

[69] Ibid, para. 21.

[70] Ieng Sary's Appeal against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, January 22, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/538/D97_14_5_EN.pdf. (*Ieng Sary JCE Appeal).*

form of criminal liability is cited as compelling evidence that the concept is not accepted in international customary law.[71]

Ieng Sary's brief implies that the investigating judges are using JCE to circumvent a lack of evidence on the specific role played by individuals involved in the planning, preparation, and execution of large scale or widespread campaigns of criminality.[72]

Ieng Thirith's appeal focuses more closely on the ambiguity of the *Investigating Judges' Order on JCE* and its failure to provide adequate reasoning or address the arguments raised by the defendants.[73] Her counsel argue that the order does not give the accused sufficient notice as to how JCE might be applied in the case against their client. They also point out that the Pre-Trial Chamber, in an appeal following the Duch Closing Order, held that JCE could not be used against Duch because the prosecutors' introductory submission did not adequately delineate the alleged JCE so as to provide the accused adequate notice during the investigative phase of the case.[74] The same introductory submission that covered charges against Duch covers charges against the other charged persons and has, apparently, not been modified in this regard.[75] Counsel concurs with the arguments made on behalf of Ieng Sary that the investigating judges erred in concluding that JCE could be considered to have been customary international law in Cambodia in 1975, and that the reliance on *Tadic* to support this conclusion is a legal error. Defense lawyers also argue that even if JCE I is applicable to the ECCC because it is closely related to co-perpetration, a concept codified in Cambodian law, there is no basis for applying JCE II or III at the ECCC.

In response, prosecutors asserted that the investigating judges' ruling is not technically an "order" subject to appeal under the rules of the court, but merely a "declaration on applicable law" that cannot be appealed at this stage. They note that it is not yet clear that any of the accused will be finally indicted with crimes under a theory of JCE and thus any appeal should wait until the issue is ripe before the Trial Chamber.[76] They argue that "(1) JCE has been part of customary international law since the 1940s and it remained so between 1975-9 when the charged crimes were committed; 2) it is applicable before the ECCC as this Court is mandated to prosecute international crimes and, as held by the Pre-Trial Chamber, has the indicia of an international tribunal; and, finally 3) as a criminal mode of liability under customary international law, JCE is applicable in Cambodia regardless of whether there was national incorporating legislation."[77]

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[71] Ibid, at para. 48.
[72] Ibid, at para. 82.
[73] Ieng Thirith Defense Appeal Against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise,' January 18, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/531/D97_15_1_EN.pdf. (*Ieng Thirith JCE Appeal).*
[74] Decision on Appeal Against Closing Order Indicting Kaing Guek Eav, alias "Duch," December 5, 2008, at http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf. (*Appeal Decision on Duch Closing Order*).
[75] Because of the confidentiality of most documents filed in connection with the investigation, it is not possible to verify this, but it is implied in the *Ieng Thirith JCE Appeal* brief filed publically.
[76] Prosecution response to Defense Appeals on JCE, February 19, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/554/D97_16_5_EN.pdf.
[77] Ibid, para. 3.

The question of whether JCE is applicable at the ECCC remains unclear, despite extensive litigation on the issue in the Duch case. The issue was raised to the Pre-Trial Chamber in the Duch case when the prosecutors filed an appeal of the investigating judges' closing order, claiming the investigating judges erred in not including JCE as a mode of liability.[78] The Pre-Trial Chamber refused the request to add JCE as a mode of liability in the Duch case because it found the prosecutors provided insufficient notice to the accused about the exact nature of the JCE. Because the chamber ruled that JCE could not be applied for this reason, it found it unnecessary to address the status of JCE as customary international law between 1975 and 1979, or its applicability as a form of liability at ECCC.[79]

The prosecutors raised the issue again to the Trial Chamber in the Duch case, arguing that an adequate basis for application of JCE in the case had been laid in the introductory submission and the investigation.[80] The Trial Chamber stated that it would not rule on the motion of the prosecutors until it issued its final judgment at the conclusion of the trial. As a result, the parties in the Duch case had little guidance regarding whether JCE was applicable, even while they developed their arguments at the trial.

First ECCC Supreme Chamber Ruling

The ECCC Supreme Court Chamber issued its first decision on December 24, 2009, dismissing the appeal of two civil party groups in the Duch case against a ruling of the Trial Chamber.[81] On August 27, 2009, in the course of the Duch trial, the Trial Chamber ruled that civil parties would be barred from making submissions related to sentencing of the accused and from posing questions to Duch concerning his character. The Trial Chamber, over the dissent of Judge Jean-Marc Lavergne, had reasoned that the primary role of civil parties relates to their claim for reparations, and that they do not have a role in regard to sentencing, which is the purview of the prosecution as the representative of the Cambodian people.[82] The Supreme Chamber dismissed the appeals on the ground that they fell outside of the scope of Rule 104 (4), which allows only limited opportunities for immediate appeals of Trial Chamber decisions issued prior to a final judgment.

Civil Party Participation

Modified Rules for Civil Party Participation

The Duch trial demonstrated that civil party participation, while not without significant problems, could add meaning to the trial proceedings for victims. By speaking both in and outside the courtroom, the civil parties in the Duch trial ensured that the stories of victims of S-21 prison were not forgotten. Civil parties spoke on their own behalf but their voices resonated

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[78] *Appeal Decision on Duch Closing* Order.
[79] *Appeal Decision on Duch Closing Order,* para. 142.
[80] Co-Prosecutors' Request for Application of JCE, June 8, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/355/E73_EN.pdf.
[81] Decision on the Appeals filed by lawyers for Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009, December 24, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/504/E169_1_2_EN.pdf.
[82] Decision on Civil Party Co-lawyers' joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character, October 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72_3_EN.pdf.

more broadly on behalf of all victims of the crimes committed while Duch presided over S-21 prison. Through civil party participation, the immense impact of the crimes on several generations of Cambodians received appropriate emphasis in the trial.

The presence of victims as formal parties with many of the same procedural rights as the accused and the prosecutors was a precedent-setting development among hybrid or international tribunals.[83] Civil party participation developed at the ECCC because, as a hybrid court located as a special chamber within the domestic court system of Cambodia, the court is designed to follow domestic procedural rules to the extent feasible and consistent with international standards and the unique needs of the court.[84] But this domestic practice of civil party participation designed to provide compensation to individual victims had to be adapted to a court dealing with mass atrocities. That process proved challenging and problematic in many respects in the court's first trial against Duch.[85] In response, and in recognition that the number of civil parties in Case 002 is likely to be many times the number in the Duch trial, the court undertook to modify the rules pertaining to civil party participation.[86] The judges noted that "[d]ue to the high numbers of Civil Party applications received in relation to Case 002 and the complexity of the case, there is a need to streamline and consolidate Civil Party participation in advance of the commencement of the [Case 002] trial. This is necessary to safeguard the ability of the ECCC to reach a verdict in its core case, as well as to enhance the quality of victim participation from the perspective of the victims."[87] In a plenary session that ended on February 9, 2010, the judges—after a period of consultation with civil society organizations, civil party lawyers and the Victims Unit of the court—adopted a series of rules which materially modify the scheme for civil parties to participate at the trial stage in proceedings.[88]

At the core of the new procedures is the concept that all civil parties will be represented at the trial stage by a single team of lawyers, the "lead co-lawyers."[89] In essence, the lead co-lawyers will be representing the interests of victims as a group rather than as individuals. Victims who are accepted as civil parties will have individual lawyers with the right to make recommendations to the lead co-lawyers. At the discretion of the lead co-lawyers, the individual

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[83] The ICC procedure includes significant provisions for victim participation, but does not allow victims to participate as formal parties with rights similar to the prosecution and defense. For a discussion of ICC procedures for victim participation see War Crimes Research Office, Washington School of Law at American University, "Victim Participation at the Case Stage of Proceedings," February 2009 at http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf?rd=1.

[84] *Agreement,* Article 12; See also David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, International Criminal Law, Third Edition, Volume III, International Enforcement, Martinus Nijhoff Publishers, The Netherlands, 2008, for an explanation of the limited discussion of civil party participation in the negotiations for the ECCC.

[85] *November 2009Progress Report*, at page 6.

[86] There were approximately 90 civil party applicants that participated in the Duch trial. The final number of accepted civil parties will be determined in the Trial Chamber's judgment expected by mid-2010. Over 4,000 victims filed applications for civil party status in the 002 Case. The final number of accepted parties will not be determined until the end of an appeal period following issuance of a final indictment.

[87] Press Release, "7th Plenary Session of the ECCC Commences Tuesday 2 February," January 28, 2010 at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=333.

[88] See Internal Rules, Rev 5, February 9, 2010, at http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf.

[89] Rule 12 *ter*.

lawyers may on occasion present an argument or question a witness at trial. Civil parties will continue to be allowed to request permission to make a statement during the trial about their losses.

This new scheme will eliminate the time-consuming process from the Duch trial of allowing each civil party lawyer to question every witness and present arguments on each legal issue. There were only four civil party lawyers in the Duch trial and there would have been far more civil party representatives in Case 002, resulting in serious delays and adverse impacts on the rights of the accused.

The rules adopted to streamline the process remove the direct ability of a civil party to have his or her own lawyer participate in all aspects of the trial. This cost was balanced against the impracticality of continuing such a practice for a trial likely to have several thousand civil parties and seems reasonable under the circumstances. In addition, because the majority of the population in Cambodia today can count themselves as direct or indirect victims of the Khmer Rouge, modifying the trial practice to provide for legal representation of civil parties as a group fits with the need to acknowledge a broad field of victims.

Processing of Civil Party Applications

The timely processing of and communication with civil party applicants continues to be problematic for the court. In November 2009, the judges modified the internal rules to provide a deadline for applications of two weeks following the announcement by the investigating judges that they considered the investigation closed.[90] The goal of this rule change was to implement a process whereby the investigating judges would rule on civil party applications in the pre-trial phase of a case rather than having the Trial Chamber make such rulings during the trial stage. This modification will provide early notice to civil party applicants about their status and should increase efficiency at the trial level.[91]

The difficulties with the change, however, are twofold. First, it undermines the right of potential civil parties to make a meaningful decision about whether to apply for civil party status. The investigation stage of cases is governed by a "rule of confidentiality."[92] During the course of the investigation, the public, including potential civil parties, are provided scant information about the scope of the investigation, the crime scenes covered or the nature of the allegations against the accused. Yet, in order to qualify for civil party status, a victim must not only demonstrate that he or she has suffered "physical, material or psychological injury upon which a claim of collective and moral reparation might be based,"[93] but also that this harm is "directly linked to one or more factual situations that form the basis of the ongoing judicial investigation."[94] The new rules present a real dilemma for victims in that the deadline to apply for civil party status expires

[90] Rule 23 *bis (2)*.

[91] In the Duch case, significant trial time was allocated to argument and evidence about the admissibility of civil parties. Similar proceedings in a case with a much larger number of civil party applicants (i.e. Case 002) were regarded by the judges as unmanageable.

[92] Rule 56 (1)

[93] Rule 26 *bis.*

[94] Press Release, "The Co-Investigating Judges Release Information about Scope of Investigation in Case 002," November 5, 2009, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=322. (*Information from Investigating Judges re Scope of Investigation).*

before the court is required to provide the necessary information about the scope of the investigation, making it impossible for victims to assess whether they qualify for such status.

In practice, the dilemma could be solved if the investigating judges disclosed information about the scope of the investigation sufficiently in advance of the close of the investigation to allow victims to realistically assess whether to submit an application. With regard to Case 002, the investigating judges issued a public statement on November 5, 2009 listing various crimes and geographical crime sites under investigation in Case 002.[95] While the crimes and sites described in this document may not match those included in the final indictment, they do give those interested in applying for civil party status the information necessary to determine if they *might* qualify. Unfortunately, this information was provided so late in the process that victims applying after the information came out were not able to exercise their rights to participate in the investigation, because the processing time for the applications extended until the end of the investigation phase.[96] In addition, the notification by the investigating judges was provided only ten weeks prior to the announcement by the judges that the investigation was closed, giving potential civil parties just twelve weeks to obtain adequate information about their rights and submit an application. In a country where communication is challenging, literacy low, and where the vast majority of the population lives in rural areas with little access to media, this is insufficient time to understand and exercise their rights as potential civil parties.

These delays are exacerbated by the fact that most civil party applicants have received no communication at all from either the Victims Support Section or the Office of the Investigating Judges about the status or the receipt of their application.

These problems are mitigated to some extent by the February 2010 changes to the rules that move civil party participation to a more symbolic status by providing that all civil parties are represented as a group by a single team of lawyers. But it is clear that one of the effects of the new rules, and perhaps the intent, is to limit the number of civil party participants in the trial.

Defense Rights with Regard to Civil Party Participants

Under the recent rule changes, the investigating judges will issue a final ruling on the admissibility of pending applications at the same time they issue the closing order either indicting or dismissing the accused in Case 002. The rules provide an expedited appeal process of such rulings to the Pre-Trial Chamber by either the applicant or the defense counsel.[97] Within ten days of the notification of the decision on civil party admissibility, an applicant or accused can file an appeal outlining reasons why the investigating judges are alleged to have erred in determining the admissibility of the application. The rule expressly provides that no extensions of time shall be granted, any response shall be filed within five days of notification of the appeal to the other party, and that the decision of the Pre-Trial Chamber shall be final.

The tight time frame for appeals seems intended to ensure that the civil party application process does not delay moving the case from the closing order stage to the beginning of the trial. However, there is a real risk that the expedited process does not provide adequate time for meaningful appeals. Lawyers for civil party applicants (who likely represent many clients in a

[95] Ibid.
[96] Rule 23 bis (3).
[97] Rule 77 *bis*.

similar situation) may not have time within the ten-day period to consult with their clients about the facts and strategy of an appeal.

Similarly, ten days is an extremely short time period for defense counsel to prepare specific appeals of what is likely to be a large number of civil party applications. This concern was expressed by the Defense Support Section following the adoption of the changed rules: "the amendments have removed any meaningful right for the accused to challenge the admissibility of civil party applications brought against them. Under the new regime, the defense will be deprived of any rights to challenge the admissibility of civil parties at trial. Instead, they will have only 10 days to appeal against the investigating judges' decisions on (approximately) 4,000 civil party applications. In other words, if an accused wants to exercise his 'right' to challenge the application of every civil party, he will need to file 400 appeals a day in two languages. According to international standards an accused's right to appeal must be practical and effective. In adopting these amendments, the Plenary has left the accused with a right that is merely theoretical."[98]

Defense counsel also object that the recent rule changes do exacerbate rather than remedy the inequity that results from a phalanx of attorneys representing the large number of civil parties which vastly outnumber defense counsel, overwhelm them in resource terms. This imbalance, they assert, undermines the equality of arms and, thus the fairness of the proceedings. The sheer number of civil parties in a mass atrocity case does create potential unfairness for the defense. Problems were apparent in the Duch trial proceedings when questioning by civil party lawyers became repetitive and was not always related to the specific interests of civil parties.[99] However, the recent changes in the rules to limit the trial participation of all civil parties to the interventions of a single team of lawyers dramatically changes the role of civil parties at trial and limits the scope of many of the difficulties evident in the Duch trial. In some respects, individual civil parties are no longer participating at the trial stage—rather, victims' interests are represented as a single group. Although lawyers for individual or groups of civil parties can provide advice to the co-lawyers, they no longer have the same right to directly oppose the defense at trial. While this change does not address the fact that many lawyers representing civil parties may be assisting the co-lawyers with advice and assistance in preparation, it does greatly mitigate the fundamental problem of a large number of civil party lawyers separately attacking the defense at trial alongside the prosecutor.

Changed Mandate for Victims Support Section

Under the new rules adopted by the judges in February 2010, the Victims Unit of the court was renamed the Victims Support Section and its role has been broadened to include "the development and implementation of programs and measures other than of a legal nature addressing the broader interests of victims. Such programs may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental entities external to the ECCC."[100]

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[98] Press Release, "Press Statement from the Defence Support Section on the Conclusion of the 7th ECCC Plenary Session," February 9, 2010 at http://www.eccc.gov.kh/english/cabinet/press/148/DSS_Press_Release_Plenary8.2.10(ENG).pdf.

[99] See *August 2009 Progress Report* and *November 2009 Progress Report.*

[100] Rule 12 *bis* (2).

This development is important because, as stated previously, large numbers of Cambodians who do not become formal civil parties are victims of the Khmer Rouge and have an interest in the same kinds of information and services offered by the court to civil parties. Victims may not become civil parties for a variety of reasons, including: 1) logistical difficulties in applying and participating as a civil party; 2) lack of information or understanding about the civil party process; and 3) the fact that their situation does not fall within the limited scope and crime sites included in the final indictment. Under the new rules, such victims can still benefit from services from the Victims Support Unit.

Examples of additional activities planned by the Victims Support Unit pursuant to its expanded mandate include presenting public forums with court officials, providing the opportunity to view proceedings, and disseminating information about the nature of the cases before the court.

The expanded role of the Victims Support Section is an important for outreach purposes. Other than assisting in televising the Duch trial, the court has provided limited outreach to Cambodians about the work of the ECCC. The likelihood that more than a year will pass between the end of the Duch trial and the beginning of the Case 002 trial means that outreach to victims and the population generally is needed to ameliorate cynicism about the slow progress of the proceedings. Many of the goals of the court, most importantly that it provide justice to the 1.7 million victims and help the people of Cambodia better understand their history and move forward toward a more just society, are sacrificed when insufficient attention is paid to outreach. In is first four years of operation, both strategic planning and funding for such activities have been limited. In order to fulfill its mandate to serve the interests of Cambodians, and in recognition of the great interest evidenced by the Cambodian population in the ECCC, the court must have both a developed strategy and adequate resources to implement a robust outreach effort and fulfill the broadened mandate of the Victims Support Section.

Appointment of New International Prosecutor and Reserve Prosecutor

Several months after being nominated by the UN, Andrew Cayley (Great Britain) was appointed as the international prosecutor to replace Robert Petit who left office in September 2009. Nicholas Koumjian (United States) was appointed as the reserve international prosecutor. Both men were formally sworn into their offices in February 2010. Cayley will take up full time residence in Phnom Penh in March 2010, working with his Cambodian colleague, Chea Leang, to guide the Office of the Prosecution through the closing and likely trial in Case 002, and through the investigation and, assuming indictments are issued, trial of Cases 003 and 004.

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