

# REPORT

## The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia

October 2012

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This report examines recent developments in two cases—known as Cases 003/004—before the Extraordinary Chambers in the Courts of Cambodia. As a new international co-investigating judge takes office, the report examines the main issues in Cases 003/004 and explores ways forward for the court, as well as avenues that should not be pursued.

This report is part of a series 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.soros.org/termsearch/7939/listing?f\[0\]=field\\_taxonomy\\_work\\_type%3A6870](http://www.soros.org/termsearch/7939/listing?f[0]=field_taxonomy_work_type%3A6870).



# I. Executive Summary and Recommendations

## A. Introduction

This report examines recent developments in two cases—known as Cases 003/004—before the Extraordinary Chambers in the Courts of Cambodia (ECCC). Cases 003/004 have been before the ECCC’s co-investigating judges since September 2009, and have become the symbolic centerpieces of an ongoing dispute over the ECCC’s independent authority to determine whom to indict and prosecute. As a new international co-investigating judge, Mark Harmon (United States), takes office, it is important to examine the main issues in Cases 003/004 and explore possible ways forward for the court at this crucial juncture.<sup>1</sup> This report first looks at significant recent events related to those cases, and then outlines the reasons why certain proposed solutions to the Case 003/004 dilemma—including transferring the cases to a wholly Cambodian jurisdiction—should not be pursued. Simply stated, the ECCC must continue its work on Cases 003/004, rather than look for ways to shirk its responsibility.

## B. Background

In the autumn of 2010, Cambodian Prime Minister Hun Sen informed United Nations Secretary-General Ban Ki-moon, during the Secretary-General’s visit to Phnom Penh, that “Case 003 will not be allowed...[t]he court will try the four senior leaders successfully and then finish with Case 002.”<sup>2</sup> These statements by the Prime Minister were the latest in a series of public comments made by senior Cambodian government officials bearing the same message: the ECCC would shut down after Case 002 was completed.<sup>3</sup>

In November 2010, the Justice Initiative released a report entitled *Salvaging Judicial Independence: the Need for a Principled Completion Plan*<sup>4</sup> which noted that some ECCC stakeholders were proposing “an option for transferring cases to a Cambodian-controlled successor jurisdiction.”<sup>5</sup> The Justice Initiative examined the feasibility of such a proposal,

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<sup>1</sup> ECCC Press Release, “Deployment of New International Co-Investigating Judge,” July 30, 2012, available at: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20PR%2030%20Jul%202012%20En.pdf>.

<sup>2</sup> Open Society Justice Initiative, “Salvaging Judicial Independence: the Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia,” November 2010, (hereinafter “OSJI Completion Plan report”), p. 4, citing James O’Toole, “Hun Sen to Ban Ki-moon: Case 002 Last Trial at ECCC,” *Phnom Penh Post*, October 27, 2010, available at: <http://khmernz.blogspot.com/2010/10/hun-sen-to-ban-ki-moon-case-002-last.html>.

<sup>3</sup> Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011,” pp. 11-13, available at: [http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-court-20111114](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114); see also Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2010,” available at: <http://www.soros.org/sites/default/files/cambodia-court-20100324.pdf>.

<sup>4</sup> OSJI Completion Plan report, November 2010, available at: <http://www.soros.org/sites/default/files/cambodia-khmer-rouge-20101110.pdf>.

<sup>5</sup> OSJI Completion Plan report, p. 2. Note that these reports have since been further confirmed by Wikileaks cables released into the public domain. See, for example, “Friends of the ECCC Discuss Budget and Judicial Calendar,” US Embassy Phnom Penh to SecState DC, 10PHNOMPENH26 (Jan. 14, 2010),

highlighting some of the compelling reasons why transferring Cases 003/004 would be contrary to the interests of justice and the objectives behind the ECCC's establishment. The Justice Initiative outlined the reasons why the ECCC—in its current internationalized configuration—should complete all four cases before it. Additionally, the report advocated for transparency in the court's completion planning processes, including genuine engagement with victims' groups, civil society, and court monitors.

The Justice Initiative now re-examines this issue, for a number of compelling reasons.

In the 18 months since the OSJI Completion Plan report, Cases 003/004 have unraveled to an unprecedented degree.<sup>6</sup> The Royal Government of Cambodia's (RGC) public and unwavering opposition to them has not abated.<sup>7</sup> Two international investigating judges have resigned, reportedly because of Cambodian government political interference, or perceived interference, in their work.<sup>8</sup> Between May and July 2011, a number of international staff members in the Office of Co-Investigating Judges (OCIJ) walked out to protest the failure of two judges (one Cambodian and the other international) to genuinely investigate Case 003.<sup>9</sup> The Justice Initiative has repeatedly called upon the United Nations and the court's donors to convene an independent panel of experts to investigate allegations of egregious judicial

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available at: <http://cablegatesearch.net/cable.php?id=10PHNOMPENH26&q=knut%20rosandhaug>: “Case 003 is scheduled to begin as soon as human resources are available from Case 002. Rosandhaug emphasized that the slow start of Case 003 is not due to objections from the Cambodian government, but rather to the need to capitalize on the capacity and institutional knowledge of the current staff, who will first concentrate on Case 002 before phasing into Case 003.” (para. 6)

“Rosandhaug informed the donors that at the end of the final closing order for Case 003, the law stipulates that all residual matters of the court be transferred to the ECCC. However, according to Rosandhaug, in 2012 there will be a larger capacity on the national side to handle Case 003 and suggested that the law could be changed to transfer that case entirely to the domestic court (for this to happen, the Parliament would have to repeal the current law and promulgate a new law). He emphasized that the question is about who will try the case, not the existence of it. The CDA urged the UN and Cambodian government to initiate discussions on the topic to give it the modality and attention it deserves. The Japanese Ambassador agreed, again suggesting it may become ‘the work of Ambassador Williamson.’” (para. 7)

<sup>6</sup> For the Justice Initiative's most recent examination of the issues in Cases 003/004 over the past 18 months, see update reports from February 2012, November 2011, and June 2011, available at: (Feb 2012)

[http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-eccc-20120223](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20120223);

(Nov 2011) [http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-court-20111114](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114);

(June 2011) [http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-eccc-20110614](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614).

<sup>7</sup> For examples of the types of public comments made by Cambodian government officials other than the prime minister, see OSJI's November 2011 Update Report at page 11, and footnotes 37-42.

<sup>8</sup> See OSJI Press Statement concerning the appointment of International Co-Investigating Judge Mark Harmon, which outlines the background to these judicial resignations and highlights some of the issues facing the new co-investigating judge as he assumes office, available at: <http://www.soros.org/press-releases/new-judge-will-be-center-struggle-over-khmer-rouge-tribunal>. Public statements from each of the two previous international co-investigating judges who have resigned are available here: <http://www.eccc.gov.kh/en/articles/press-release-reserve-international-co-investigating-judge> and here: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

<sup>9</sup> This was during the tenure of Judges Siegfried Blunk (Germany)—who later resigned—and You Bunleng (Cambodia), who remains in office.

misconduct and incompetence, and political interference, in Cases 003/004.<sup>10</sup> Meanwhile, Cases 003/004 have been in a state of limbo for the better part of a year.

As yet another new international co-investigating judge—the fourth to hold that title—assumes office,<sup>11</sup> the ECCC also faces critical funding constraints. On the international side, the OCIJ has yet to recruit a proper complement of staff to assist in the judicial investigations, yet there is a recruitment freeze on the international side of the court.<sup>12</sup> This raises serious concerns that Cases 003/004 will not be completed because the OCIJ does not have the crucial funding it needs to investigate its cases. The UN and some donors have indicated a commitment to see at least the current phase of the Case 002 trial (involving three former senior Khmer Rouge leaders) through to completion. But disturbingly, public comments from the UN and donor states often fail to give Cases 003/004—which have been on the court’s docket for over three years—the attention they deserve.<sup>13</sup> Thus, without a turnaround, the RGC will achieve its stated desire to prevent Cases 003/004, the UN will lose credibility, many victims will receive no justice for the atrocities committed against them, and the ECCC’s historical record will provide—at best—an extremely limited account of how Khmer Rouge atrocities were committed.

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<sup>10</sup> See OSJI’s June 2011 Update Report, November 2011 Update Report, and OSJI Press Releases <http://www.soros.org/press-releases/un-must-investigate-cambodias-khmer-rouge-tribunal>; <http://www.soros.org/press-releases/un-fails-address-crisis-credibility-facing-cambodia-s-khmer-rouge-tribunal>; <http://www.soros.org/press-releases/khmer-rouge-tribunal-un-must-act-restore-credibility>; <http://www.soros.org/press-releases/un-must-reconsider-commitment-khmer-rouge-court-0>.

<sup>11</sup> Julia Wallace, “New KR Tribunal Investigating Judge to Arrive Next Month: Harmon’s first test will be to reassess decisions made by Kasper-Ansermet,” *The Cambodia Daily*, August 21, 2012, p. 15. According to UN Special Expert on the United Nations Assistance to the Khmer Rouge Trials, Mr. David Scheffer, Judge Harmon will arrive in Phnom Penh “in September”... “But he is studying documents and preparing for his responsibilities in the interim.”

<sup>12</sup> Julia Wallace, “KRT Freezes Recruitment of International Staff,” *The Cambodia Daily*, July 30, 2012, p. 18. ECCC Spokesperson Lars Olsen was quoted as follows: “The UN’s support to the ECCC is funded solely through voluntary contributions. Until such time that donors pledge sufficient funds to the UN to meet the costs associated with new commitments, it is necessary to initiate a recruitment freeze.” The recruitment freeze was reported to have taken effect on July 10, 2012, and as of the date of this report, the UN side of the court’s operations was reported to require a further \$20.5 million USD in order to be able to operate for the remainder of 2012. The Justice Initiative’s discussions with court insiders reveal that the international side of the court requires approximately \$2.2 million USD per month to satisfy basic operational costs.

<sup>13</sup> As the Justice Initiative reported in November 2011, United Nations Under Secretary-General for Legal Affairs and UN Legal Counsel Patricia O’Brien—in response to questions from Cambodian civil society about the likelihood of the UN commissioning an inquiry into political interference at the ECCC—was reported to have said that an investigation into interference could “open the door for the defense [in Case 002]” and “could really undermine Case 002, [and] the defense might have a field day with that.” See November 2011 Update Report, footnote 18, quoting from: Julia Wallace, “Nuon Chea Takes Meddling Charge to Court,” *The Cambodia Daily*, October 24, 2011, pp. 1 and 30.

Shortly after this incident, OSJI sources reported similar comments by Ms. O’Brien to international members of the American Bar Association in Washington, DC. She was reported to have said that the UN would be concerned about the findings of a UN inquiry “tainting the judgment in Case 001” and that the “priority now is just to get through Case 002.” In a statement by Australian Foreign Minister Bob Carr concerning Australia’s latest pledge of funding to the ECCC, no mention was made of Cases 003/004. The opening line of the statement reads: “Minister for Foreign Affairs, Senator Bob Carr today announced Australia would provide \$1.4 million to help finance the trials of three Khmer Rouge leaders accused of involvement in the deaths of at least 1.7 million people in the 1970s.” The remainder of the statement refers to Cases 002 and 001 only. Statement available at: [http://foreignminister.gov.au/releases/2012/bc\\_mr\\_120713a.html](http://foreignminister.gov.au/releases/2012/bc_mr_120713a.html).

The appointment of the new international co-investigating judge, Mark Harmon, presents an opportunity for the ECCC, the RGC, the UN, and the court's donors to assert collectively their commitment to an impartial, judicial and non-political disposition of Cases 003/004, through genuine, credible, and thorough investigations into all allegations in both introductory submissions.<sup>14</sup>

Against this background, this Justice Initiative report:

- (i) documents critical recent developments in Cases 003/004, while highlighting the various issues likely to confront Co-Investigating Judges Harmon and You Bunleng in carrying out their investigations;
- (ii) puts forth a variety of legal reasons why Cases 003/004 must not be transferred to a wholly nationalized Cambodian jurisdiction; and
- (iii) explains why so-called “partial withdrawal” by the UN from the *Agreement* establishing the ECCC, leaving it to deal only with Case 002, is not an option.

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<sup>14</sup> According to the ECCC's Internal Rules, the “Introductory Submission” is the “written submission by the Co-Prosecutors requesting the Co-Investigating Judges to open an investigation into a crime and proposing charges.” (See Internal Rules, rev. 8, dated August 3, 2011, available at: <http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8>. All references to the Internal Rules in this report are to the 8<sup>th</sup> revision, unless otherwise expressly stated). After receiving the Introductory Submissions, the ECCC procedure is that the Co-Investigating Judges commence a judicial investigation. Rule 55 is the dominant provision governing the powers and limitations on the co-investigating judges during the judicial investigation. It stipulates that a judicial investigation is compulsory for crimes within the jurisdiction of the ECCC (IR 55.1); and that the judges must only investigate the facts set out in the Introductory Submission, or a “Supplementary Submission” (IR 55.2). According to the glossary, a “Supplementary Submission” refers to a written submission by the Co-Prosecutors requesting the Co-Investigating Judges to issue an order or undertake further action in an ongoing investigation.

## **C. Recommendations:**

### ***TO THE UNITED NATIONS***

#### **To United Nations Special Expert to the Secretary-General on the UNAKRT, Amb. David Scheffer; to United Nations Under-Secretary General for Legal Affairs and Legal Counsel, Ms. Patricia O'Brien; and to the UN Office of Legal Affairs:**

- Sustain donor interest and support so that adequate funding is provided to all cases on the court's docket.
- Ensure that adequate human resources are provided to the Office of Co-Investigating Judges to complete its mandate.
- Following Judge Harmon's deployment to Phnom Penh, closely monitor the progress of the Case 003/004 judicial investigations, while observing the confidential nature of the investigative process.
- Actively engage with the Cambodian government—both publicly and privately, as appropriate—to ensure that it refrains absolutely from any and all further political interference with the judicial and investigative mandate of the Office of Co-Investigating Judges.

#### **To the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Ms. Gabriela Knaul de Silva:**

- Renew the request made in 2006 for an invitation to conduct a country visit to Cambodia to assess the independence of judges, lawyers, and court officials in the ECCC, as well as in the wider Cambodian judicial system.
- Remain engaged with interlocutors who continue to raise issues concerning the independence of the ECCC.

#### **To the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence, Mr. Pablo de Greiff:**

- Closely monitor the ECCC to ensure that it succeeds in establishing accountability for Khmer Rouge atrocities, serves justice, provides remedies to victims, promotes healing and reconciliation in Cambodia, and advances the rule of law in Cambodia.
- Request an invitation to conduct a country visit to Cambodia to gather relevant information on Cambodia's normative framework, national practices, and experiences relating to the promotion of truth, justice, reparation, and guarantees of non-recurrence.

- Observe trends, developments, and challenges in relation to the ECCC and make recommendations thereon.

**To the United Nations Special Rapporteur on the Situation of Human Rights in Cambodia, Mr. Surya Subedi:**

- Continue to monitor the ECCC, including raising issues concerning judicial independence, political interference, and impunity.

***TO THE ECCC***

**To the Administration:**

- Take all necessary steps to ensure that adequate budgetary provision is made for genuine, thorough, and credible investigations to be carried out in Cases 003/004.
- Despite the recruitment freeze on the international side of the court's operations, ensure that Judge Harmon is provided with all of the resources he can be afforded to progress with his crucial work.

**To the Co-Prosecutors:**

- In light of the absence of crimes of sexual violence from the Case 003/004 introductory submissions, thoroughly review all evidentiary material in the possession of the Office of Co-Prosecutors concerning rape and other forms of sexual violence, as well as any and all material gathered by non-governmental organizations since the introductory submissions were filed, with a view to ascertaining whether crimes of sexual violence occurred at crime sites covered by the introductory submissions. If warranted, file a Supplementary Submission with the co-investigating judges addressing this issue.

**To the Co-Investigating Judges:**

- To the extent possible, and in recognizing the confidential nature of ongoing judicial investigations, ensure that there is transparency in decision-making in Cases 003/004, as permitted by Internal Rule 56 (*lex specialis*), and as mandated under Internal Rule 21 (*lex generalis*).
- Ensure that the public is kept informed on critical progress in Cases 003/004 through regular press briefings and/or statements, as appropriate. Ascribe orders and decisions "public" status, whenever possible, including by redacting confidential information, as required.

- Give clear instructions to the court’s Victims Support Section (VSS) and Public Affairs Section (PAS) to ensure that outreach to potential victim-complainants and civil parties is conducted as soon as possible.
- In investigating the facts in the Case 003/004 introductory submissions, ensure questions concerning crimes of sexualized violence are mainstreamed into investigative strategy.

### ***TO THE ROYAL GOVERNMENT OF CAMBODIA***

- Publicly commit to ensuring the independence of the investigative and judicial processes in Cases 003/004.
- Ensure that all Cambodians working at the ECCC are free to perform their critical work in all cases before the court.
- Extend invitations to the Special Rapporteur on Independence of Judges and Lawyers, and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, to come to Cambodia for the purposes of their respective mandates.

### ***TO THE COURT’S DONORS***

- Ensure the adequate provision of financial resources to the ECCC until the court has completed its important work in all cases currently before it. Ensure that all branches of the court are provided with adequate funding.
- Remain engaged in the whole range of the court’s caseload, and insist—both privately and publicly, as appropriate—that decisions made within the court are based on facts and law, and not extraneous considerations. Insist that the ECCC is as transparent as possible in all administrative, judicial, and prosecutorial decision-making.

## II. Significant Developments in the Case 003/004 Judicial Investigations since February 2012

Available information at the time of the Justice Initiative's February 2012 Update Report showed that the ECCC was facing some of its worst challenges yet concerning Cases 003/004.<sup>15</sup> The Cambodian government had refused to recognize the legitimate authority of Reserve International Co-Investigating Judge Laurent Kasper-Ansermet (Switzerland).<sup>16</sup> Hiding behind the decision of Cambodia's judicial appointing authority, the Supreme Council of the Magistracy (of which ECCC National Co-Investigating Judge You, National Co-Prosecutor Chea Leang, and other highly placed Cambodian ECCC officials are voting members), the Cambodian government effectively blocked the appointment. This direct affront to the provisions of the *Agreement*—which are designed to guarantee autonomy on the part of the UN in selecting and nominating its judicial candidates—elicited a strong response from many different stakeholders. The UN responded boldly, citing the government for its “breach” of the *Agreement*.

During the period from December 2011 through February 2012, Judges You and Kasper-Ansermet frequently and publicly sparred through exchanges of press releases.<sup>17</sup> Each time Judge Kasper-Ansermet attempted to move forward with the judicial investigations—or to take any decision related to them—he was blocked by his national counterpart.<sup>18</sup> As the rift between the two judges deepened, the ECCC's Pre-Trial Chamber was dragged into the dispute.<sup>19</sup> Asked to rule upon disagreements between the co-investigating judges, the national/international divide in the Pre-Trial Chamber also widened. All Cambodian judges on the Pre-Trial Chamber aligned themselves with the Cambodian government's position, and that of Judge You—namely, that Judge Kasper-Ansermet did not have any authority to

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<sup>15</sup> For a summary of these developments, see Justice Initiative February 2012 Update Report at pp. 4-5; 20-30. See also, Mark Ellis, International Bar Association Executive Director, “The Extraordinary Chambers in the Courts of Cambodia: A Failure of Credibility,” February 2011, available at: [http://www.ibanet.org/Human\\_Rights\\_Institute/Work\\_by\\_regions/Asia\\_Pacific/Cambodia.aspx](http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Cambodia.aspx). see also Bridget Di Certo, “Bar lowers boom on KRT ‘failure,’” February 28, 2012, *Phnom Penh Post*, p. 1-2, available at: <http://www.phnompenhpost.com/index.php/KRTalk/bar-lowers-boom-on-krt-failure.html>.

<sup>16</sup> For a full explanation of the relevant legal provisions concerning Judge Kasper-Ansermet's appointment as reserve international co-investigating judge, and the authority which flowed therefrom, see Justice Initiative February 2012 Update Report at pp. 20-30, esp. footnote 100. See also Justice Initiative press release: “Cambodian Government Must Confirm New Judge Now,” <http://www.soros.org/press-releases/cambodian-government-must-confirm-new-judge-now>.

<sup>17</sup> On the ECCC website, these statements are available at: <http://www.eccc.gov.kh/en/case/topic/286>, under the tab “NEWS,” or alternatively at this link: <http://www.eccc.gov.kh/en/media-center/press-releases>.

<sup>18</sup> Just prior to the effective date of his resignation, Judge Kasper-Ansermet issued a detailed summary of the lengths to which—in his opinion—Cambodian decision-makers in the court (ranging from judges and lawyers to administrators) had actively thwarted any attempt by him to move the investigations forward. See Note of the Reserve International Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, March 21, 2012, available at: [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D114\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D114_EN.PDF).

<sup>19</sup> This is because the ECCC's Pre-Trial Chamber has two main areas of jurisdiction in relation to decisions taken by the co-investigating judges: first, it is an appellate body for decisions taken by the co-investigating judges; secondly, it is the appropriate body for resolving legal disputes between the co-investigating judges (or the co-prosecutors) pursuant to the ECCC's disagreement mechanisms.

act, and therefore that any action taken by him was invalid.<sup>20</sup> The jurisprudence issued by the Pre-Trial Chamber in relation to these events raises serious concerns about the independence of the Pre-Trial Chamber's national judges. For example, the Pre-Trial Chamber's president, Prak Kimsan, flouted the ECCC's legislative framework and practice directions to block Judge Kasper-Ansermet from filing (and consequently prevented the Pre-Trial Chamber from ruling upon) a legal disagreement.<sup>21</sup> Unilaterally, and without the knowledge or authorization of the Pre-Trial Chamber's international judges, Judge Prak effectively dismissed the legal action by way of memorandum to the deputy director of administration. The Pre-Trial Chamber's national judges said that the issue of "admissibility" of a legal action was "administrative only."<sup>22</sup>

One of Judge Kasper-Ansermet's final actions was to seek to engage the Cambodian Supreme Council of the Magistracy in taking disciplinary action against Judge You for misconduct.<sup>23</sup> Predictably however, the complaint disappeared. The media reported that Ouk Savuth—a Supreme Council of the Magistracy member—said the body had never received the filing.<sup>24</sup> In a similarly controversial—and probably equally ineffective—move, Judge Kasper-Ansermet filed a complaint with the Phnom Penh municipal court against unnamed current and former ECCC staff members, alleging interference with the administration of justice.<sup>25</sup> However, when contacted by the media, chief court clerk Prak Savuth said that the documents filed by Judge Kasper-Ansermet did not constitute a formal complaint against any of his colleagues.<sup>26</sup>

Following months of an untenable situation, Judge Kasper-Ansermet announced his resignation on March 19, 2012 (noting that his effective date of resignation would be May 4,

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<sup>20</sup> Clarification of the National Judges of the Pre-Trial Chamber on the Note of Mr. Laurent Kasper-Ansermet, D38, March 26, 2012 (dated March 21, 2012), available at:

<http://www.eccc.gov.kh/sites/default/files/media/National%20PTC%2026%20Mar%202012%20En.pdf>

<sup>21</sup> Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, February 23, 2012, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012\\_En.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012_En.pdf).

<sup>22</sup> Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, February 23, 2012, para. 13, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012\\_En.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012_En.pdf).

<sup>23</sup> The decision taken by Judge Kasper-Ansermet was marked "confidential" but widely reported in the local press. *See, for example*, Abby Sieff, "Ex-KRT Judge Called for Colleague's Suspension," May 28, 2012, *The Cambodia Daily*, p. 21; Bridget Di Certo, "Judge alleged misconduct," May 28, 2012, *Phnom Penh Post*, p. 6, available at: <http://www.phnompenhpost.com/index.php/KRTalk/judge-alleged-misconduct.html>.

<sup>24</sup> Abby Sieff, "Ex-KRT Judge Called for Colleague's Suspension," May 28, 2012, *The Cambodia Daily*, p. 21.

<sup>25</sup> Press Release of the Reserve International Co-Investigating Judge, May 4, 2012, available at:

<http://www.eccc.gov.kh/sites/default/files/media/ECCC%20IntOCIJ%204%20May%202012En-corrected.pdf>.

<sup>26</sup> Kuch Naren, "KRT Judge's Documents Not A Complaint, Court Clerk Says," May 9, 2012, *The Cambodia Daily*, p. 23. "The documents he filed is just a memorandum and a submission to challenge a judge, but this is not a lawsuit," Mr. Savuth said, adding that he had not been able to thoroughly read the submission as it was in English only." [...] "I passed it all to prosecutor Yet Chakriya. I don't know if he has assigned any other prosecutor to work on this," Mr. Savuth said. Mr. Chakriya is also a deputy prosecutor at the Khmer Rouge tribunal." *See also* Julia Wallace and Chhorn Chansy, "Court Receives ex-KRT Judge's Complaint," May 7, 2012, *The Cambodia Daily*, p. 22. *See also* Bridget Di Certo and Chhay Channyda, "KRT staff tampering with Case 004: outgoing judge," May 7, 2012, *Phnom Penh Post*, p.4, available at:

<http://www.phnompenhpost.com/index.php/KRTalk/krt-staff-tampering-with-case-004-outgoing-judge.html>.

2012).<sup>27</sup> He noted that his authority to act had been constantly contested by his national counterpart, and that this had led to an entirely dysfunctional situation within the Office of Co-Investigating Judges.<sup>28</sup> It also seems clear that the extent of Judge Kasper-Ansermet's public sparring with Judge You, as well as the growing controversies around his work, grated on many within the UN and among the court's donors.<sup>29</sup>

In the weeks following Judge Kasper-Ansermet's resignation, the UN stated that it had "serious concerns about the ECCC judicial process in Cases 003 and 004."<sup>30</sup> The UN stressed that the judicial process in Cases 003/004 had to be "brought back onto a positive course," and that a process for the selection of a new international co-investigating judge would be initiated.

As discussed in the next two sections of this report, the Justice Initiative considers the continuing pursuit of Cases 003/004 to be the only reasonable option available to the UN, other than withdrawing from the court entirely. At this time, a complete UN withdrawal from the ECCC—several years into the court's tenure and with Case 002 still proceeding—would effectively reward the Cambodian government for its determination to block the ECCC from pursuing its mandate in Cases 003/004. If it were to become clear that Cambodian government's intransigence is ultimately preventing the judicial resolution of Cases 003/004, UN withdrawal may be the only principled option. For now, however the UN's decision to

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<sup>27</sup> ECCC Press Release by the Reserve International Co-Investigating Judge, March 19, 2012, available at: <http://www.eccc.gov.kh/en/articles/press-release-reserve-international-co-investigating-judge>. See also "Swiss judge resigns from tribunal trying Khmer Rouge leaders, alleges interference," March 19, 2012, Associated Press, available at: [http://www.washingtonpost.com/world/asia\\_pacific/khmer-rouge-jailer-to-testify-against-regimes-senior-leaders-at-un-backed-tribunal/2012/03/19/gIQAZvP2LS\\_story.html](http://www.washingtonpost.com/world/asia_pacific/khmer-rouge-jailer-to-testify-against-regimes-senior-leaders-at-un-backed-tribunal/2012/03/19/gIQAZvP2LS_story.html); see also "UN judge quits Cambodia war crimes tribunal," March 19, 2012, *Al Jazeera*, available at: <http://www.aljazeera.com/news/asia-pacific/2012/03/2012319143340854125.html>; see also "Second Judge Quits Khmer Rouge Tribunal Complaining of Interference," March 19, 2012, *Voice of America*, available at: <http://blogs.voanews.com/breaking-news/2012/03/19/second-judge-quits-khmer-rouge-tribunal-complaining-of-interference/>; Bridget Di Certo, "'Blocked' judge quits court," March 20, 2012, *Phnom Penh Post*, p. 1-2, available at: <http://www.phnompenhpost.com/index.php/KRTalk/blocked-judge-quits-court.html>; Irwin Loy, "Cambodian War Crimes Tribunal Under Pressure After Judge Resigns," March 20, 2012, *Voice of America*, available at: <http://www.voanews.com/khmer-english/news/Cambodian-War-Crimes-Tribunal-Under-Pressure-After-Judge-Resigns-143503086.html>.

<sup>28</sup> Bridget Di Certo, "Judge decries 003, 004 'sabotage'," March 22, 2012, *Phnom Penh Post*, p. 2, available at: <http://www.phnompenhpost.com/index.php/KRTalk/judge-decries-003-004-sabotage.html>; see also Julia Wallace and Kuch Naren, "Judge Details 'Dysfunction' At Tribunal: Kasper-Ansermet describes stonewalling that led to his resignation," March 22, 2012, *The Cambodia Daily*, pp. 1-2; see also Kong Sotharith, "Surprise Resignation of Judge Adds to Tribunal Woes," March 22, 2012, *VOA Khmer*, available at: <http://www.voanews.com/khmer-english/news/Surprise-Resignation-of-Judge-Adds-to-Tribunal-Woes-143831216.html>.

<sup>29</sup> Open Society Justice Initiative interviews with confidential ECCC sources between January and May, 2012.

<sup>30</sup> Statement Attributable to the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia, New York, March 30, 2012, available at:

<http://www.un.org/sg/statements/index.asp?nid=5961>.

UN News Centre, "UN Voices Concern as Second Judge Resigns from Cambodia Genocide Court,"

available at: <http://www.un.org/apps/news/story.asp?NewsID=41578&Cr=Cambodia&Cr1=>. "UN

concerned over Khmer Rouge tribunal row," March 22, 2012, World Radio, available at:

<http://worldradio.ch/wrs/news/wrsnews/un-concerned-over-khmer-rouge-tribunal-row.shtml?29786>.

appoint another judicial officer to replace Judge Kasper-Ansermet appears to have been the most prudent course available.

In anticipation of the arrival of the newly appointed Judge Harmon, it is important to outline some of the major issues he will likely face as he embarks upon his role. Some of these have already been highlighted in the Justice Initiative's press statement welcoming Judge Harmon's appointment.<sup>31</sup> The appointment of a judge noted for his experience, qualifications, and integrity is an indication that the UN is committed to ensuring that Cases 003/004 proceed through the judicial system to their legal conclusion, whatever the result may be.

### **A. Validity of Judge Laurent Kasper-Ansermet's Actions and Decisions**

While Judge Kasper-Ansermet was undoubtedly a controversial figure, he took a number of noteworthy legal and investigative actions in the Case 003/004 judicial investigations. On the day of Judge Kasper-Ansermet's arrival in Phnom Penh, he issued an order that the Case 003 investigation—prematurely closed amid public outcry in April, 2011—be resumed.<sup>32</sup> In that order, Judge Kasper-Ansermet said that the investigation thus far had been “defective and prejudicial to all parties (including victims, suspects and the prosecution).”<sup>33</sup> He also said that the acts and omissions of his predecessor, Judge Siegfried Blunk, and Judge You could amount to a “refusal to investigate” which would constitute a “breach of their duty to conduct a judicial investigation.”<sup>34</sup>

Other significant decisions taken by Judge Kasper-Ansermet concern the admission of civil parties,<sup>35</sup> informing the suspects of their rights,<sup>36</sup> and issuing findings that the Case 003 suspects fall under the ECCC's personal jurisdiction.<sup>37</sup> While each of these actions was valuable in its own right, the series of decisions was enormously important for, *inter alia*, the integrity of the jurisprudential legacy being left by the ECCC. The record of Judges You and

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<sup>31</sup> New Judge will be at Center of Struggle over Khmer Rouge Tribunal

<http://www.soros.org/press-releases/new-judge-will-be-center-struggle-over-khmer-rouge-tribunal>.

<sup>32</sup> Order on Resuming the Judicial Investigation, CF003/07-09-2009-ECCC-OCIJ, D28, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D28\\_EN\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D28_EN_0.pdf)

<sup>33</sup> Ibid, p. 7, para. 8.

<sup>34</sup> Ibid, p. 8, para. 9.

<sup>35</sup> Julia Wallace, “Rob Hamill is First Case 003 Civil Party, Int'l Judge Says,” February 27, 2012, *The Cambodia Daily*, p. 19; see also Bridget Di Certo, “Hamill Granted Civil Party Status,” February 27, 2012, *Phnom Penh Post*, available at: <http://www.phnompenhpost.com/index.php/KRTalk/hamill-granted-civil-party-status.html>. Cf. Bridget Di Certo, “Theary Seng out as civil party,” March 1, 2012, *Phnom Penh Post*, p. 3, available at: <http://www.phnompenhpost.com/index.php/KRTalk/judges-remain-at-loggerheads-theary-seng-out-as-civil-party.html>. See also

Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant (Downing and Lahuis), February 28, 2012, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D5\\_1\\_4\\_2\\_EN\\_Redacted.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D5_1_4_2_EN_Redacted.PDF).

<sup>36</sup> ECCC Press Release by the Reserve International Co-Investigating Judge, March 19, 2012, available at:

<http://www.eccc.gov.kh/en/articles/press-release-reserve-international-co-investigating-judge>. Kuch Naren and Julia Wallace, “KRT Suspect Im Chaem Informed of Her Rights,” March 6, 2012, *The Cambodia Daily*, pp. 1-2.

<sup>37</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D48\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D48_EN.PDF).

Blunk, created in the first ten months of 2011, was extremely damaging to the ECCC. Jointly, these two judges routinely flouted the ECCC's governing legal framework and violated the rights of victims and suspects alike in an apparent attempt to reach a pre-determined outcome in Cases 003/004. Meanwhile, they sought to sanction anyone attempting to engage the greater Cambodian and international public in the judicial process, or indeed to expose the gross deficiencies in their work.<sup>38</sup>

Despite the Cambodian government's refusal to recognize the legitimate authority of Judge Kasper-Ansermet when he replaced Judge Blunk, the law governing the ECCC's operations makes clear the validity of all major decisions taken by Judge Kasper-Ansermet during his tenure—including the resumption of the Case 003 investigation, as well as those concerning the admission of civil parties, the assignment of counsel to any Case 003/004 suspects, and the determination that the Case 003 suspects fall squarely within the court's jurisdiction. The validity of Judge Kasper-Ansermet's actions is further supported by the United Nations' assertion of his legitimate authority, and by the position of the international judges of the Pre-trial Chamber, who endorsed his conduct.<sup>39</sup> Lastly, in choosing to stonewall Judge Kasper-Ansermet by refusing to recognize his legal authority to act, Judge You ran out of time to file with the Pre-Trial Chamber any disagreement with Judge Kasper-Ansermet's acts.<sup>40</sup>

## **B. Practical Cooperation by the Cambodian Government: An Ongoing Concern**

The long history of Cambodian government opposition to Cases 003/004 suggests caution, at a minimum, in assessing the prospects for Judge Harmon. Judge Kasper-Ansermet was not the first to be stymied by Cambodian court officials. Judge Marcel Lemonde (France), the first international co-investigating judge to take office at the ECCC, also experienced difficulties in trying to move the Case 003/004 investigations forward.<sup>41</sup> Furthermore, when then-International Co-Prosecutor Robert Petit (Canada), filed the Case 003/004 Introductory Submissions in November 2008, he asked for all five suspects to be arrested and provisionally detained.<sup>42</sup> In the three years since this issue was resolved by the Pre-Trial

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<sup>38</sup> The Justice Initiative's November 2011 Update Report and June 2011 Update Report highlight the litany of allegations against Judges You and Blunk which were the basis for the Justice Initiative at various intervals requesting the UN to appoint an independent panel of experts to investigate these allegations of misconduct, incompetence and political interference.

<sup>39</sup> Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, February 23, 2012, available at: [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012\\_En.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion02-2012_En.pdf).

<sup>40</sup> See Rule 72 (2) of the Internal Rules: "Within 30 (thirty) days, either Co-Investigating Judge may bring the disagreement before the [Pre-Trial Chamber] by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statement to its judges, with a copy to the other Co-Investigating Judge... The other Co-Investigating Judge may submit a response within 10 (ten) days..."

<sup>41</sup> The Justice Initiative highlighted some of these difficulties in its June and November 2011 Update Reports. Obstructions included the signing—and subsequent "unsigning"—of a Rogatory letter used to issue investigative instructions to the judicial police. This resulted in the vast majority of investigations conducted in Cases 003/004 in the 2010 calendar year being conducted by international investigators acting alone.

<sup>42</sup> Robert Petit filed the Introductory Submissions in Cases 003/004 in November, 2008, acting alone (i.e. without the endorsement of his national counterpart, Chea Leang). There was then a lengthy legal process before the ECCC's Pre-Trial Chamber to decide whether or not the cases should be put forward for judicial

Chamber,<sup>43</sup> not a single arrest warrant for any of the suspects has been issued. And, as highlighted by the Pre-Trial Chamber:

[T]he Co-Investigating Judges have not decided on the requests made by the International Co-Prosecutor for the arrest and provisional detention of the persons named in [Cases 003 and 004]. There has been no appeal filed by the International Co-Prosecutor in relation to the Co-Investigating Judges lack of determination on these requests either.<sup>44</sup>

In respect of Cases 001 and 002, all suspects were arrested, charged, and provisionally detained within three months of the opening of judicial investigations.<sup>45</sup> Inside sources at the ECCC have also reported to the Justice Initiative that suspects in Cases 001 and 002 were arrested and provisionally detained on the basis of information contained in the Introductory

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investigation. The Pre-Trial Chamber split on this issue along national/international lines (three Cambodian judges agreeing with the national co-prosecutor, and two foreign judges agreeing with the then-international co-prosecutor), however, according to special mechanisms built into the ECCC's founding documents, a supermajority of four judges would have been required to block the investigations from moving forward. Accordingly, in September 2009, Cases 003 and 004 were sent for judicial investigation by then-Acting International Co-Prosecutor William Smith (Australia) following the resolution of this litigation.

<sup>43</sup> The Case 003/004 introductory submissions were filed on November 20, 2008, by then-International Co-Prosecutor, Robert Petit, acting alone. On this day, he also filed a disagreement (pursuant to Rule 71 of the ECCC's Internal Rules) before the ECCC's Pre-Trial Chamber, seeking resolution of the dispute between him and National Co-Prosecutor, Chea Leang, as to whether the investigations should proceed before the ECCC's co-investigating judges. On August 18, 2009, the ECCC's Pre-Trial Chamber delivered its decision on this disagreement. The chamber was split along Cambodian/ international lines. According to Rule 71.4(c), this did not constitute a "decision" (which requires the affirmative vote of at least four judges). As such, the "default decision"—that the action proposed to be executed by Robert Petit, acting alone, be carried out—applied. Pursuant to this ruling, the cases were submitted for judicial investigation by the co-investigating judges. See [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Public\\_redacted\\_version\\_-\\_Considerations\\_of\\_the\\_PTC\\_regarding\\_the\\_Disagreement\\_between\\_the\\_Co-Prosecutors\\_pursuant\\_to\\_Internal\\_Rule\\_71\\_\(English\).pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_(English).pdf).

<sup>44</sup> Decision on Defence Support Section request for a Stay in Case 003 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 003, December 15, 2011, para. 12, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/3\\_Redacted\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/3_Redacted_EN.PDF).

Decision on Defence Support Section request for a stay of proceedings in Case 004 proceedings before the Pre-Trial Chamber and for measures pertaining to the Effective Representation of Suspects in Case 004, February 20, 2012, para. 11, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/3\\_Redacted\\_EN-1.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/3_Redacted_EN-1.PDF).

Note that paragraphs 11 and 12, respectively, of these decisions are identical except for the case mentioned (003, or 004).

<sup>45</sup> Case 001, as the nomenclature suggests, was the ECCC's first case against notorious S-21 prison commander Kaing Guek Eav, alias "Duch." At the time of Duch's "arrest and provisional detention" he had actually been in the custody of Cambodian military authorities for several years.

Case 002 is the ECCC's second case against three former Khmer Rouge leaders: Ieng Sary, Nuon Chea, and Khieu Samphan. The trial is currently in progress. All three of these accused persons, plus a fourth co-accused (Ieng Thirith, the wife of Ieng Sary who has been severed from the Case 002 proceedings for reasons of mental unfitness to stand trial), were arrested within 1-3 months of the filing of the Introductory Submissions in those cases.

Submissions. By contrast, even though the Introductory Submissions in Cases 003/004 were filed almost four years ago, no suspect in either case has yet been arrested.<sup>46</sup>

The Pre-Trial Chamber judges' observations illuminate how the political conundrums surrounding Cases 003/004 can affect all parties, including the international co-prosecutor. In Judge Kasper-Ansermet's arguably most controversial order on the Case 003 judicial investigation, delivered just prior to his departure, the judge invited the co-prosecutors to file a supplementary submission in the Case 003 investigation.<sup>47</sup> This action was considered highly controversial because Judge Kasper-Ansermet recommended that four high-ranking officials in the sitting Cambodian government be interviewed by the co-prosecutors concerning allegations of Khmer Rouge war crimes in the vicinity of the Cambodian-Vietnamese border. The co-prosecutors publicly ruled out taking any action regarding Judge Kasper-Ansermet's invitation.<sup>48</sup> They refuted media categorization of the identified individuals as "potential targets of investigation," even though Judge Kasper-Ansermet based his inquiries on a 2005 article written by a leading Khmer Rouge historian, which details the alleged involvement of current senior Cambodian People's Party officials—including at least one individual named in Judge Kasper-Ansermet's order—in the Democratic Kampuchea regime.<sup>49</sup> In advising the public that they had declined Judge Kasper-Ansermet's invitation, the co-prosecutors said that they had considered

[t]he gravity of the crimes alleged in the Introductory Submission; the clearly-established scope of the current investigation; the importance of prioritizing the efficient completion of ongoing investigations and trial proceedings before the ECCC; and the established

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<sup>46</sup> While the Introductory Submissions were filed on November 20, 2008, the ensuing legal dispute between the co-prosecutors before the Pre-Trial Chamber resulted in 7-8 months of litigation, such that the co-investigating judges have been seized of Cases 003/004 for three years (since resolution of the dispute by the Pre-Trial Chamber on August 18, 2009).

<sup>47</sup> The Forwarding Order is a confidential document, but the fact of its existence and contents was widely reported in the media. *See, for example*, "Cambodian officials named over Khmer Rouge genocide," June 03, 2012, *The Sydney Morning Herald*, available at: <http://www.smh.com.au/world/cambodian-officials-named-over-khmer-rouge-genocide-20120602-1z0sv.html>; Bridget Di Certo, "Top officials eyed in KRT probe: report," June 04, 2012, *Phnom Penh Post*, p. 1 and 6, available at: <http://www.phnompenhpost.com/index.php/KRTalk/top-officials-eyed-in-krt-probe-report.html>; Abby Seiff and Julia Wallace, "EX-KRT Judge Sought Probe of Vietnam Attacks, Newspapers Say," June 04, 2012, *The Cambodia Daily*, p. 22: "The Khmer Rouge tribunal's former reserve co-investigating judge last month asked prosecutors to authorize an investigation into military attacks on Vietnamese civilians, which he said should include interviews with National Assembly President Heng Samrin, Senate President Chea Sim, Senator Ouk Bunchhoeun, and Royal Cambodian Armed Forces Commander-in Chief Pol Saroeun, Australian newspapers The Age and the Sydney Morning Herald reported yesterday... The four senior CPP officials listed as key witnesses in the document by Judge Kasper-Ansermet were all members or leaders of military divisions or districts where incursions into Vietnamese territory and attacks on Vietnamese citizens took place under the Khmer Rouge regime. Three of the four—Mr. Samrin, Mr. Sim and Sen. Bunchhoeun—were also summoned as witnesses in 2009 by the Office of Co-Investigating Judges, but refused to appear and give evidence at the tribunal."

<sup>48</sup> Public Statement by the Co-Prosecutors, June 5, 2012, available at:

<http://www.eccc.gov.kh/en/articles/public-statement-co-prosecutors-regarding-investigation-case-003>.

<sup>49</sup> Heder, Steve (2005) "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective.," in: Ramji, J. and van Schaack, B., (eds.), *Bringing the Khmer Rouge to Justice. Prosecuting Mass Violence before the Cambodian Courts*, the Edwin Mellen Press, pp. 377-423.

public position of the International Co-Prosecutor that no further cases would be initiated following Cases 003 and 004.<sup>50</sup>

The co-prosecutors' refusal to take up Judge Kasper-Ansermet's invitation is a manifestation of the extreme political sensitivity around Cases 003/004. This political sensitivity and the compromises it requires are not, unfortunately, limited to Cases 003/004. For example, during the Case 002 trial, the Trial Chamber has, on more than one occasion, switched off the microphone of defense counsel who make reference to any of the four sitting Cambodian government officials named by Judge Kasper-Ansermet. The Justice Initiative continues to be concerned that these sensitivities and attendant compromises may limit the court's genuine search for the truth.

Following the Cambodian government's prolonged public campaign of opposition to Cases 003/004, it is fair to ask if it will be possible to secure witness testimony in those cases.<sup>51</sup> If there continue to be politically-imposed limitations on the Case 003/004 investigations, they must be made known and challenged.

Ultimately, decision-making in Cases 003/004 must be open to public scrutiny. And there must be clear and consistent outreach to all potential victim-complainants and victim-civil parties who may have crucial testimony to give.<sup>52</sup>

### **C. Financial Constraints and the Potential Impact of Funding Shortages on Case 003/004 Judicial Decision-Making**

As repeatedly highlighted in recent months by United Nations Special Expert to the Secretary-General on the Khmer Rouge Tribunal, Amb. David Scheffer, the ECCC is currently facing some of the toughest financial challenges in its history.<sup>53</sup> To be sure, the international community cannot be expected to provide limitless resources for the ECCC.

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<sup>50</sup> Public Statement by the Co-Prosecutors, June 5, 2012, available at:

<http://www.eccc.gov.kh/en/articles/public-statement-co-prosecutors-regarding-investigation-case-003>.

<sup>51</sup> For a recent example of the possible impact of public government statements on witness testimony at the ECCC, see Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs Hor Namhong, filed by the Nuon Chea defence in Case 002 trial proceedings, available at:

[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E219\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E219_EN.PDF). See also

Addendum to Rule 35 Request for Summary Action Against Minister of Foreign Affairs Hor Namhong, available at: [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E219\\_1\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E219_1_EN.PDF).

<sup>52</sup> Outreach on the ECCC's activities is undertaken by both the Victims' Support Section and the Public Affairs Section. Until now, there has been no outreach, and no outreach budget, for Cases 003/004. While the lack of common approach between Judges You and Kasper-Ansermet may account for part of this communication black hole, Judges You and Blunk jointly released information on the Case 004 crime sites, upon request from International Co-Prosecutor Andrew Cayley who had previously been sanctioned for releasing crime base information on Case 003. However, in spite of the joint approach of Judges You and Blunk, no subsequent outreach campaign on Case 004 was designed or implemented. See Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004, August 8, 2011, available at:

[http://www.eccc.gov.kh/sites/default/files/media/ECCC%20PR%20OCIJ%208%20Aug%202011%20\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC%20PR%20OCIJ%208%20Aug%202011%20(Eng).pdf)

<sup>53</sup> See, for example, David Scheffer, "No Way to Fund a War Crimes Tribunal, August 28, 2012, available at: [http://www.nytimes.com/2012/08/29/opinion/Funding-Cambodias-War-Crimes-Tribunal.html?\\_r=1](http://www.nytimes.com/2012/08/29/opinion/Funding-Cambodias-War-Crimes-Tribunal.html?_r=1); see also Julia Wallace, "UN Special Expert on KRT Says Funding Is Main Challenge," March 5, 2012, *The Cambodia Daily*, p. 18. (Q & A with David Scheffer)

And yet, once a matter has been approved by an internationally-supported judicial mechanism for investigation, every conceivable effort must be made by the court’s donors to ensure that it proceeds to judicial conclusion. Cases 003/004 are properly before the Co-Investigating Judges and should be genuinely and effectively dealt with by judicial authorities. Particularly in view of the fragility of judicial independence in Cambodia, financial constraints should not be permitted to hamper the ongoing investigations in these cases. At the same time, there must be absolute transparency if financial constraints—or indeed any other considerations—limit the judges’ ability to fulfill their obligations. So-called “functional earmarking”—the practice by donors of dedicating funds to only one part of the court—should be discouraged because of the likelihood it will negatively affect the ability of all branches of the court to carry out the court’s mandate. For example, functional earmarking for the ECCC’s Trial Chamber or Supreme Court Chamber—in lieu of the Office of Co-Investigating Judges or Pre-Trial Chamber—would send a disastrous message: that rather than safeguarding independent judicial decision-making about who should be indicted, the donors are literally buying into the Cambodian government’s political control over the court’s docket, and tacitly encouraging it.

### **III. Legal Barriers to the Transfer of Cases 003/004 to a Wholly Nationalized Cambodian Jurisdiction**

The ECCC’s pursuit of Cases 003/004 remains problematic, for both political and financial reasons. There is mounting pressure on the parties to the ECCC *Agreement* to find a proper resolution to those cases. One possible solution put forth by various ECCC stakeholders is to move Cases 003/004 to a wholly nationalized Cambodian court. This is a bad idea, for a host of reasons that this report will now explore.

In other jurisdictions, international criminal cases have been transferred to wholly national jurisdictions via one of two main avenues. The first is via the transfer of an ongoing investigation from a prosecutor to a national authority (known as the “transfer of a case file or dossier”). The second is via a formal legal procedure (known as a “referral” or a “Rule 11bis referral”) which refers to the legislative framework governing such a process.

The *ad hoc* tribunals (the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) are the two jurisdictions in which these procedures have been most commonly applied.<sup>54</sup> Crucially, however, these institutions were in the process of trying scores of alleged perpetrators when cases, or dossiers, were

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<sup>54</sup> As the lifespans of both the ICTY and the ICTR unfolded, there was growing international pressure for them to wrap up their respective mandates. The subsequent reporting by the *ad hoc* tribunals on this issue became known as the tribunals’ “completion strategy.” UN Security Council Resolution 1503 called upon the ICTR to formalize its completion strategy in similar terms to that of the ICTY, “by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to *competent* national jurisdictions, *as appropriate*, as well as the strengthening of the capacity of such jurisdictions (emphasis added). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/481/70/PDF/N0348170.pdf?OpenElement>.

transferred to successor courts. By contrast, the ECCC has only four cases on its docket. Transfer of Cases 003/004 would cut its docket in half.

There have been many instances of ongoing investigations being transferred to national authorities prior to any indictment being laid or any judicial involvement with the case. The ICTR has transferred 55 dossiers to the Rwandan authorities for “further investigation and possible future action.”<sup>55</sup> In deciding how to cull its list of potential targets, the ICTR prosecution worked from criteria that included an assessment of the level of seniority of the target as well as the strength of the evidence against him.<sup>56</sup> This is also consistent with the practice of the ICTY.<sup>57</sup>

And even with the greater safeguards afforded by the ICTY and ICTR, transfer of cases to national courts has not been problem-free. At the ICTR, at least one case involving allegations against members of the Rwandan Patriotic Front (currently Rwanda’s governing party) was transferred to Rwandan authorities for prosecution. Human Rights Watch described the subsequent trial as a “political whitewash and miscarriage of justice.”<sup>58</sup> The prospect of transferring cases from the ECCC to a wholly nationalized Cambodian jurisdiction carries the same risks: the people who would prosecute and judge the cases would not be politically independent or able to act impartially, and the government would seek to protect—for political reasons—those who might be tried.

## A. Transfer of Case File

The Justice Initiative considers that it would be highly inappropriate to transfer either Case 003 or Case 004 to a wholly national Cambodian jurisdiction. This would amount to an abdication of responsibility by the United Nations and international donors to combat impunity for Khmer Rouge crimes in Cases 003/004. Furthermore, Cases 003/004 are not comparable to preliminary case files whose jurisdiction has yet to be decided. The ECCC has been formally seized of these cases since 2008 and, pursuant to its rules, affirmed the propriety of investigation by its own co-investigating judges in 2009. (The ICTY and ICTR

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<sup>55</sup> ICTR/INFO-9-2-639.EN, “More Prosecution’s Case Files Transferred to Rwanda,” June 8, 2010, available at: <http://www.unict.org/tabid/155/Default.aspx?ID=1138>.

<sup>56</sup> Telephone interview with senior ICTR prosecution official, August 29, 2010. *See also* Reports on Completion Strategy of the ICTR, available at:

<http://www.unict.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx>. (May 2005, S/2005/336, p. 10, para. 37; December 2005, S/2005/782, p. 10, para. 40; May 2008, S/2008/322, p. 12, para. 48).

<sup>57</sup> *See* ICTY Completion Strategy Reports, available at: <http://www.icty.org/tabs/14/2>. (May 2004, S/2004/420, p. 6, para. 21; May 2004, S/2004/420 Enclosure II, p. 40, paras 4-5: the Prosecutor discusses two lists separating high-level suspects and lower-level suspects, as well as the transfer of 19 cases involving a total of 67 suspects to courts in Bosnia and Herzegovina, Croatia, Macedonia, and Serbia and Montenegro.

<sup>58</sup> For documentation on this case, *see* Human Rights Watch, “Rwanda: Tribunal’s Work Incomplete,” available at: <http://www.hrw.org/news/2009/08/17/rwanda-tribunal-s-work-incomplete>; *see also* [http://www.hrw.org/sites/default/files/related\\_material/2009\\_06\\_Rwanda\\_Jallow\\_Response.pdf](http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf); *see also* <http://www.hrw.org/news/2009/08/14/letter-ict-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime>. As noted by Human Rights Watch, “the Military Court of Kigali acquitted two senior officers for the crimes while two more junior officers who had pleaded guilty to the crimes were given reduced sentences of eight years on grounds that the crimes were not premeditated.” (*See* <http://www.hrw.org/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes>).

do not have investigating judges.) The ECCC has already taken many procedural and substantive decisions in respect of these cases. An extra-judicial decision now to transfer these cases to a wholly national court would ride roughshod over pending judicial investigation, deliberation, and decision-making at the ECCC. Particularly in view of the persistent, visible opposition to these cases at the highest levels of the Cambodian government, such a decision would inevitably suggest—to the public in Cambodia and beyond—that the international community had acquiesced to political fiat and abandoned the genuine search for accountability.

However, this issue could come up for consideration again at the time of the completion of the judicial investigations if one or more of the suspects in Cases 003/004 is indicted via a closing order. In the following pages, therefore, the Justice Initiative explores the compelling reasons why—according to international jurisprudence—were a legal amendment to be made to the ECCC’s founding documents to allow for the referral of a case to a wholly national successor jurisdiction, the Cambodian court system would not satisfy the legal criteria.

## **B. Rule 11bis Referral**

### *1. Prerequisites for referral under international criminal legal jurisprudence*

Cases 003/004 do not meet the minimum prerequisites for referral under international criminal jurisprudence. The Justice Initiative’s November 2010 report noted the common minimum standards that international and hybrid tribunals have applied when turning over actual cases for trial to domestic jurisdictions. The ICTY and the ICTR apply these standards under the provisions of Rule 11bis, adopted by each of the tribunals in their respective Rules of Evidence and Procedure as a component of their completion strategies.<sup>59</sup>

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<sup>59</sup> International Criminal Court for the Former Yugoslavia (ICTY) Rules of Evidence and Procedure, Rule 11bis, Rev. 44, December 2009, available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev44\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf), providing in relevant part:

“(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the “Referral Bench”), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Referral Bench may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused;” and

International Criminal Tribunal for Rwanda (ICTR) Rules of Evidence and Procedure, Rule 11 bis, Revised February 19, 2010, at <http://www.unict.org/Portals/0/English/Legal/ROP/100209.pdf>.

Since the ECCC has not adopted a comparable procedural rule nor articulated a comprehensive completion strategy, procedures established by other international tribunals may serve as guidance, according to the ECCC's own internal rules.<sup>60</sup>

Broadly speaking, Rule 11*bis* jurisprudence demonstrates that referral chambers seek to ensure the political will and practical capacity of successor courts to try cases in accord with established standards for fair and independent trials.<sup>61</sup> International courts evaluate the following prerequisites (among others) for referral to national jurisdiction: 1) that suspects are indicted (e.g., they are cases within the judicial process); 2) that the receiving state is willing to prosecute; 3) that the receiving state is adequately prepared to prosecute, and; 4) that the gravity of offenses and level of responsibility of the accused are not so high as to preclude referral. *Each* of these is a prerequisite to be met by the national jurisdiction being considered to receive the cases. In looking to Rule 11*bis* jurisprudence, it is clear that the minimum requirements for referral by the ECCC to local courts in Cambodia cannot be met. These criteria are evaluated in greater detail below.

Rule 11*bis* governs referrals “[i]f an indictment has been confirmed” and therefore any transfer to the national court system would be contingent upon indictments first being laid by the ECCC. Investigations into Cases 003/004 have been stalled for months despite the fact that, according to its own procedural rules, judicial investigation is *compulsory* for crimes within ECCC's jurisdiction.<sup>62</sup> Once the prosecutor filed the Introductory Submissions to Cases 003/004 in November 2008, these became analogous to indicted cases before the ICTY and ICTR. These cases are also recognized as ECCC cases on the court's official docket.

The necessity of investigation and indictment by an independent prosecutor clearly serves to curb the potential for executive control over a court's decisions about who is and is not

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“(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”

<sup>60</sup> Pursuant to the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (“ECCC Law”), which provides in Article 33 new, para. 1: “If these existing procedure [sic] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or of there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.”

<sup>61</sup> See *discussion* in Justice Initiative Completion Plan Report, pp. 8-9.

<sup>62</sup> Internal Rules (Rev. 8) of the Extraordinary Chambers in the Courts of Cambodia, (revised Aug. 11, 2011) (“ECCC Internal Rules”), Rule 55.

prosecuted. These decisions are always meant to be in the purview of the independent prosecutors (or, in the unique case of the ECCC’s framework, also the co-investigating judges). As international jurisprudence demonstrates, and good practice dictates, it is preferable that cases are not transferred to wholly national jurisdictions at the investigation stage because of the grave risks around independent decision-making of post-conflict institutions, particularly in relation to the harboring of alleged war criminals. This is especially so in the case of Cambodia, for reasons further discussed below.

It is important to acknowledge, however, that issues concerning the surrender of fugitives are common to all internationalized criminal jurisdictions.<sup>63</sup> An indictment, even if accompanied by an unexecuted arrest warrant, has strong resonance in the ongoing fight against impunity. As experience demonstrates, even those who are thought to be immune from prosecution can be apprehended and prosecuted.

## 2. *Willingness of receiving state to prosecute*

Of utmost importance in the Cambodian context, a national court must be willing and adequately prepared to accept the transfer of a mass atrocity case from an internationalized court.<sup>64</sup> Here, the Royal Government of Cambodia has made unequivocally clear by its statements and actions that it does not wish the suspects in Cases 003/004 to be investigated further. Moreover, numerous reports have documented the systematic inability of national courts to act independently of Cambodian government will, particularly in cases of high political significance, such as those before the ECCC.<sup>65</sup> Thus a referral of Cases 003/004 to the Cambodian national courts would almost certainly result in a failure to genuinely prosecute. This critical requirement is therefore not met.

Under international law, all states, by virtue of their membership in the international community, are obligated to prevent and prosecute crimes against humanity, grave breaches of the Geneva Conventions, torture, and genocide.<sup>66</sup> Every state bears responsibility to “end impunity and to prosecute those responsible for war crimes, genocide, crimes against

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<sup>63</sup> For example, in relation to the ICTY, various stakeholders worked tirelessly to secure the surrender of Bosnian Serb military leader Ratko Mladić and Bosnian Serb politician Radovan Karadžić. In relation to the ICTR, there have been many legitimate criticisms made of the failure to indict members of the Rwanda Patriotic Front; meanwhile, individuals such as alleged genocide financier Félicien Kabuga and former Chief of Staff of the Rwandan army Protais Mpiranya remain at large. Dealing with similar issues, the International Criminal Court has up to 11 outstanding arrest warrants for individuals ranging from former Sudanese President Omar Al-Bashir, to head of the Ugandan guerrilla group, the Lord’s Resistance Army, Joseph Kony, and alleged Congolese warlord, Bosco Ntaganda.

<sup>64</sup> See ICTY Rule 11 *bis* (A)(iii); ICTR Rule 11 *bis* (A)(iii).

<sup>65</sup> See further examination of this issue in Section III. B.3 of this report.

<sup>66</sup> See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission (2001), Article 1, commentary (para. 4), p. 33, *citing Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)* (1970), ICJ, Feb. 5, 1970, para. 34: “[e]very State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations... [c]hief among these are “the outlawing of acts of aggression, and of genocide, as also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” See also *Belgium v. Senegal*, Questions Relating to the Obligation to Prosecute or Extradite [concerning former Chadian president Hissène Habré], July 20, 2012, Judgment of the International Court of Justice, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

humanity and serious violations of international humanitarian law.”<sup>67</sup> Universal condemnation of these crimes demonstrates that they are prohibited as a matter of customary international law.<sup>68</sup> Furthermore, “[t]he establishment of several international and hybrid criminal tribunals in the last two decades, including the ECCC, is further evidence of states’ determination to ensure that international crimes do not go unpunished.”<sup>69</sup> Cambodia bears a responsibility to prosecute suspects of mass atrocities and its efforts to prevent the ECCC from doing so regarding the suspects in Cases 003/004 constitute a violation of its obligations under international law.<sup>70</sup>

The UN would be complicit in this violation were it to support the transfer of Cases 003/004 to a fully domestic court with the knowledge that the suspects are highly unlikely to be genuinely tried. As “a subject of international law...capable of possessing international rights and duties,”<sup>71</sup> the UN possesses an obligation to ensure the cases legitimately before the ECCC proceed through the judicial system impartially, fairly, and expeditiously.<sup>72</sup>

Another option that the UN has reportedly contemplated<sup>73</sup> involves its partial withdrawal from the ECCC *Agreement*, to continue supporting Case 002 but effectively cease all official backing of Cases 003/004.<sup>74</sup> Not only would this violate international obligations, but it

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<sup>67</sup> UN Security Council Resolution 1674, UN Doc. No. S/RES/1674, paras. 7, 8 (April 28, 2006): As the UN Security Council affirmed, prosecuting these crimes and “ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses.” In affirming the importance of prosecution, the UN has called attention to “the full range of justice and reconciliation mechanisms to be considered, including national, international and ‘mixed’ criminal courts and tribunals and truth and reconciliation commissions, and *notes* that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims.”

<sup>68</sup> *See e.g.* UN Security Council Resolution 1674, UN Doc. No. S/RES/1674, para. 3 (April 28, 2006) recalling: “that deliberately targeting civilians and other protected persons as such in situations of armed conflict is a flagrant violation of international humanitarian law, *reiterates* its condemnation in the strongest terms of such practices, and *demand*s that all parties immediately put an end to such practices” (emphasis added).

<sup>69</sup> *See* Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Non Bis In Idem* and Amnesty and Pardon), File No. 002/19-09-2007/ECCC/TC, E51/15 (Nov. 3, 2011) (“Sary Preliminary Objections Decision”), para. 47, *citing e.g.* the ICTY (in 1993), the ICTR (1994), the SCSL (2002), the hybrid tribunals in Kosovo (1999), the Special Panels for Serious Crimes in East Timor (1999), the Special Tribunal for Lebanon (2007), the Court of Bosnia and Herzegovina War Crimes Chamber (2005), and the ECCC (2003).

<sup>70</sup> The ECCC has noted Cambodia’s “absolute duty” to prosecute certain international crimes, including grave breaches of the Geneva Conventions, genocide, and torture, pursuant to its international treaty obligations. *See* Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Non Bis In Idem* and Amnesty and Pardon), File No. 002/19-09-2007/ECCC/TC, E51/15 (Nov. 3, 2011) (“Sary Preliminary Objections Decision”), para. 28.

<sup>71</sup> *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission (2001), Article 1, commentary (para. 7), p. 34, *citing Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 179.

<sup>72</sup> The UN Charter states explicitly one of the purposes of the organization is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” Charter of the United Nations (June 26, 1945), available at: <http://www.un.org/en/documents/charter/index.shtml> (“UN Charter”), Chapter 1, article 1, para. 1. *See also* UN Charter, Chapter VII, article 39, endowing the Security Council with the power to take effective measures to restore international peace and security.

<sup>73</sup> Open Society Justice Initiative interviews with ECCC and donor sources, Phnom Penh, February-July, 2012.

<sup>74</sup> There is no mechanism for partial withdrawal in the present agreement; such an action would require an amendment to the *Agreement*. For more analysis of this issue, see discussion *infra* Section IV of this report.

would also be in direct contravention of the ECCC *Agreement*, governed by the Vienna Convention on the Law of Treaties (“Vienna Convention”) and negotiated for the purpose of bringing to justice the perpetrators of Khmer Rouge era atrocities.<sup>75</sup> Article 26 of the Vienna Convention (“*pacta sunt servanda*”) states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. It is not possible to amend the *Agreement* in order to eschew the international obligation to prosecute.

The failure of the ECCC to genuinely investigate and—should the facts and law lead to it—indict individuals in Cases 003/004 would also violate victims’ rights to truth and justice under international law. International standards include not only fairness to the accused, but also to victims of atrocities and the international community.<sup>76</sup> In addition, the UN Impunity Principles provide broad protections for the “right to know” and the “right to justice.” The right to know recognizes the inalienable right of all people to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.<sup>77</sup> Ensuring full and effective exercise of the right to truth is meant to safeguard against the recurrence of violations.<sup>78</sup> States are required to undertake prompt, thorough, independent and impartial investigations of human rights and international humanitarian law violations.<sup>79</sup> Provisions should be made for victims to institute proceedings, as individuals or collectively, and particularly as civil parties.<sup>80</sup> Although perhaps not yet elevated to the status of customary international law, these principles represent developing norms that the world expects the UN—as a pioneer of rule of law development and international justice—to advance.

Similarly, under its own laws, the Cambodian government has an obligation not to harbor perpetrators of mass atrocities. The Cambodian Penal Code codifies protection for victims in stating that its provisions will not operate to deny justice for victims of violations of international humanitarian law, international custom, or international conventions ratified by Cambodia.<sup>81</sup> Despite these international obligations, the Cambodian government’s consistently stated opposition to Case 003/004 present grave, and real, risks that Cases 003/004 would not be genuinely tried domestically.<sup>82</sup>

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<sup>75</sup> ECCC Agreement, Article 2.2, and ECCC Agreement, Article 1, Purpose: the object and purpose of the Agreement and Law is to prosecute “senior leaders of the Democratic Kampuchea and those most responsible for crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia from the period of 1975 to 1979.”

<sup>76</sup> See *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, Sept. 14, 2004 (“*Ademi Decision*”), para. 53.

<sup>77</sup> See UN Doc. No. E/CN.4/2005/102/Add.1, Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity (Diane Orentlicher) and Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Feb. 8, 2005 (“Impunity Principles”), Principle 2: The Inalienable Right to Truth.

<sup>78</sup> Impunity Principles, Principle 2: The Inalienable Right to Truth.

<sup>79</sup> Impunity Principles, Principle 19: Duties of States with Regard to the Administration of Justice.

<sup>80</sup> Impunity Principles, Principle 19: Duties of States with Regard to the Administration of Justice.

<sup>81</sup> Penal Code of Cambodia, Article 8: No impunity for serious violations of international humanitarian law.

<sup>82</sup> See Justice Initiative Report June 2011 at 11-12.

### 3. *Ability of receiving state to prosecute in accordance with international fair trial standards*

Internationalized courts must ensure that successor courts will conduct trials in accordance with internationally recognized fair trial standards, including trial by a competent, independent, and impartial tribunal.<sup>83</sup> As emphasized by the UN Human Rights Committee, “[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.”<sup>84</sup> The ECCC is legally bound to uphold international fair trial standards, consistent with Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), as provided in its *Law, Agreement, and Internal Rules*.<sup>85</sup>

The independence and impartiality of the Cambodian judiciary cannot be guaranteed.<sup>86</sup> In the first place, the government has never adopted a law on the status of judges and

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<sup>83</sup> See e.g. *The Prosecutor v. Radovan Stankovic*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11BIS Referral, Sept. 1, 2005 (“*Stankovic* Appeal Decision”), para. 19.

<sup>84</sup> See UN Human Rights Committee General Comment No. 32, para. 19, available at: [http://sim.law.uu.nl/SIM/CaseLaw/Gen\\_Com.nsf/a1053168b922584cc12568870055fbbc/177d6404e42d30d7c125736100432793?OpenDocument](http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc/177d6404e42d30d7c125736100432793?OpenDocument).

<sup>85</sup> See ECCC Agreement, Article 12, para. 2: “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party;” ECCC Law, Article 33: “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights;” ECCC Internal Rules (Rev. 8), Rule 21: “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.” See also International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (Dec. 16, 1966), Article 14, elaborating these rights as follows:

1. The equality of all persons before the court.
2. A fair and public hearing by a competent, independent, and impartial tribunal established by law.
3. The presumption of innocence until guilt is proven according to the law.
4. The right of an accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
5. The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing.
6. The right of an accused to be tried without undue delay.
7. The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.
8. The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
9. The right of an accused to examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him.
10. The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings.
11. The right of an accused not to be compelled to testify against himself or to confess guilt.

<sup>86</sup> A truly independent tribunal must be independent of the country’s executive, legislature, and parties to a case. See *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, June 28, 2011, para. 174 (“*Uwinkindi* Referral Chamber Decision”), citing

prosecutors, despite the Constitution requiring one.<sup>87</sup> This ensures that there are no guarantees for the independence of individual judges.<sup>88</sup> There is ample evidence that the judiciary lacks independence from the executive branch, compounded by demonstrated political interference at the ECCC.<sup>89</sup> Political control of the Cambodian judiciary is evidenced by an endless stream of politically-motivated prosecutions coupled with a consistent failure to prosecute suspects who are politically well-connected. Of particular interest, Wikileaks cables reveal concerns on the part of the ECCC's Deputy Director of Administration Knut Rosandhaug about the RGC's "understand[ing of] the concept of separation of power."<sup>90</sup>

The failure to prosecute the real killers of Chea Vichea—the slain labor leader and human rights defender—raised widespread concerns about the independence of the judiciary as well as the investigation process, the treatment of suspects, and intimidation of witnesses.<sup>91</sup> Although an appeals court eventually overturned the sentences of the two men wrongly convicted of Mr. Vichea's murder, there were no attempts to apprehend the real suspects, in spite of numerous eyewitnesses to the crime.<sup>92</sup> Later, the judge who overturned the sentences was reassigned, with the government citing errors in his decision-making as the

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*Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v. Italy*, App. No. 8603/79, European Court of Human Rights, December 18, 1980, p. 212.

<sup>87</sup> 1993 Constitution of the Kingdom of Cambodia ("Constitution"), Article 116, available at:

<http://www.constitution.org/cons/cambodia.htm>.

<sup>88</sup> See Press Release, "Cambodia: Legal Foundation and Framework for the Country's Judiciary Required," Asian Legal Resource Center (Aug. 31, 2009), available at:

[http://www.alrc.net/doc/mainfile.php/alrc\\_st2009/574/](http://www.alrc.net/doc/mainfile.php/alrc_st2009/574/).

<sup>89</sup> The ICC offers factors for assessing the independence of the judiciary by looking to: alleged involvement of the state in the commission of the alleged crimes; extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in investigation, prosecution and trial; and corruption of investigators, prosecutors and judges. Office of the Prosecutor, International Criminal Court, Draft Policy on Preliminary Examinations, October 4, 2010, The Hague, Netherlands, paras. 64 and 65.

<sup>90</sup> *Friends of the ECCC Discuss Staffing Challenges, Budget, and the Way Forward*, US Embassy Phnom Penh to Sec State DC, 09PHNOMPENH765 (Oct. 16, 2009), available at:

<http://cablegatesearch.net/cable.php?id=09PHNOMPENH765&q=rosandhaug>. "Stating his belief that Cambodia did not intend to violate international standards at the KRT, Rosandhaug nonetheless cautioned that some in the RGC did not understand the concept of separation of powers, such as between the legislature and the judiciary. Although he gave no indication of any interference to date, Rosandhaug appealed for the United States to remain engaged in the ECCC as both a donor and as a moral leader to communicate the international community's expectations for credible justice." (para. 5).

<sup>91</sup> See Amnesty International Report, "Kingdom of Cambodia: The Killing of Trade Unionist Chea Vichea," December 3, 2004 ("Amnesty Report"), available at: [www.unhcr.org/refworld/pdfid/42ae98890.pdf](http://www.unhcr.org/refworld/pdfid/42ae98890.pdf), at 2, 7.

Chea Vichea, a prominent and internationally respected trade union leader, was assassinated on January 22, 2004. Prior to his death, Mr. Vichea had been an outspoken government critic and had received numerous death threats. It is widely believed that government agents killed Mr. Vichea. According to eyewitnesses, two gunman on a motorbike pulled up to a newspaper stall where Mr. Vichea was reading the morning paper, one stepped off the bike and shot three times at point-blank range, killing him instantly.

<sup>92</sup> See Press Release, International Trade Union Confederation, "Chea Vichea Case: Release of Born Samnang and Sok Sam Oeun On Bail," January 6, 2009, available at: <http://www.ituc-csi.org/chea-vichea-case-release-of-born.html>; see also Chrann Chamroeun, "Chea Vichea Case Reopened," August 18, 2009, *Phnom Penh Post*, available at: <http://khemernz.blogspot.com/2009/08/chea-vichea-case-reopened.html>.

reason for doing so.<sup>93</sup> The judge's decision was only erroneous, from the SCM's perspective, to the extent that it did not adhere to the government's will.

The outcome in the high profile Vichea case is one of many examples of a pattern of impunity for government officials implicated in violent crimes and reflects the level of political control of the justice system.<sup>94</sup> The Cambodian League for the Promotion and Defense of Human Rights (LICADHO) highlighted these concerns in a press release earlier this year:

Rather than adopting and enacting the Law on the Status of Judges and the amendment of the Law on the Organization and Functioning of the Supreme Council of Magistracy...and rather than taking any other concrete steps to ensure the independence of the judiciary, the government has continued to demonstrate a complete disregard for the rule of law and the independence of the judicial branch. At least seven episodes of gun violence at protests have been documented since November 2011, but there have been arrests in only one case - and only following the Prime Minister's highly publicized demand for action against the specific perpetrators in that case. The ongoing impunity for the perpetrators of six recent incidents is particularly troubling given that there is clear video and photographic evidence and dozens of witnesses to the violence.<sup>95</sup>

Another example of government control over the judicial process was on display in relation to former Bavet town governor, Chhouk Bandith, who allegedly shot and seriously wounded three women among some 6,000 workers protesting factory conditions in eastern Svay Rieng province on February 20, 2012.<sup>96</sup> Despite his confession, Mr. Bandith was only charged with causing unintentional injury, under Article 236 of Cambodia's Penal Code, punishable by as few as six days to a maximum of two years imprisonment.<sup>97</sup> While Bandith's trial has finally

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<sup>93</sup> See Amnesty Report at 10 citing "Chea Vichea Judge is removed" March 22-26, 2004, *The Cambodia Daily*. On March 19, 2004, Judge Heng Thirith of the Phnom Penh Municipal Court sought to dismiss the case against the two suspects due to lack of evidence. After the prosecutor appealed the dismissal, the case was transferred to the Court of Appeals. Only days later, on March 26, 2004, the Supreme Council of Magistracy announced Judge Thirith's reassignment to a provincial court.

<sup>94</sup> For a full recounting of impunity in Cambodia, see Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, "Continuing Patterns of Impunity in Cambodia," October 5, 2005, available at: [http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic\\_CMB05102005E.pdf](http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf).

<sup>95</sup> Press Release, "All Talk, Little Action: Two Years After UN Human Rights Review, Cambodia Continues to Ignore Key Recommendations," *Cambodian League for the Promotion and Defense of Human Rights (LICADHO)* (March 12, 2012), available at: <http://www.licadho-cambodia.org/pressrelease.php?perm=272>.

<sup>96</sup> See May Tithara and David Boyle, "Fears, rumors in wake of shooting," February 23, 2012, *Phnom Penh Post*, available at: <http://www.phnompenhpost.com/index.php/2012022354684/National-news/fear-rumours-in-wake-of-shooting.html>; see also Alex Watts, "The Factory Shooting Farce & Why Cambodia Needs An Aung San Suu Kyi," March 19, 2012, *Khmer 440.com*, available at: <http://www.khmer440.com/k/2012/03/the-factory-shooting-farce-why-cambodia-needs-an-aung-san-suu-kyi/>.

<sup>97</sup> See Kuch Naren and Dene-Hern Chen, "Governor Charged for SEZ Shootings," April 20, 2012, *The Cambodia Daily*, pp. 1, 20.

been scheduled, Cambodian human rights workers have highlighted the fact that such delays are emblematic of cases involving the politically-connected.<sup>98</sup>

On April 26, 2012, a prominent environmental activist was shot dead by military police.<sup>99</sup> Chut Wutty was killed while investigating illegal logging-related activity in Cambodia's Cardamom Mountains. After offering conflicting explanations for Chut Wutty's death, the government-led investigation concluded that Mr. Wutty was shot and killed by In Rattana, a military officer, over a personal dispute and that a private security officer accidentally shot and killed Rattana in attempting to disarm him.<sup>100</sup> The government maintains that the killing arose from the "personal dispute," allegedly caused by Wutty's refusal to hand over the memory card in his camera that he had been using to photograph the illegal logging site. However, rights groups criticized the conclusions of the government's investigation, finding it unlikely that In Rattana would have fired at Mr. Wutty over a verbal dispute and also noting that the security guard charged with shooting Rattana was not usually armed.<sup>101</sup> Mr. Wutty, who had been fighting against illegal logging and environmental destruction for over 15 years, had faced numerous incidents of government threats and intimidation in the past.<sup>102</sup>

Mr. Wutty's case also highlights issues surrounding the extent to which the government targets its opponents, or those perceived to operate counter to government interests. In 2009, Moeung Sonn was convicted of "dissemination of disinformation" and sentenced to two years imprisonment *in absentia* for saying that a proposed decorative lighting installation at Angkor Wat could damage the 12<sup>th</sup> century temple.<sup>103</sup> The suit was initially brought against Mr. Sonn by Deputy Prime Minister Sok An, who is also president of the Apsara Authority, which oversees maintenance of the ancient temples. Government lawyers claimed the verdict was appropriate because Mr. Sonn's words "could cause turmoil impacting the

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<sup>98</sup> May Titthara, "Bandith Trial to Begin Soon," *Phnom Penh Post*, September 17, 2012, p. 3. LICADHO senior investigator, Om Samath, notes that "If the wealthy, powerful and high-ranking people are involved in crime, the procedure will be taken in slow motion... [t]he court has no commitment to seek justice for the victim." See also, Lauren Crothers and Khuon Narim, "In Cambodian Courts, Scales of Justice Are Tilted," *The Cambodia Daily*, August 17, 2012, pp. 1-2: "Mr. Bandith's case... would appear emblematic of a string of recent cases that underlines just how immune high-powered officials are when they come before the politically-aligned legal system. In April, three men from Prime Minister Hun Sen's bodyguard unit brutally beat four people in a Koh Kong hotel. They were charged and sentenced in July to three years in jail, but a few days later were quietly released from detention with little explanation."

<sup>99</sup> See Saing Soenthrith and Abby Seiff, "Forestry Activist Chut Wutty Shot Dead," April 27, 2012, *The Cambodia Daily*, p. 1-2; May Titthara and David Boyle, "Activist Gunned Down: Forest advocate Chut Wutty slain in K Kong," April 26, 2012, *Phnom Penh Post*, p. 1-2, available at: <http://www.phnompenhpost.com/index.php/2012042655803/National-news/environmental-activist-chut-wutty-shot-dead.html>.

<sup>100</sup> See May Titthara, "Chut Wutty investigation wraps following shooting charge," May 7, 2012, *Phnom Penh Post*, available at: <http://www.phnompenhpost.com/index.php/2012050755993/National-news/case-closed-in-shooting.html>.

<sup>101</sup> See Kuch Naren, "Continue Probe Into Killings, Rights Groups Say," May 8, 2012, *The Cambodia Daily*, p. 1, 24.

<sup>102</sup> See David Boyle and Bridget Di Certo, "Another chapter in bloody history," April 27, 2012, *Phnom Penh Post*, p. 3, available at: <http://www.phnompenhpost.com/index.php/2012042755825/National-news/another-chapter-in-bloody-history.html>.

<sup>103</sup> See Khy Sovuthy and Abby Seiff, "Verdict Stands in Angkor Wat Lighting Case," *The Cambodia Daily*, pp. 1 and 18.

country's safety.” As former U.S. Ambassador to Cambodia Carol Rodley noted in a leaked diplomatic cable: “disinformation suits are the ruling Cambodian People’s Party’s weapon of choice...in silencing its critics.”<sup>104</sup>

The case was also indicative of another worrying trend, the judicial practice of changing charges on appeal in order to accommodate political considerations. In May 2011, the Court of Appeals upheld Sonn’s sentence but changed the charge from disinformation to incitement.<sup>105</sup> In April 2012, the Supreme Court of Cambodia upheld the conviction and ruled that the changing of the charge did not violate Cambodian law.<sup>106</sup> The same action occurred in the case of a LICADHO activist charged and convicted of disinformation in August 2010. On appeal, the Appeals Court changed the sentence to incitement, under Article 495 of Cambodia’s new Penal Code, a provision that did not exist at the time of activist’s arrest.<sup>107</sup> This is a clear violation of fair trial rights. Lack of protection for other rights (including protection for witnesses), evidence of tampering with witness testimony, and inadequate criminal investigation standards also counsel against referral of ECCC cases to the Cambodian courts.

Many other cases highlight the government’s use of the judicial process to target critics and political opponents. The most recent example is that of Mam Sonando, founder of Beehive Radio, one of only three independent radio stations in Cambodia “which regularly broadcasts reports that are critical of the Royal Government of Cambodia.”<sup>108</sup> A verdict in his case, in which rights groups monitoring the trial said no evidence was presented connecting Sonando with the charges (of “secessionism”) against him, was rendered on October 1, 2012.<sup>109</sup> Alarming, 71-year-old Sonando was sentenced to 20 years imprisonment, while one of his co-defendants, Bun Ratha, was sentenced to 30 years, *in absentia*, and a number of others to shorter terms.<sup>110</sup> Meanwhile, media reports consistently reveal a loss of faith in the

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<sup>104</sup> Id. at 18.

<sup>105</sup> Id. at 1.

<sup>106</sup> Id. at 1.

<sup>107</sup> Leang Sokchouen, LICADHO staff member, who was prosecuted for allegedly producing and distributing anti-government leaflets in Takeo province in May 2010. See “Cambodia: Free Human Rights Worker,” July 14, 2011, *Human Rights Watch*, available at: <http://www.hrw.org/news/2011/07/14/cambodia-free-human-rights-worker>.

<sup>108</sup> See, Cambodian Centre for Human Rights, Press Release: Tomorrow’s Mam Sonando Hearing an Opportunity to Set the Record Straight on Fair Trial Rights, September 10, 2012, available at: [http://www.cchr-cambodia.org/index\\_old.php?url=media/media.php&p=press\\_detail.php&prid=285&id=5](http://www.cchr-cambodia.org/index_old.php?url=media/media.php&p=press_detail.php&prid=285&id=5). CCHR notes that “The RGC has committed to judicial reform as part of its “Rectangular Strategy” and stated strategy on legal and judicial reform, and has also accepted all 91 recommendations made by UN member states under the 2009 Universal Periodic Review – including judicial reform. The reality is, though, that things are going the opposite way insofar as transparency and fairness in criminal procedure are concerned with the end result that Cambodians have almost lost faith in the system.”

<sup>109</sup> See, Cambodian Centre for Human Rights, Press Release: Lack of Evidence Leaves Court Little Choice but to Acquit Mam Sonando and Set Him Free, September 13, 2012, available at: [http://www.cchr-cambodia.org/index\\_old.php?url=media/media.php&p=press\\_detail.php&prid=288&id=5](http://www.cchr-cambodia.org/index_old.php?url=media/media.php&p=press_detail.php&prid=288&id=5).

<sup>110</sup> Abby Seiff, “Activist Mam Sonando gets 20 years,” *Phnom Penh Post*, October 1, 2012, available at: <http://www.phnompenhpost.com/index.php/2012100159018/National-news/activist-mam-sonando-gets-20-years.html>

Cambodian judicial system by Cambodia's most vulnerable populations, seeking redress for human rights violations.<sup>111</sup>

#### 4. Sufficiency of national legal framework to criminalize offenses charged

Other barriers to referral include discrepancies in substantive criminal law at the national level, including, for example, lack of command responsibility and other forms of liability.<sup>112</sup> While some of these obstacles are present in the Cambodian context, deficiencies in national criminal law can be overcome through legislative amendment, as illustrated by the ICTR referral jurisprudence in Rwanda.<sup>113</sup> However, the major concerns about the ability of the Cambodian legal system to deliver fair and independent justice cannot be overcome by mere technical legislative amendments.<sup>114</sup>

#### 5. Appropriateness of jurisdiction over mass atrocity suspects

International courts also refuse to refer cases to wholly national jurisdictions where the gravity of the offenses and level of responsibility of the accused are high.<sup>115</sup> The ECCC's personal jurisdiction extends over "senior leaders" and "those most responsible" for crimes committed during the Khmer Rouge period. While the ECCC's Statute and Rules do not

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<sup>111</sup> See, for example, Lauren Crothers and Khuon Narim, "In Cambodian Courts, Scales of Justice are Tilted," *The Cambodia Daily*, August 17, 2012, pp. 1-2: [quoting Yeng Virak, executive director of the Community Legal Education Centre, an organization that offers legal assistance to the poor] "It's a double standard that the weak and poor lose and the powerful and rich and well-connected can get away with it." See also, Kong Sothananarith, "Desperate Boeung Kak Protesters Turn to the Spirit World," *Voice of America (Khmer)*, June 7, 2012, available at: <http://www.voacambodia.com/content/desperate-boeung-kak-protesters-turn-to-the-spirit-world-157846675/1359550.html>. "When citizens run to abstract beliefs, such as this case, it means people have lost all confidence and belief in state institutions, such as the judicial system and the authorities, to solve their problems," said Moeun Tola, a labor rights activist for the Community Legal Education Center."

<sup>112</sup> See e.g., *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, 4 December 2008, paras. 12, 19 ("Hategekimana Appeal Decision") (upholding decision of the Trial Chamber to deny transfer of the accused to the courts of Rwanda based on lack of fair trial protections); see also Bekou, Olympia, *Rule 11 bis: An examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 *Fordham Int'l L.J.* 723, 763-764, February 2010, noting that applicable substantive law of the state informs a determination regarding the state's capacity to take jurisdiction.

<sup>113</sup> See *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("Uwinkindi Decision").

<sup>114</sup> Contrast the Cambodian context with the ICTR. The Referral Chamber deemed evidence of due process violations in one trial proceeding in Rwanda insufficient to constitute evidence of the lack of impartiality of the entire Rwandan judiciary. See *Uwinkindi* Decision, para. 35. Weighed against the consistently revised Transfer Law requiring expansive fair trial protections, evidence of political interference was not enough to persuade the Referral Chamber to deny transfer to national jurisdiction. In contrast, evidence of the lack of impartiality and independence of the Cambodian judiciary is overwhelming and is not counter-balanced by any laws ensuring enhanced fair trial protection.

<sup>115</sup> See ICTY Rules of Evidence and Procedure, Rule 11 bis, Rev. 44, December 2009, (C): "In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused." See also *Jankovic*, para. 19; *Stankovic* Appeal Decision, paras. 7 and 15-16 (noting that "...the Tribunal judges amended Rule 11bis to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the Tribunal has implicit authority to do so under the Statute."); See also Bekou at 737 (discussion of ICTY referral decisions).

define either term, an analysis of the tribunal's own decisions, related jurisdictions, and the provision's drafting history, including the preliminary report by the Group of Experts, all suggest that the factors used by ICTY to evaluate jurisdiction under its own provision offer an informative analytical framework.

Whether the ECCC may exercise personal jurisdiction over a suspect can be established by considering both the gravity of the offense and the level of responsibility of the accused. Individual factors for each are listed below.

1. Gravity of the offense:
  - i. the number of victims;
  - ii. the timeframe and geographic area in which the crimes were allegedly committed;
  - iii. the number of separate incidents;
  - iv. the way in which the crimes were allegedly carried out; and
  - v. any other circumstances.
  
2. Level of responsibility:
  - i. role of the accused in the commission of the alleged offenses; and
  - ii. position and rank of the accused, based on his *de facto* or *de jure* authority.<sup>116</sup>

An analysis of the publicly known allegations against the Case 003/004 suspects based on these criteria strongly suggests that each of the suspects would meet even the higher jurisdictional threshold for the ICTY, such that a dismissal of the cases without thorough judicial investigations revealing information to the contrary would amount to an abuse of judicial power. This is further reinforced by the findings of Reserve International Co-Investigating Judge Laurent Kasper-Ansermet, prior to his departure from the ECCC.<sup>117</sup>

The offenses alleged against the two Case 003 suspects are extremely grave. Their actions individually and as part of a joint criminal enterprise are alleged to have resulted in the deaths of several thousand members of the Royal Army of Kampuchea at notorious killing sites throughout the country.<sup>118</sup> The Case 003 suspects are also alleged to have kidnapped an unknown number of foreign nationals, generally resulting in their torture and execution. The alleged crimes were characterized as physical and mental abuse, including the creation of widespread paranoia through repeated purges.

It is equally difficult to disclaim the Case 003 suspects' level of responsibility. Both suspects are alleged to have held positions of significant *de jure* authority in the political and military

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<sup>116</sup> *Prosecutor v. Milan Lukić, Sredoje Lukić*, Case No. IT-98-32/1 PT, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, April 5, 2007, para. 27, at [http://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/tdec/en/070405.pdf](http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tdec/en/070405.pdf).

<sup>117</sup> See Case File No. 003/07-09-2009-ECCC-OCIJ, Decision of Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, D49, paras. 16-20, available at: <http://www.eccc.gov.kh/en/document/court/decision-personal-jurisdiction-and-investigative-policy-regarding-suspect>.

<sup>118</sup> Case File No. 003/07-09-2009-ECCC-OCIJ, Decision of Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, D48, paras. 16-23.

ranks of the CPK, exercising *de facto* control over their subordinates, and planning and implementing policies at detention centers and work sites within their areas of control.<sup>119</sup> As such, both of the suspects are alleged to be directly responsible for severe and widespread crimes and are arguably precisely the types of offenders contemplated by the ECCC's personal jurisdiction provision. This is further reinforced by the fact that these individuals are among suspect numbers six to 10 on the ECCC's docket.

Similarly, all three suspects in Case 004 are former Khmer Rouge cadre who exercised authority at the zone levels as well as at detention and torture centers.<sup>120</sup> They are consequently alleged to be responsible for tens of thousands of deaths, as well as for inhumane living conditions, forced labor, disappearances, and other human rights violations. Prosecutors at the ECCC estimate that between 250,000 and 300,000 people were killed while under the authority of the Case 004 suspects.<sup>121</sup> It is difficult to conceive of legitimate jurisdictional grounds on which the case might be dismissed.

#### **IV. Legal Barriers to the UN's Partial Withdrawal from the ECCC**

As noted, pulling out solely of Cases 003/004 would amount to a violation of the UN's obligations under the ECCC *Agreement*. There is no provision for partial withdrawal.

According to the Establishment Law, the ECCC dissolves following definitive conclusion of the proceedings.<sup>122</sup> Withdrawal from or termination of the *Agreement* is not possible until all proceedings at the ECCC have drawn to a close, or if and until the UN has lost confidence in the court's ability to hold fair and independent trials. Cases 003/004 are currently under investigation, concerning suspects believed to be responsible for, *inter alia*, the mass murder and torture of tens of thousands of victims. The proceedings are therefore far from any definitive conclusion.

Absent the conclusion of proceedings, termination or withdrawal from the *Agreement* is permitted in conformity with its terms.<sup>123</sup> In the ECCC *Agreement*, Article 28 allows the UN to cease providing assistance, financial or otherwise, should the RGC change the structure or organization of the ECCC or otherwise cause the court to function in a manner that does not conform to the *Agreement* terms.<sup>124</sup> There are grounds to support the UN's total withdrawal

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<sup>119</sup> See Case File No. 003/07-09-2009-ECCC-OCIJ, Decision of Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, D49, paras. 21-25. Case File No. 003/07-09-2009-ECCC-OCIJ, Decision of Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, D48, paras. 24-28.

<sup>120</sup> See Douglas Gillison, "Extra-ordinary Injustice," February 27, 2012, *The Investigative Fund (The Nation Institute)*, available at: [http://www.theinvestigativefund.org/investigations/international/1612/extra-ordinary\\_injustice/](http://www.theinvestigativefund.org/investigations/international/1612/extra-ordinary_injustice/).

<sup>121</sup> See Douglas Gillison, "Crimes Scenes of the Khmer," Feb. 27, 2012, *The Investigative Fund (The Nation Institute)*, available at: [http://www.theinvestigativefund.org/investigations/international/1614/crime\\_scenes\\_of\\_the\\_khmer/](http://www.theinvestigativefund.org/investigations/international/1614/crime_scenes_of_the_khmer/).

<sup>122</sup> ECCC Law Article 47: Court shall automatically dissolve following "definitive conclusion" of the proceedings.

<sup>123</sup> Vienna Convention on the Law of Treaties, 1155 UNT.S. 331 (May 23, 1969) ("Vienna Convention"), Article 54, available at: <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html>.

<sup>124</sup> ECCC Agreement, Article 28, Withdrawal of cooperation.

from the *Agreement*, although as noted above, the Justice Initiative does not believe total withdrawal is appropriate at this time. But there is nothing to allow the UN to withdraw support for Cases 003/004 only. If the UN has lost all confidence in the ECCC's ability to perform its functions independently and fairly, it must withdraw. It cannot pick and choose cases on the ECCC's docket.

The *Agreement* also states that amendments must be preceded by consultation between the parties and the Vienna Convention sanctions amendments as agreed to by the parties.<sup>125</sup> However, a modification to a treaty cannot be incompatible with the “effective execution of the object and purpose of the treaty as a whole.”<sup>126</sup> The object and purpose of the ECCC Law is to bring to justice individuals under the court's jurisdiction, not to find a way to allow them to escape justice.<sup>127</sup> Cambodia and the UN are therefore bound by their agreement to cooperate in prosecuting the senior leaders and those most responsible for gross human rights violations during the Khmer Rouge era.<sup>128</sup> Furthermore, evidence of bad faith cannot be offered as reason to amend. An amendment allowing partial withdrawal would serve to sanction the already demonstrated bad faith on the part of the Cambodian government, evidence of which has been extensively documented.<sup>129</sup>

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<sup>125</sup> ECCC Agreement Article 2.3, Vienna Convention Article 39.

<sup>126</sup> Vienna Convention Article 41.1(b).

<sup>127</sup> The object and purpose of the Agreement and Law is to prosecute “senior leaders of the Democratic Kampuchea and those most responsible for crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia from the period of 1975 to 1979”. ECCC Agreement, Article 1, Purpose.

<sup>128</sup> Interpretation of these terms may be assisted by looking to Article 31 of the Vienna Convention. Article 31.1 states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” “Context” refers to the text, preamble and annexes to the treaty, in addition to an instrument concluded in connection with the treaty, which here includes the ECCC Law. Vienna Convention, Article 31.2. The purpose of the law is to bring to trial “senior leaders of the Democratic Kampuchea and those who were most responsible” for the crimes and serious violations enumerated above. Article 32 of the Vienna Conventions allows recourse to supplementary means of interpretation, to confirm or determine the meaning of ambiguous terms.

<sup>129</sup> Press Release, Open Society Justice Initiative, “UN Must Reconsider Commitment to Khmer Rouge Court,” March 21, 2012, available at: <http://www.soros.org/initiatives/justice/news/cambodia-statement-20120321>:

- The resignation of two international investigating judges due to apparent Cambodian government interference in the conduct of their work.
- The Cambodian government's January 2012 breach of the agreement establishing the court—categorized as such by the UN itself—in repudiating express terms which required it to immediately endorse Judge Kasper-Ansermet's appointment as full co-investigating judge following the resignation of Judge Siegfried Blunk.
- Repeated statements by Cambodian government officials, including the prime minister, the foreign minister, and government spokespersons, that the court will close after its prosecution of those currently being tried and will not investigate or adjudicate two additional cases previously referred for investigation.
- Persistent, well-documented violations of the rights of suspects and victims alike throughout the course of flawed judicial investigation into Cases 003 and 004. Violations have been documented by international judges of the court's Pre-Trial Chamber, as well as Judge Kasper-Ansermet himself, and include allegations of serious judicial misconduct.
- Persistent attempts by national Pre-Trial Chamber judges to thwart the provisions of the Agreement designed to guarantee the court's independence, by removing international judicial officers from decision-making in relation to Cases 003 and 004.

Amending the *Agreement* to allow partial withdrawal would be tantamount to terminating the *Agreement*. Such an action would not relieve the parties of obligations owed under international law that are independent of the *Agreement*.<sup>130</sup> This includes the duty to fulfill the purpose for which the ECCC was established, namely, the prosecution of individuals accused of genocide and other crimes against humanity. Similarly, under the Vienna Convention, termination of a treaty does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination.<sup>131</sup> The rights of victims cannot be obstructed by termination, nor is the Cambodian government's obligation to provide means of redress for gross human rights violations vitiated. Further, the UN, having created a legitimate expectation of access to justice in all cases before the ECCC, must not facilitate the Cambodian government's obfuscation of its legal obligations.

## V. Conclusion

The ECCC, the UN, and the court's donors face a serious problem with Cases 003/004: namely, the Cambodian government's political opposition to accountability for Khmer Rouge crimes for all but a small, pre-selected group of persons. To address this problem, the UN, donors, and the court's staff must rededicate themselves to the task at hand and demonstrate increased determination to fulfill the court's mission—including pursuing Cases 003/004 to their conclusion. As this report has demonstrated, other options, including transferring cases to a wholly Cambodian jurisdiction or a partial withdrawal by the UN from the ECCC *Agreement*, are untenable. Justice for the Khmer Rouge's victims requires that the court complete all of the cases currently before it.

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<sup>130</sup> Vienna Convention on the Law of Treaties Article 43 – invalidity, termination or denunciation of a treaty, or withdrawal of a party from it, shall not in any way impair duty of any state to fulfill any obligation of a state to which it would be subject to under international law independent of the treaty.

<sup>131</sup> Vienna Convention on the Law of Treaties Article 70(1): Termination of treaty (unless otherwise provided for), (a) releases parties from obligation under the treaty but (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

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