

REPORT

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia November 2011

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA faces an unprecedented crisis of confidence, due to allegations of judicial misconduct. The crisis can only be addressed through an independent inquiry by the UN. This report examines the recent events leading to the current crisis, establishes the legal basis for an inquiry, and offers recommendations for action by the UN, the Royal Government of Cambodia, and donors to the court.

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/initiatives/justice/focus/international_justice/articles_publications/sub_listing.



EXECUTIVE SUMMARY AND RECOMMENDATIONS

This report summarizes events at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since June 2011, including the resignation of International Co-Investigating Judge Siegfried Blunk in October 2011. It argues that Judge Blunk's resignation has not reduced the pressing need for the United Nations to establish an independent inquiry into allegations of judicial misconduct, incompetence, and lack of judicial independence by the co-investigating judges at the ECCC. This report sets out both the actions that have given rise to these allegations and the legal principles that enable an investigation to be established by the UN without compromising the principle of judicial independence.

KEY RECOMMENDATIONS FROM THIS REPORT

To United Nations Secretary-General Ban Ki-moon and Under Secretary-General for Legal Affairs and Legal Counsel Patricia O'Brien:

- Appoint an independent panel of experts, comprised of three judges of international standing, preferably with relevant experience in international criminal courts or *ad hoc* tribunals, to conduct a full inquiry into allegations of misconduct, incompetence, and lack of independence in the judicial investigations of Cases 003/004 by Judge Siegfried Blunk and Judge You Bunleng.
- Take all necessary measures to ensure the immediate appointment of International Co-Investigating Judge Laurent Kasper-Ansermet (Switzerland) to office in full accordance with Article 5.6 of the *ECCC Agreement*.¹

To the UN and donors to the ECCC:

- Take all necessary measures to ensure that the Office of the Co-Investigating Judges, including Co-Investigating Judge Laurent Kasper-Ansermet, is provided with all necessary financial and human resources to fully meet all legal duties regarding Cases 003/004.
- In revising the ECCC's budget for 2012, ensure that adequate financial provision is made for the conduct of full outreach activities to solicit applications for civil party status in Cases 003/004.

¹ Article 5.6 of the *ECCC Agreement* states that “[i]n case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post **must be** the reserve international co-investigating judge.” (Emphasis added.)

To the Royal Government of Cambodia, the UN, and ECCC donors:

- Take all necessary measures to ensure that the ECCC's co-investigating judges, including Judge Laurent Kasper-Ansermet, and their national and international staff, are able to exercise all powers available to them in conducting full and genuine investigations in Cases 003/004.

I. INTRODUCTION

The Justice Initiative's June 2011 Update Report² examined the conduct of the ECCC's two co-investigating judges (CIJs)—Judge You Bunleng (Cambodia) and Judge Siegfried Blunk (Germany)—in apparently blocking the investigation of up to five alleged perpetrators of Khmer Rouge atrocities (known as Cases 003/004).³ That report focused on the premature closing of the Case 003 investigation in late April 2011, without even the most rudimentary investigative acts having been carried out.⁴ The judges' conduct was examined against a backdrop of statements made by senior Cambodian government officials—including Prime Minister Hun Sen—expressly prohibiting the ECCC from engaging in further prosecutions beyond Case 002.⁵ In its report, the Justice Initiative urged the UN and donors to take immediate action to deal with the worsening crisis of credibility facing the court. The report suggested a number of different measures which

² Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update* (hereinafter "June 2011 Update Report"), available at:

http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf.

³ Case 003 involves two suspects: former Khmer Rouge navy commander Meas Muth and air force commander Sou Met. Case 004 involves three suspects—Ta An, Ta Tith, and Im Chaem—who are alleged to have held mid-level positions of authority in the Khmer Rouge regime.

Judge Blunk resigned from office on October 9, 2011, following months of criticism of his conduct, citing the appearance of political interference in his work by the Cambodian government. *See* Press Release by the International Co-Investigating Judge, October 10, 2011, available at:

<http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

Under the ECCC system—which follows the civil law tradition—the co-prosecutors must send a case to the co-investigating judges if, following a preliminary investigation, they have "reason to believe" that crimes within the jurisdiction of the court have been committed. The co-investigating judges then become officially seized of the case file and must conduct a judicial investigation for crimes within the court's jurisdiction. *See* Internal Rules 53 and 54 ECCC Internal Rules (Revision 8), available at

<http://www.eccc.gov.kh/en/document/legal/internal-rules>. (All references to the Internal Rules in this Report are to this version, and will appear as "IRs, Rule_").

⁴ Case File No: 003/07-09-2009-ECCC-OCIJ, Notice of Conclusion of Judicial Investigation, April 29, 2011, at http://www.eccc.gov.kh/sites/default/files/documents/court/DOC/D13_EN.pdf. *See also* Press Release:

Statement by the International Co-Prosecutor Regarding Case File 003, May 9, 2011, at

<http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003> which

revealed that neither of the Case 003 suspects had been summoned, formally charged, nor even questioned.

Witnesses had not been interviewed. Crime sites had not been examined. A number of other investigative deficiencies were identified. In a news interview, International Co-Prosecutor Andrew Cayley said that "a significant amount" of investigation was still to be carried out (*see* Rob Carmichael, "Tribunal's Credibility Under Threat as Controversial Cases Head for Closure," May 11, 2011, at

http://www.robertcarmichael.net/Robert_Carmichael/Cambodia_Radio_News/Entries/2011/5/11_Tribunals_credibility_under_threat_as_controversial_cases_head_for_closure.html).

⁵ Case 002, as the nomenclature indicates, is the ECCC's second case, involving the prosecution of those alleged to be the four senior-most surviving leaders of the Khmer Rouge regime: Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith. The opening statements in this case are scheduled to take place November 21-25, 2011, with the first witnesses scheduled to testify immediately thereafter. (*See* Scheduling order for opening statements and hearing on the substance in Case 002, October 18, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/court/DOC/E131_EN.PDF.) Case 001 involved the prosecution of one individual—Kaing Guek Eav, *alias* Duch, infamous commander of security center 21 (Tuol Sleng or S-21)—who was convicted by the trial chamber in July 2010. His case is currently under appeal before the ECCC's final court of appeal, the Supreme Court Chamber.

could be taken to address the situation, including an inquiry by an independent panel of experts into the Office of Co-Investigating Judges (OCIJ).⁶

Months passed with no concrete evidence of any action being taken by the UN or donors. The UN issued a press statement on the same day as the publication of the June 2011 Update Report, though not directly responding to any of the allegations and recommendations therein.⁷ The UN's statement went to considerable lengths to defend the co-investigating judges' actions, asserting that the co-investigating judges were not "under an obligation to provide reasons for their actions at this stage of the investigation." In addition to being contrary to principles of transparency and established best practice, this assertion ignored provisions in the ECCC's own rules empowering the judges to keep the public informed about the progress of judicial investigations. Decisions emanating from the OCIJ only served to further worsen the situation. Victims of the crimes supposedly under investigation in Cases 003/004 were routinely sidelined—their lawyers ignored by the court—in decisions which clearly violated basic principles of fairness and legal certainty, and ran contrary to the ECCC's own prior jurisprudence.⁸

Judge Blunk finally resigned on October 9, 2011.⁹ Ironically, he cited "perceived... attempted interference by [Cambodian] government officials with Cases 003 and 004" as the reason for his resignation.¹⁰ Coming after months of criticism leveled at his own conduct, including extremely serious allegations of incompetence and misconduct, Judge Blunk's departing words did little to clarify exactly what transpired in the judicial investigations of Cases 003/004 during his tenure. The Royal Government of Cambodia (RGC) hit back at Judge Blunk's criticisms, denying any wrongdoing whatsoever and instead leveling blame for his resignation at a "sustained campaign by international organizations (including Human Rights Watch, Amnesty International and the Open Society Justice Initiative) alongside persistent media interference (led by the arch-

⁶ This call for an independent inquiry was later joined by Cambodian NGOs, including the Documentation Centre of Cambodia (DC-Cam) and the Cambodian Centre for Human Rights (CCHR).

⁷ UN Statement SG/SM/13642, "United Nations Rejects 'Media Speculation' that Judges Received Instructions to Dismiss Case before Extraordinary Chambers in Courts of Cambodia," June 14, 2011, at <http://www.un.org/News/Press/docs/2011/sgsm13642.doc.htm>. See also Douglas Gillison, "UN Claim Clean Hands at Tribunal," *Cambodia Daily*, June 16, 2011; James O'Toole, "Ban Hits Back at Tribunal Criticism," *Phnom Penh Post*, June 16, 2011, p. 3.

⁸ See, for example, Order on the Admissibility of the Civil Party Application of Rob Hamill. This order was actually rendered confidentially on April 29, 2011 (the same day the Case 003 investigation was closed), however its contents were not publicly known until a redacted version of Rob Hamill's appeal before the Pre-Trial Chamber was filed in August, 2011. See also, Order on the Admissibility of the Civil Party Application of Seng Chan Theory, April 29, 2011, relevant content of which appears in the Appeal Against Order on the Admissibility of Civil Party Application of Seng Chan Theory, May 18, 2011, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_1_4_1_Redacted_EN.PDF. See also Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], August 15, 2011, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_4_1_EN_Redacted.PDF.

⁹ Human Rights Watch called for the resignation of both judges in an October 3, 2011 press release. This call echoed earlier calls made by Case 002 civil parties Theory Seng (Cambodia) and Robert Hamill (New Zealand), both of whom had been rejected as civil parties in Cases 003/004 by the co-investigating judges.

¹⁰ Press release by the international co-investigating judge, October 10, 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

conservative US newspaper *Wall Street Journal*) that have long opposed the ECCC...”¹¹ Unquestionably, Judge Blunk’s resignation made even more compelling the case for an inquiry into allegations that the CIJs had been hampered by political interference in their judicial investigations of Cases 003/004.

The UN’s initial response to Judge Blunk’s resignation gave further cause for concern.¹² The UN’s statement made general comments about the importance of judicial independence—while ignoring the lack of judicial independence apparent in the co-investigating judges’ conduct. However, shortly after the statement was issued, United Nations Under-Secretary-General for Legal Affairs Patricia O’Brien traveled to Phnom Penh to assess the situation, meeting with the RGC, ECCC officials, court donors, and members of the Cambodian NGO community.¹³ While in Phnom Penh, she “strongly urged the [RGC] to refrain from statements opposing the progress of Cases 003 and 004 and to refrain from interfering in any way whatsoever with the judicial process.”¹⁴ These were positive steps towards addressing the crisis. However, O’Brien’s strong words must be backed up by immediate action which demonstrates to the RGC and the Cambodian and international community that political interference with judicial independence will not be tolerated under any circumstances, and that the legitimacy and credibility of the ECCC is a top priority of the UN. This is especially important because Judge Blunk’s replacement—Judge Laurent Kasper-Ansermet, who will be the third international co-investigating judge to assume responsibility for Cases 003/004—cannot be expected to pursue genuine investigations without the unequivocal support of the RGC, in substance as well as in form.

More recent events have further reinforced the urgent need for an inquiry by reputable international judges into the co-investigating judges’ conduct. Less than two weeks after Judge Blunk’s resignation, the two international Pre-Trial Chamber judges at the ECCC—Rowan Downing (Australia) and Katinka Lahuis (Netherlands)—delivered a damning opinion on the CIJs’ rejection of a Case 003 civil party application.¹⁵ In their

¹¹ See, for example, Statement of the Spokesperson of the Press and Quick Reaction Unit of the Office of the Council of Ministers, October 13, 2011, available at:

<http://www.cambodiatribunal.org/sites/default/files/Judge%20Blunk%20resignation%20bow%20to%20NGOs%20pressure.pdf>.

¹² The UN issued a statement thanking Judge Blunk for his service and stating that it was “working urgently” to ensure that the reserve judge, Laurent Kasper-Ansermet, was available. The statement again made only general references to the need for the ECCC to proceed with its work independent of interference from any source. See Statement by UN Secretary-General Spokesperson, October 10, 2011, available at:

<http://www.cambodiatribunal.org/blog/2011/10/statement-un-secretary-general-spokesperson>; see also James A. Goldston, “Justice Delayed and Denied,” *New York Times*, October 13, 2011, available at:

http://www.nytimes.com/2011/10/14/opinion/14iht-edgoldston14.html?_r=1.

¹³ http://www.monstersandcritics.com/news/asiapacific/news/article_1670344.php/UN-undecided-on-inquiry-at-Cambodian-war-crimes-court.

¹⁴ Press Statement, available at:

<http://www.cambodiatribunal.org/sites/default/files/Press%20Statement%2020%20Oct%202011.pdf>.

¹⁵ Considerations of the Pre-Trial Chamber regarding the appeal against order on the admissibility of civil party application Robert Hamill, October 25, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/court/doc/D11_2_4_4_Redacted_EN.PDF (see in particular, Opinion of Judges Lahuis and Downing at court document pages 00748553-64). See also Press Release: Rob Hamill’s Civil Party Admissibility Appeal a Test Case for the Pre-Trial Chamber, October 25,

minority opinion (the decision was split along national and international lines), the international judges highlighted serious concerns about the legitimacy and transparency of the Case 003 investigations, including the CIJs' failure to provide victims with sufficient information to enable them to meaningfully participate in the judicial investigation.¹⁶ They also revealed further evidence that the CIJs may have engaged in misconduct, including tampering with the case file, improperly modifying an order that was already under appeal, and failing to provide documents to appellants or their legal representatives.¹⁷ Their opinion contains some of the most powerful evidence yet that the CIJs engaged in judicial misconduct in the Case 003/004 investigations.

The conduct described by Judges Downing and Lahuis, in conjunction with the serious allegations raised in OSJI's June 2011 Update Report—namely, that the ECCC's co-investigating judges were jointly engaged in a judicial charade with respect to Cases 003/004 in order to satisfy political ends—must be investigated. During her visit to Phnom Penh, Patricia O'Brien was reported to have said that an inquiry into Cases 003/004 could be potentially damaging to Case 002 and provide further grounds for complaint by the defense in that case.¹⁸ However, continued failure to act further jeopardizes the court's legitimacy, its achievements for justice in Case 001, and its credibility in the imminent commencement of the Case 002 trial.¹⁹ A failure to investigate may undermine any fair trial successes which are achieved in Case 002 if these serious questions remain unaddressed. A fully independent inquiry by reputable international judges into the co-investigating judges' conduct is the only plausible way forward at this late stage.

2011, available at: <http://www.cambodiatribunal.org/sites/default/files/news/Press%20Release%20-%20PTC%20Indecision%20over%20Rob%20Hamill%27s%20Appeal%20-%202025%20Oct%202011-1.pdf>.

¹⁶ Considerations of the Pre-Trial Chamber regarding the appeal against order on the admissibility of civil party application Robert Hamill, Document Number: D11/2/4/4, Opinion of Judges Lahuis and Downing, October 25, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_4_Redacted_EN.PDF.

¹⁷ Considerations of the Pre-Trial Chamber regarding the appeal against order on the admissibility of civil party application Robert Hamill, Document Number: D11/2/4/4, Opinion of Judges Lahuis and Downing, Posted date: 25 October 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_4_Redacted_EN.PDF, at para 13.

¹⁸ Julia Wallace, "Nuon Chea Takes Meddling Charge to Court," *Cambodia Daily*, October 24, 2011, pp. 1 and 30: "In a meeting with NGOs on Friday, Ms O'Brien discussed Judge Blunk's resignation and cases 003 and 004, and summarized her discussion with Mr. Sok An, according to Ou Virak, president of the Cambodian Center for Human Rights. Mr. Virak said that he had also asked Ms. O'Brien whether the UN would launch an independent investigation into political interference at the court. 'Her response to me was, basically, 'Look: We do take this issue very seriously, we are considering all options very carefully,' but she did also say the investigation into interference could open the door for the defense [in Case 002],' Mr. Virak said. 'It could really be used to raise a lot of question for their [defense teams'] own purposes, and because of that, they [the UN] made a preliminary decision that an investigation is probably not something they will undertake.... She said we have to be very careful in asking for that, because it could really undermine Case 002, [and] the defense might have a field day with that.'"

¹⁹ "Nuon Chea Team Files Complaint Against Hun Sen, Others," <http://www.voanews.com/khmer-english/news/kr-issues/Nuon-Chea-Team-Files-Complaint-Against-Hun-Sen-Others-132486188.html>, Kong Sothananarith, VOA Khmer, Monday, 24 October 2011.

The remainder of this report will review the legal framework for ECCC judicial accountability and outline the evidence giving rise to the need for an independent inquiry into the conduct of the ECCC's co-investigating judges, including factors that have arisen since the publication of the Justice Initiative's June 2011 Update Report.

II. THE LEGAL BASIS REQUIRING THE UNITED NATIONS TO ACT

The Justice Initiative's June 2011 Update Report examined how the RGC's consistent statements of opposition to Cases 003/004 *prima facie* placed it in breach of the ECCC *Agreement*.²⁰ It also examined the *UN Basic Principles on Independence of the Judiciary*, the *Bangalore Principles on Judicial Conduct*, and the interplay between them.²¹ These international documents lay out the fundamental requirements of a functioning judiciary, as well as guidelines for and limits upon judicial conduct. Together, they are designed to ensure public confidence in the judicial system and the rule of law.

The *UN Basic Principles* state that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”²² The *UN Basic Principles* also provide guidelines for the discipline, suspension, and removal of judges, “for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”²³ Therefore, judicial independence is not absolute: judges can and should be held accountable for any serious misconduct or breach of duty. As noted by the Independent Commission of Jurists, “[w]hile judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical

²⁰ For example, Article 5(3) of the ECCC *Agreement* states that judicial officers “shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.” Article 12(2) requires that the court shall operate “in accordance with international standards,” and Article 13 that the accused shall be afforded the right to trial by an independent and impartial tribunal in accordance with Article 14 of the International Covenant on Civil and Political Rights. Article 25 of the ECCC *Agreement* obligates the RGC, *inter alia*, to assist the co-investigating judges—without undue delay—in the identification and location of persons, and in the arrest or detention of persons. Article 28 of the *Agreement* provides a basis for UN withdrawal from the *Agreement* should the RGC “change the structure or organization of the [ECCC] or otherwise cause them to function in a manner that does not conform with the terms of the present *Agreement*.” (Emphasis added.)

²¹ See OSJI June 2011 Update Report, p. 31, citing United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, at <http://www2.ohchr.org/english/law/indjudiciary.htm>; and Bangalore Principles of Judicial Conduct, 2002, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11058&LangID=E>.

²² Principle 2, United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www2.ohchr.org/english/law/indjudiciary.htm>.

²³ UN Basic Principles, Principles 17-20.

behaviour.”²⁴ If construed properly, “the notion of ‘judicial accountability’ should not be seen in tension with ‘judicial independence.’ Rather, the combination of judicial independence and judicial accountability should foster public confidence in the courts.”²⁵ The *Bangalore Principles on Judicial Conduct* are intended to establish basic standards for ethical conduct by judges. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards.²⁶ The principles set down generally use the “reasonable observer” standard: for example, “[a] judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.”²⁷

In addition to these relevant provisions, the co-investigating judges appear to be in breach of a number of provisions of the ECCC’s own *Code of Judicial Ethics*.²⁸ The preamble to that code recognizes the *Cambodian Code of Ethics* as well as the *UN Basic Principles on the Independence of the Judiciary*. According to its preamble, the ECCC code “incorporat[es] both national and international norms [on judicial conduct].” It stipulates that both the RGC and the UN agree that all ECCC judges must:

(a) Uphold the independence of their office and the authority of the ECCC, and must conduct themselves accordingly in carrying out their judicial functions *including by refraining from engaging in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.*²⁹

(b) Be impartial, and *ensure the appearance of impartiality in the discharge of their duties.*³⁰

(c) Avoid any conflict of interest, or being placed in a situation which might *reasonably give rise to a conflict of interest.*³¹

(d) Conduct themselves with probity and integrity in accordance with their office, *thereby enhancing public confidence in the judiciary.*³²

²⁴ “An International Commission of Jurists Report on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioner’s Guide,” Geneva, 2004, <http://www.mafhoum.com/press7/230S24.pdf>.

²⁵ Institute for Democracy in South Africa, “Judicial Accountability Mechanisms: A Resource Documentation Product of the Political Information and Monitoring Service (PIMS) at the Institute for Democracy in South Africa (IDASA),” March 2007, at http://www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/documents/Judicial_Accountability_SOUTH_AFRICA.pdf.

²⁶ Bangalore Principles, *Preamble*.

²⁷ Bangalore Principles, Principle 3.1.

²⁸ ECCC Code of Judicial Ethics, adopted at the Plenary Session of the ECCC, 31 January 2008, available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/Code_of_judicial_ENG.pdf. (Emphasis added.)

²⁹ ECCC Code of Judicial Ethics, Article 1.1 and 1.2. (Emphasis added.)

³⁰ ECCC Code of Judicial Ethics, Article 2.1. (Emphasis added.)

³¹ ECCC Code of Judicial Ethics, Article 2.2. (Emphasis added.)

³² ECCC Code of Judicial Ethics, Article 3.1. (Emphasis added.)

(e) Not directly or indirectly accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions.³³

(f) *Act diligently*; perform their judicial duties *properly* and expeditiously.³⁴

(g) Take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.³⁵

Because the co-investigating judges *prima facie* failed to adhere to these norms, the UN must take action. The Justice Initiative's June 2011 Update Report suggested a number of possible mechanisms for addressing allegations that the co-investigating judges engaged in serious misconduct and have demonstrated that they are incompetent or not independent. Pertinent examples were drawn from the Rome Statute of the International Criminal Court, which provides a mechanism for peer review of allegations that a judge has engaged in "serious misconduct" or "misconduct of a less serious nature."³⁶

The mechanism provided for under the Rome Statute, however, is not the only means to repair this situation. There are several independent office holders within the United Nations system with powers or obligations to act. For example, the UN's Office of Internal Oversight Services (OIOS) can address complaints concerning UN officials; the UN Special Rapporteur on the Independence of Judges and Lawyers has the authority to conduct inquiries into questions of judicial independence, and to report thereon; the UN High Commissioner for Human Rights has the authority to monitor and comment upon the implementation of the International Covenant on Civil and Political Rights (ICCPR, Article 14 of which guarantees the fundamental right of all persons to be tried by an independent and impartial tribunal); and the Special Rapporteur on the Situation of Human Rights in Cambodia has related powers in his ongoing assessment of Cambodia's compliance with the ICCPR. The UN therefore has the authority, the obligation, and the means to act. The following pages set out some of the possible lines of evidence which could be pursued by an independent fact-finder.

Moreover, as a co-equal party to the *Agreement* on the ECCC, the Secretary-General himself has both the responsibility and the authority to launch an investigation into alleged judicial misconduct, judicial incompetence, and political interference at the tribunal. The Secretary-General must immediately appoint an independent panel of experts, comprised of judges of international standing, to conduct an inquiry into allegations of judicial misconduct and incompetence, as well as lack of judicial independence, in the Office of the Co-Investigating Judges.

³³ ECCC Code of Judicial Ethics, Article 3.2.

³⁴ ECCC Code of Judicial Ethics, Article 5.1, 5.3. (Emphasis added.)

³⁵ ECCC Code of Judicial Ethics, Article 5.2.

³⁶ See OSJI June 2011 Update Report, pp. 31-35, especially pp. 33-34. Articles 46 and 47, Rome Statute of the International Criminal Court (ICC Statute), available at <http://untreaty.un.org/cod/icc/index.html>.

III. EVIDENCE OF JUDICIAL MISCONDUCT, JUDICIAL INCOMPETENCE, AND POLITICAL INTERFERENCE OR LACK OF JUDICIAL INDEPENDENCE

There is a large body of circumstantial evidence that the co-investigating judges breached their legal and ethical duties, either because of deliberate, premeditated acts, or due to incompetence or misconduct. This evidence suggests that they failed to act independently and impartially. In other words, there is a *prima facie* case against the co-investigating judges that requires immediate action.

A review of the facts demonstrates that the co-investigating judges persistently thwarted the investigative processes in Cases 003/004, undermined the court's legitimacy and credibility, affronted the rights of victims and suspects, shrouded their actions in secrecy, and punished those seeking to expose them. Overall, Judges You and Blunk are responsible for fostering a major crisis of public confidence in the ECCC which has damaged the credibility of other branches of the court, as well as the work it has already carried out. This must be redressed with all urgency by establishing an independent inquiry into their actions. The following five sections of this report highlight these acts and omissions and the context in which they occurred.

A. Repeated statements by Cambodian Prime Minister Hun Sen and other government officials that Cases 003/004 will not proceed, and evidence of their impact

The prime minister has repeatedly stated his objection to the ECCC's prosecuting any individuals beyond those five already indicted in Cases 001 and 002.³⁷ In late October 2010, he reportedly told UN Secretary-General Ban Ki-moon that "Case 003 will not be allowed....The court will try the four senior leaders successfully and then finish with Case 002."³⁸

Hun Sen's words have been widely echoed by other Cambodian government officials, as well as senior Cambodian court officials. For example, earlier this year Cambodian Minister for Information Khieu Kanharith, said that those interested in pursuing Cases 003 and 004 "should just pack their bags and go home."³⁹ In March this year—with both Cases 003 and 004 still pending judicial determination—the national deputy co-prosecutor declared at a public forum for civil party representatives: "There will be no Case 003 and 004."⁴⁰ Then in June, at the 60th anniversary of the Cambodian People's

³⁷ See, for example, Chean Sokha and Robbie Corey-Boulet, "ECCC Ruling Risks Unrest: PM," *Phnom Penh Post*, September 8, 2009; Sopheng Cheang, "Cambodia PM Accuses Other Countries of Stirring Unrest," Associated Press, September 10, 2009; and Vong Sokheng, "Inquiries could sink ECCC: PM," *Phnom Penh Post*, September 10, 2009. See also, Hun Sen speech recorded and broadcast by Voice of America, March 18, 2009; Neth Pheaktra and Georgia Wilkins, "Judges Should Focus on Current KR Suspects: Gov't," *Phnom Penh Post*, March 12, 2008; Chean Sokha and Robbie Corey-Boulet, "ECCC Ruling Risks Unrest: PM," *Phnom Penh Post*, September 8, 2009; Maggie Tait, "Interference 'Deplored' by Judge," NZPA, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

³⁸ Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC," *Phnom Penh Post*, Oct. 27, 2010.

³⁹ James O'Toole, "Prosecutor speaks out," *Phnom Penh Post*, May 10, 2011, pp. 1-2.

⁴⁰ Alice Foster and Chhorn Chansy, "Prosecutor Says Tribunal Lacks Money, Time," *Cambodia Daily*, March 18, 2011, p. 23.

Party, Senate President Chea Sim said that his party supported the ECCC's process along the lines of Prime Minister Hun Sen's statement to UN Secretary-General Ban Ki-moon that Case 003 not be allowed.⁴¹

In the first week of October 2011, even as the court faced some of its harshest criticism yet, Cambodian Foreign Minister Hor Namhong reportedly told a visiting French diplomat that only the Cambodian government can decide which Khmer Rouge leaders are to be prosecuted. According to Hor Namhong's son, Hor Sothoun, Hor Namhong told the diplomat: "On the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue.... This issue must be decided by Cambodia.... And no other countries can tell Cambodia what to do."⁴²

Demonstrating the widespread understanding that the Cambodian officials' words were meant to influence the ECCC, one of the suspects in Case 004, Im Chaem, reportedly said: "The government already said the tribunal should stop with Case 002."⁴³ She added: "I have no intention of going to court....I'm happy because I feel protected by the government, especially Prime Minister Hun Sen."⁴⁴

The judicial investigations in Cases 003/004 were opened in September 2009, amid controversy between the international and national co-prosecutors.⁴⁵ Cambodian prosecutors and judges have repeatedly aligned their decision-making with the views of the government and echoed the Cambodian government's reasoning.⁴⁶ Long before the controversy surrounding Judge Blunk, Co-Investigating Judges You and Marcel Lemonde (France)—Judge Blunk's predecessor—engaged in a battle over issuing Rogatory Letters for investigations. Judge You initially signed the authorization for such investigation, but withdrew his agreement shortly after the order became public. A

⁴¹ Thomas Miller, "More Questions for KRT Case 003," *Phnom Penh Post*, June 29, 2011, p. 2.

⁴² Julia Wallace and Neou Vannarin, "Additional KR Arrests in Cambodia's Hands, Hor Namhong says," October 5, 2011, *Cambodia Daily*, p. 26.

⁴³ Julia Wallace and Kuch Naren, "Dam Victims Appeal to Tribunal to Investigate Case 004: Im Chaem Denies Involvement in Khmer Rouge Crimes," July 1, 2011, *Cambodia Daily*, p. 1.

⁴⁴ Julia Wallace, "Scenes from a Khmer Rouge Trial Gone Wrong," *The Atlantic*, September 21, 2011, available at: http://www.theatlantic.com/international/archive/2011/09/scenes-from-a-khmer-rouge-trial-gone-wrong/245405/?single_page=true.

⁴⁵ For background on this issue, see the Justice Initiative's previous update and thematic reports, in particular: *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2010*, regarding apparent political interference in Cases 003/004 at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324 ("Justice Initiative Political Interference Report").

⁴⁶ Most notable are the examples of splits along national/international lines in the Pre-Trial Chamber over the course of the past two weeks, firstly in respect of the Rob Hamill's appeal against his civil party rejection, but also in relation to ICP Andrew Cayley's appeal against the CIJs' order that he retract parts of a public statement he made in May, 2011. See also, Press Release: Statement from the National Co-Prosecutor regarding Case File 003, May 10, 2011, at <http://www.eccc.gov.kh/sites/default/files/media/5-Press%20release%20by%20the%20National%20Prosecutor-10%20May%202011-Eng.pdf>. The NCP's "reasons" for not pursuing Case 003 further included that "that priorities should be given to the prosecution of the Accused in custody" and that "the Tribunal's mandate can be adequately fulfilled through the prosecution" of them—both political lines of argument consistently maintained by the RGC. See also Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 72, 18 August 2009, at: http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version; and Corrigendum, August 31, 2009.

spokesperson from the Interior Ministry publicly reiterated that “only the five top leaders [are] to be tried.”⁴⁷ Judge You cited the “current state of Cambodian society” as the reason for refusing to agree to any investigation of the cases.⁴⁸ The investigations of Cases 003/004 stagnated, and any work on them was said to be conducted by internationals only.⁴⁹ On one occasion earlier this year, Judge You indicated to the media that the investigations were proceeding, but then the co-investigating judges issued a press statement almost immediately thereafter, retracting any such idea.⁵⁰

B. Premature closing of the Case 003 investigation in April 2011

Court officials repeatedly stated that “no field investigations” were being undertaken in Cases 003/004.⁵¹ Neither of the Case 003 suspects was ever summoned, charged, or questioned. Key witnesses were not interviewed. Crime sites were not examined. Relevant, important information from the Case 002 case file was not transferred to the 003 case file. But according to sources inside the Court, some insignificant documents from the 002 case file were hastily added to the 003 case file prior to the close of the 003 investigation. ECCC sources also reported that many Cambodian staff members of the Office of Co-Investigating Judges (OCIJ)—previously rarely in the office—were suddenly coming to work to stuff the 003 case file, and create the illusion of a genuine investigation.⁵² Further extremely serious allegations of tampering with the case file—by the CIJs—were revealed recently by the international judges of the Pre-Trial Chamber.⁵³

⁴⁷ Douglas Gillison, “KRT Begins Investigations of Five new Regime Suspects,” *Cambodia Daily*, June 8, 2008.

⁴⁸ See ECCC Press Release, “Statement from the Co-Investigating Judges,” June 9, 2010.

⁴⁹ See also “The Court Report,” ECCC Publication, November 2010 at <http://www.eccc.gov.kh/en/publication/court-report-november-2010>; see also Justice Initiative December Update, p. 11; see also Justice Initiative Political Interference Report at page 21.

⁵⁰ James O’Toole, “Cambodian KRT Judge at Work on New Cases,” *Phnom Penh Post*, February 1, 2011, p. 1. This was the press article citing progress in the investigations in Cases 003/004 which gave rise to the controversy. The co-investigating judges subsequently issued their “No field investigations” press statement, and the issue was further reported in: James O’Toole, “Judges at KRT Give Update on 003, 004,” *Phnom Penh Post*, February 3, 2011, p. 2; Douglas Gillison, “No Field Investigations in New Case, Tribunal Says,” *Cambodia Daily*, February 3, 2011, p. 21. Statement from the Co-Investigating Judges, February 2, 2011, at <http://www.eccc.gov.kh/sites/default/files/media/ECCC OCIJ 2 Feb 2011%28Eng%29.pdf>.

⁵¹ See “The Court Report,” ECCC Publication, February 2011, p. 7: “No field investigation was conducted during the reporting period” and “The Court Report,” ECCC Publication, March 2011, p. 6: “No field investigations were conducted in February.” See also “The Court Report,” ECCC Publication, April 2011, p. 6, which makes no mention at all of field investigation activity. All editions between February and April cite desk-based review of materials, mainly from the Case 002 file. “The Court Report,” ECCC Publication, January 2011, p. 5, cites: “...one Case 003 related field mission in Phnom Penh on 1 December.”

⁵² Confidential interviews with court employees, Phnom Penh, April-June 2011.

⁵³ Considerations of the Pre-Trial Chamber Regarding the Appeal Against order on the Admissibility of Civil Party Applicant Robert Hamill (D11/2/4/4), October 24, 2011, available at: <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-p>. In relation to the backdating and modification of an order already subject to appeal, the international judges stated (at para. 14), “We note that the modifications were aimed at improperly curing fundamental defects in the Impugned order... [and that they were] so fundamental that they affect[ed] its very substance.”

The question of whether the co-investigating judges' decision to close the Case 003 investigation was politically motivated relates to the legal limitations of the court's personal jurisdiction. The ECCC has power to prosecute "senior leaders" of the Khmer Rouge regime and "those most responsible" for the atrocities it committed.⁵⁴ Many of those opposing Cases 003/004 argue that the people being investigated for alleged crimes in those cases do not fit either description. But several experts with inside knowledge of the investigations and the negotiations between the RGC and the UN leading to the agreement establishing the court⁵⁵ believe the jurisdiction argument to be a legal ruse. Confidential case documents widely available in the public domain confirm the absurdity of the ruse,⁵⁶ as does a review of relevant jurisprudence from other international criminal jurisdictions,⁵⁷ which establishes that the five suspects are undoubtedly within the jurisdiction of the court. The personal jurisdiction argument also offered a widely-known legal "solution" to a political problem, as became clear when the co-investigating judges finally confirmed their "concerns" about jurisdiction to the public.⁵⁸ Interestingly, one of

⁵⁴ Article 1 of 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 (ECCC Law) at <http://www.eccc.gov.kh/en/document/legal/law-on-eccc>; Article 1 of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (ECCC Agreement) at <http://www.eccc.gov.kh/en/document/legal/agreement>. See also Preamble, and Articles 5.3 and 6.3 of the ECCC Agreement.

⁵⁵ David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction," May 22, 2011, available at: http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf; Steve Heder, "A review of the Negotiations Among Cambodia, the UN and the US on the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia," available at: <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>.

⁵⁶ Both the Case 003 and 004 Introductory Submissions (which are the documents containing the facts and allegations against the named suspects) are widely available in the public domain, and outline a series of highly egregious allegations against the suspects. The international co-prosecutor believed the individuals to be responsible for an array of charges resulting in the deaths of thousands, and possibly tens of thousands of individuals, spanning myriad crime sites. In light of this information, there is ample basis for, at a minimum, proceeding beyond the state of summary dismissal to investigate whether the individuals at issue were "most responsible" for the atrocities committed. They also are alleged to have held middling to senior levels in the Khmer Rouge regime's structure.

⁵⁷ See OSJI June Update Report at pp. 24-30. See, in particular, *Prosecutor v. Milan Lukić, Sredoje Lukić*, Case No. IT-98-32/1 PT, Decision on Referral of Case Pursuant to Rule 11bis 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.

⁵⁸ Press Release, Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004, August 8, 2011, at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004>. Judge Blunk, in an interview with Voice of America, also confirmed this doubt with respect to the Case 003 suspects. See <http://www.voanews.com/khmer-english/news/kr-issues/Tribunal-Judge-Sees-At-Least-Two-Years-of-Trials-Ahead-126277983.html>. See further Thomas Miller, "Case 004 Sites Revealed," *Phnom Penh Post*, August 9, 2011, p. 1; Kong Sothananarith, "Judges Release Crime Sites in Controversial Case," *VOA Khmer*, August 8, 2011, at <http://www.voanews.com/khmer-english/news/cambodia/Judges-Release-Crime-Sites-in-Controversial-Case-127231273.html>; International Justice Desk, "Judges Have 'Serious Doubts' about New Khmer Rouge Case," *Radio Netherlands Worldwide*, August 8, 2011, at <http://www.rnw.nl/international-justice/article/judges-have-serious-doubts-about-new-khmer-rouge-case>; Julia Wallace, "Under Pressure, Tribunal Judges Release List," *Cambodia Daily*, August 9, 2011, p. 27; "Judges Have 'Serious Doubts' About New Khmer Rouge Case," Agence France-Presse, August 8, 2011.

the Case 003 suspects, Meas Muth, immediately adopted the language of the two co-investigating judges in subsequent media interviews, insisting he is not among the “most responsible.”⁵⁹

Furthermore, a judicial investigation is compulsory for crimes within the ECCC’s jurisdiction,⁶⁰ and must be directed at “ascertaining the truth.”⁶¹ It is legally erroneous to limit a criminal investigation or to direct it toward a pre-determined legal conclusion. Rather, investigations must be full, genuine, and fact-based.

C. Mass resignation of legal advisory staff from the Office of Co-Investigating Judges

In June 2011, a number of Judge Blunk’s international staff (including legal advisors, consultants, and at least one investigator)⁶² quit in protest over the judges’ decision to prematurely close the Case 003 investigation.⁶³ The most recent international staff member to leave (in September, 2011) was a consultant (ironically, one of two individuals engaged to fill the gap created by mass resignations of six individuals, some months earlier) who lasted less than three weeks under Judge Blunk’s authority. Due to fear of personal and professional repercussions, most of these individuals have been unable to come forward to publicly expose the situation in their office. However, one of the consultants—a highly respected Khmer Rouge historian, Dr. Steve Heder—did publicly describe the reasons for his departure, citing the premature closing of the Case 003 investigation and Judge Blunk’s mismanagement of the office.⁶⁴ Clearly, this was not a simple situation of court staff having a difference of legal opinion with a judge. Instead,

⁵⁹ Sok Khemara, “Suspect Questions ‘Most Responsible’ Tribunal Mandate,” VOA Khmer, August 16, 2011, available at : <http://www.voanews.com/khmer-english/news/kr-issues/Suspect-Questions-Most-Responsible-Tribunal-Mandate-127880513.html>. “Taking up a defense that Khmer Rouge tribunal investigating judges have already alluded to, atrocity crimes suspect Meas Muth said in a recent interview that accusations against him by prosecution fall out of the mandate of the UN-backed court. Investigating judges Siegfried Blunk and You Bunleng said in a statement earlier this month that they have doubts about whether five suspects named by prosecutors for potential indictments fall under the court’s mission to prosecute those “most responsible” for Khmer Rouge atrocities.” He told VOA Khmer any accusations against him were not legal under the rules of the court. He said that the court should not try more than the five Khmer Rouge leaders currently in custody and warned against instability if more cadre are indicted.

⁶⁰ Internal Rule 55 (1). ECCC Internal Rules (Revision 7), available at <http://www.eccc.gov.kh/en/document/legal/internal-rules>. (All reference to the Internal Rules in this report are to this version, and will appear as “IRs, Rule_”).

⁶¹ IRs, Rule 55 (5).

⁶² Douglas Gillison, “6th UN Official Resigns from KR Judges’ Office,” *Cambodia Daily*, June 22, 2011, p. 24.

⁶³ Douglas Gillison, “UN Legal Team Walk Out on Stymied KR Cases,” *Cambodia Daily*, June 13, 2011, pp. 1 and 26: Quoting from a resignation letter from Khmer Rouge historian Stephen Heder to Judge Siegfried Blunk, the article says: “[per Heder] In view of the judges’ decision to close the investigation into case file 003, effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff’s evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office...”; James O’Toole, “Disorder in the Court: KRT Investigators Resign Over 003,” *Phnom Penh Post*, June 13, 2011, p. 1. The Judges responded that they “welcomed” the departure of the staff and that they would continue their work with the assistance of consultants, as required: see Public Statement by Co-Investigating Judges, June 12, 2011, available at <http://www.eccc.gov.kh/sites/default/files/media/OCIJ%20statement%2012June2011.pdf>.

⁶⁴ Id.

the situation concerned a number of highly experienced and reputable individuals raising serious concerns over the judicial conduct of the investigating judges directly with a party to the agreement establishing the court.

This series of facts alone should have alarmed the UN and given rise to an independent inquiry. Individual staff members should have been immediately advised of their immunity from legal process,⁶⁵ and of the whistleblower protections available to them. However, the UN did little to properly examine the situation, instead settling for cursory actions taken in the apparent hope that the controversy would blow over.

D. Consistent pattern of legally erroneous decision-making

A review of the co-investigating judges' publicly available decisions and appeals reveals a consistent pattern of conduct which sidelines legitimate interests in the investigations, disregards legal obligations, and departs from established international and ECCC jurisprudence. These decisions relate to: (i) the right of suspects to be assigned legal counsel; (ii) the right of victims to participate in the investigative process; and (iii) repeated attempts by the international co-prosecutor to have the investigative judges revisit the Case 003 investigation.⁶⁶

The co-investigating judges closed the Case 003 investigation without ever providing victims the information they required to submit civil party applications.⁶⁷ Nonetheless, information provided by International Co-Prosecutor Andrew Cayley, as well as information leaked from the OCIJ, enabled over 300 applicants to seek civil party status in each of Cases 003 and 004.⁶⁸ This is in spite of the ECCC's failure to assist victims in any way in filing these applications. Absolutely no outreach has been conducted by the court for Cases 003/004. This contrasts sharply with the court's public and widespread solicitation of applications for Cases 001 and 002. The stark contrast in approaches taken by the CIJs in Cases 001 and 002, as opposed to Cases 003/004, is one of several matters highlighted by International Pre-Trial Chamber Judges Downing and Lahuis in a recent decision concerning the admissibility of Case 003 civil parties.⁶⁹

⁶⁵ See, ECCC Agreement, Article 20.2.

⁶⁶ The international co-prosecutor sought further investigation in relation to Case 003, which the co-investigating judges denied on a legal technicality. The ICP then sought to remedy the technical error and re-file the request before the CIJs. This was also denied on a legal technicality (as it was "out of time" and the judges refused to exercise their discretion to consider it). In tandem with this action, the ICP appealed to the Pre-Trial Chamber, whose decision is pending as at the date of this publication.

⁶⁷ Julia Wallace, "Tribunal Runs Down Clock for Civil Parties: Court is Conducting No Outreach as Window to Apply in Case 003 Closes," *Cambodia Daily*, May 4, 2011, p. 1; Julia Wallace, "Government Opposes 318 Civil Party Applications," *Cambodia Daily*, May 19, 2011, p. 22.

⁶⁸ Douglas Gillison, "Before Charges, Activist Cites Two in a Dormant KR Inquest," *Cambodia Daily*, April 4, 2011, p. 26; see also James O'Toole, "New Zealander Files KR Complaint," *Phnom Penh Post*, April 8, 2011, p. 3.

⁶⁹ Considerations of the Pre-Trial Chamber Regarding the Appeal Against order on the Admissibility of Civil Party Applicant Robert Hamill (D11/2/4/4), October 24, 2011, available at: <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-p>. The international judges highlighted the fact that neither suspect was ever charged or notified that they were under investigation, that victims were not given any information about the investigation

The co-investigating judges repeatedly rejected requests for civil party status by victims who objectively have a legitimate connection to the crimes under investigation. For example, Rob Hamill's brother, Kerry Hamill, was captured on a sailboat off the coast of Cambodia by the Khmer Rouge, transferred to S-21 security center (also known as Tuol Sleng), tortured and later executed.⁷⁰ Kerry Hamill was allegedly captured by those under the authority of the Khmer Rouge navy commander, Meas Muth, who is one of two suspects in Case 003. Another individual whose spouse was tortured and executed by the Khmer Rouge at one of the Case 003 crime sites (Kampong Chhnang airport) was also denied civil party status.⁷¹ These individuals were granted civil party status in Cases 001 and 002 on the basis of the same facts involved in the Case 003 allegations. They have appealed these decisions to the Pre-Trial Chamber.⁷²

The judges' erroneous decision-making led them to question the credibility of victim complaints without any justification and advance new theories of "victimhood" that have no precedent in international criminal law or in the civil law tradition. If applied to the *Duch* case, these new "theories" would result in the exclusion of up to 95% of those granted civil party status by the trial chamber. They also depart from previous decisions by the same judge: Judge You found the same individuals to be direct victims in 001 and 002, but departed from his own prior reasoning in order to exclude them from Cases 003/004.

The co-investigating judges also neglected to recognize lawyers representing civil party applicants, and either refused to grant the lawyers access to the case files, or systematically ignored their requests for same. The substance of these decisions themselves, the treatment of the applicants and their lawyers, and the secrecy around the decisions, further reveal the lengths to which the CIJs have gone to align their conduct with their pre-determined outcome—to undermine the 003/004 investigations. This particular aspect of the judges' conduct was also highlighted by the international Pre-Trial Chamber judges in their recent opinion.⁷³

nor about their right to apply to become civil parties or to file a complaint in the case. As the judges noted (at para. 5) "no civil party applicant has been in a position to effectively exercise the right to participate in the judicial investigation expressly provided for under the Internal Rules... [resulting from] the lack of information surrounding the investigation in Case 003." They went on to say that the "rights of the victims have been ignored thus far to their detriment" and that the judges' failure to involve civil parties in the investigation "[led] to an incomplete investigation... and rais[ed] serious doubts about its impartiality."

⁷⁰ See, for example, Julia Wallace, "Another Civil Party Application for Case 003," *Cambodia Daily*, April 8, 2011, p. 24; Julia Wallace, "Rob Hamill Denounces Rejection in KR Case 003," *Cambodia Daily*, May 18, 2011, p. 24; James O'Toole, "Hamill's 003 Bid Denied," *Phnom Penh Post*, May 18, 2011, p. 4.

⁷¹ The essence of the CIJs' decision can be found in the victim's appeal submissions, which are available at: <http://www.eccc.gov.kh/en/document/court/appeal-against-order-admissibility-civil-party-applicant>.

⁷² The redacted appeals can be found at the following links: <http://www.eccc.gov.kh/en/document/court/appeal-against-order-admissibility-civil-party-applicant-seng-chan-theary>; <http://www.eccc.gov.kh/en/document/court/appeal-against-order-admissibility-civil-party-applicant>; <http://www.eccc.gov.kh/en/document/court/appeal-against-order-admissibility-civil-party-applicant-robert-hamill>.

⁷³ Considerations of the Pre-Trial Chamber Regarding the Appeal Against order on the Admissibility of Civil Party Applicant Robert Hamill (D11/2/4/4), October 24, 2011, available at: <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order>.

The co-investigating judges also rejected repeated requests by the Defence Support Section to have counsel assigned to the individual suspects, despite their unequivocal right to same from the commencement of the judicial investigation.⁷⁴ It is worth noting here that the official position of both the ECCC and the UN is that closing the Case 003 investigation was just a “procedural step” and that the case has not yet been “dismissed.”⁷⁵ However, since neither of the Case 003 suspects’ interests was ever represented during the investigation (other than by the judges themselves), and since neither of them was officially informed he was under investigation, or given an opportunity to respond to allegations, it is almost inconceivable that they could now be indicted. It would constitute an egregious violation of their fair trial rights. But perhaps more importantly, the CIJs’ denial of the suspects’ right to counsel may prejudice any future attempts to investigate and/or prosecute the individuals in a domestic setting. Although none of the Case 003/004 suspects has ever been officially interviewed by ECCC investigators, several of them have been repeatedly interviewed by Cambodian and international media without ever having been advised of their right against self-incrimination and their right to counsel. If ever convicted by a domestic court, they may be entitled to a reduction in sentence due to the violation of their fundamental rights by the ECCC.

In their most recent minority opinion concerning Case 003, International Pre-Trial Chamber Judges Downing and Lahuis found that the co-investigating judges’ rejection of International Co-Prosecutor Andrew Cayley’s requests for further investigation was legally erroneous.⁷⁶ The CIJs had rejected Cayley’s requests for further investigation on a

[admissibility-civil-p](#). The international judges (at para. 7) note a number of anomalies in the treatment of civil party applicants’ lawyers, ultimately finding that “the Co-Investigating Judges have deprived some civil party applicants, including [Rob Hamill] of the fundamental right to legal representation.”

⁷⁴ ECCC Law, Article 24 new. See also Julia Wallace, “No Lawyers for KR Suspects After Two Years,” September 16, 2011, *Cambodia Daily*, pp. 1, 29. See also ECCC Press Release – Defence Support Section: Upholding International Standards: Defence Support Section Appoints Counsel to Represent the Interests of the Suspects in Cases 003 and 004, November 30, 2010, available at

http://www.eccc.gov.kh/sites/default/files/media/ECCC_DSS_30_Nov_2010_%28Eng%29.pdf, which noted the appointment of one Cambodian lawyer to represent the interests of the five unnamed suspects, stating that the suspects were at risk of being substantially affected “as the OCIJ conducts investigations for an indeterminate period of time... The longer this situation continues, the greater the potential prejudice [to the five suspects]”; see also ECCC Press Release: Statement Regarding Legal Counsel, November 30, 2011, available at http://www.eccc.gov.kh/sites/default/files/media/ECCC_30_Nov_2010_%28Eng%29.pfd.pdf: “The concept of assigning legal counsel to represent unnamed suspects in Cases 003 and 004 has explicitly been rejected by the Co-Investigating Judges in September 2010, upon a request from the Defence Support Section. This means that unless the judges decide otherwise, the court will not recognize any lawyer assigned by the Defence Support Section for this purpose.”

⁷⁵ UN Statement SG/SM/13642, United Nations Rejects ‘Media Speculation’ that Judges Received Instructions to Dismiss Case before Extraordinary Chambers in Courts of Cambodia, June 14, 2011, at <http://www.un.org/News/Press/docs/2011/sgsm13642.doc.htm>. This has also been the consistent position of the ECCC, articulated, for example, in its monthly publication, “The Court Report.”

⁷⁶ ECCC Case No. 003/07-09-2009/ECCC/OCIJ, Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, November 2, 2011, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D20_4_4_Redacted_EN.PDF

legal technicality (that he did not have power to act alone, and that he should have filed a formal disagreement). Judges Downing and Lahuis said (at paragraph 11):

[N]ot only is there no harm resulting from the said procedural defect but we also consider that given its consequences on the conduct of the judicial investigation, rejection of the filing is a disproportionate and unjustified measure to respond to the procedural defect identified by the Co-Investigating Judges... We cannot understand how the Co-Investigating Judges expect to provide justice in a reasoned decision where they refuse to involve in the judicial investigation the International Co-Prosecutor, who has initiated it, as well as the possible victims, and further know that information exists regarding the issue of personal jurisdiction which they have effectively and directly excluded from the case file.

Read in conjunction with other features of their treatment of the Case 003 investigation, these publicly available decisions consistently demonstrate the CIJs' willingness to violate basic legal principles in order to reach pre-determined legal outcomes.

E. Attempts to stifle criticism

Judges Blunk and You repeatedly sought to silence media criticism of their conduct.⁷⁷ Initially, it was apparent that they sought to close the Case 003 investigation without attracting negative attention; however, when their actions did attract a substantial amount of critical media, they issued a number of press releases to “correct” media comment and minimize the appearance that they had acted inappropriately. This was despite the fact that they had a power to “keep the public informed” during the investigation, but did not utilize it.⁷⁸

Judges Blunk and You recently commenced contempt of court proceedings against the Khmer language service of Voice of America (VOA) media for publishing parts of the Introductory Submissions, which were leaked and published on a New Zealand-based website some six weeks before.⁷⁹ Under normal circumstances the publication of confidential information by a media outlet may warrant action, but this particular case gives rise to questions about why VOA Khmer (rather than the original publisher of the information) was targeted. When VOA Khmer published information about Cases 003/004, there was already a wealth of information about the cases—including the identities of the suspects and the allegations against them—in the public domain. Yet the judges never targeted the media outlets that originally published the information. Nor did they pursue the New Zealand-based website that originally published both introductory submissions in full. The co-investigating judges' action was inconsistent. It also

⁷⁷ See, for example, Statement from the Co-Investigating Judges Regarding Misrepresentations in the Media, available at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-misrepresentations-media>.

⁷⁸ See Internal Rules, Rule 56.

⁷⁹ Statement from the Co-Investigating Judges Regarding Contempt of Court Proceedings Against Voice of America, August 31, 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-contempt-court-proceedings-against-voice-america>.

demonstrates that rather than defending their actions in closing the investigation, the investigating judges instead chose to pursue those exposing their misconduct. VOA was also attacked by Prime Minister Hun Sen, when a VOA reporter asked him a question regarding political interference at the ECCC.⁸⁰

The initial target of Judges Blunk and You was International Co-Prosecutor Andrew Cayley, whom they sought to sanction for his May 2011 disclosure of the crime sites in Case 003. Cayley had disclosed crime site information in a press release to enable potential civil parties to submit applications before the expiration of the time limit. The CIJs ordered Cayley to retract his statement, but Cayley appealed the order to the Pre-Trial Chamber. In his appeal, he alleged a number of errors, most notably that compliance with such an order would be of no effect: the information (that is, the names of the crime sites in Case 003) was in the public domain in both Cayley's press statement and the co-investigating judges' own order for him to retract the information. In an absurd result which further revealed the extent of political decision-making at the ECCC in respect of Cases 003/004, the Pre-Trial Chamber split along national/international lines. Since they could not reach the required supermajority, the original (retraction) order stood, and Cayley was obligated to put a third statement in the public domain "retracting" the information. The international Pre-Trial Chamber judges noted this absurdity in their separate opinion.⁸¹

IV. CONCLUSION

The International Bar Association recently issued a report highlighting lessons from the current crisis of credibility facing the ECCC that could inform future hybrid tribunals.⁸² The report notes that advocates of international criminal justice must be willing to criticize those courts that do not meet international standards.⁸³ It says that while the ECCC's framework complies *de jure* with international standards for fair trial and due process, the proceedings of the ECCC do not comply *de facto*.⁸⁴ In relation to the UN's role, it emphasizes:

⁸⁰ Van Roeun, "Hun Sen Talks Tribunal, Blasts US-Funded Radio," *Cambodia Daily*, p. 24, July 25, 2011.; "Cambodian Prime Minister Criticizes VOA, Radio Free Asia," July 22, 2011, at

<http://www.voanews.com/khmer-english/news/Cambodian-Prime-Minister-Criticizes-VOA-Radio-Free-Asia-126033973.html>; Vong, Sokheng, "Hun Sen Blasts VOA, RFA 'Insults,'" p. 25, July 25, 2011.

⁸¹ ECCC Case File No. 003/07-09-2009, Doc. No. D14/1/3, Considerations of the Pre-trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on the International Co-Prosecutor's Public Statement Regarding Case 003, October 24, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_1_3_Redacted_EN-1.PDF. The international pre-trial chamber judges note (at para. 1) that "[t]he co-investigating judges have confused the situation by themselves publically repeating major parts of the confidential information directed to be retracted by them...[and that in so doing they had] rendered their retraction order itself nugatory and thus of no effect."

⁸² International Bar Association (IBA) "Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future," September 2011 (hereinafter "IBA Report"), available at

<http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20%28Sept%202011%29.pdf> p. 6, (Foreword by Dr. Mark Ellis, executive director, IBA).

⁸³ IBA Report, p. 6.

⁸⁴ IBA Report, p. 8.

In endorsing a mixed court, the UN not only adds its own legitimacy to the court, it also risks its own legitimacy. The hallmark of the UN must count for something or its ability to encourage justice throughout the world will be greatly curtailed or possibly even lost entirely...

[T]here is no doubt that the UN has given its hallmark to a court whose independence fails to meet international standards of due process. In resting the legitimacy of the ECCC on that of the Cambodian judiciary, the ECCC has weakened the UN brand in the realm of internationalized accountability.⁸⁵

In violation of the ECCC's own judicial ethics code, as well as numerous Cambodian and international legal norms, Judges Blunk and You consistently engaged in actions, omissions, and decision-making which—at the very least—“affected confidence in their independence,” defied “the appearance of their impartiality,” and brought forth a “crisis of public confidence” in the ECCC judiciary. There is little reason to have confidence in the independence of the CIJs. This situation has not changed with Judge Blunk's resignation—in fact it has been compounded by the language he used in his resignation letter.

The United Nations must investigate the allegations of judicial misconduct, incompetence, and lack of independence, and bring an end to this crisis of credibility. It is incumbent upon the UN to take immediate steps to salvage the reputation of the ECCC as a credible judicial institution.

The UN must immediately appoint an independent panel of experts, comprised of judges of international standing, to conduct an inquiry into allegations of judicial misconduct and incompetence, as well as lack of judicial independence, in the Office of the Co-Investigating Judges. Swift action can address the current crisis, as well as help stem the court's loss of credibility, as it embarks upon the hearing of evidence in Case 002.

⁸⁵ IBA Report, p. 9.

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