Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

June 2011 Update

OPEN SOCIETY JUSTICE INITIATIVE

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a regular report issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at *http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/sub_listing*.

Executive Summary and Recommendations

Impunity—in the context of mass human rights violations—is defined as the "impossibility," whether legally or factually speaking, of "bringing perpetrators to account" because they are "not subject to any inquiry" that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[1] An examination of recent developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) suggests that the court itself is on the verge of officially embracing impunity. Two of its judges—one Cambodian and the other international—appear to be blocking the investigation of up to five alleged perpetrators of Khmer Rouge atrocities, an outcome that has been expressly called for by senior Cambodian government officials.[2] Recent events have worsened longstanding concerns about the willingness of some of the ECCC's judicial officers to fulfill their obligations not only to perform their sworn duties with competence and integrity, but also to act independently, and not upon the instructions of any government or any other source.[3] Such serious judicial misconduct or breach of duty must be addressed with urgency. These recent developments threaten the court's legacy for Cases 001 and 002, for Cambodia's rule of law development, and for the ongoing fight against impunity.

On April 29, 2011, the ECCC's co-investigating judges closed their investigation into two senior Khmer Rouge officials (known as Case 003) without ever genuinely investigating the allegations against them.[4] Although not officially named by the court, the two officials are widely known to be Khmer Rouge air force commander Sou Met and navy commander Meas Muth.[5] An

[1] UN Doc. No. E/CN.4/2005/102, Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, February 18, 2005, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/111/03/PDF/G0511103.pdf?OpenElement and Addendum – Updated set of Principles for the protection and promotion of human rights through action to combat impunity.

[2] The two co-investigating judges are You Bunleng (Cambodia) and Siegfried Blunk (Germany). 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).

[3] ECCC Law, Articles 10 new and 25; ECCC Agreement, Articles 3 and 5. Note that the Law and the Agreement also require the same attributes of the co-prosecutors: Articles 19, and 6 respectively.

[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/courtdoc/D13_EN.pdf . *See also* Statement of the Co-Investigating Judges, April 29, 2011: "The Co-Investigating Judges today in a public decision concluded the investigations in Case 003 (the Case File containing more than 2.000 pieces of evidence, comprising more than 48.000 pages), and have notified the parties according to Rule 66.1." Full text at http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20%2029%20Apr%202011%28Eng%29.pdf.

[5] Sok Khemara, "Former Khmer Rouge Questions Indictments," VOA Khmer, September 7, 2009, at http://www.voanews.com/khmer-english/news/a-40-2009-09-07-voa11-90170582.html; Ian MacKinnon, "War Crimes Panel Charges Khmer Rouge Chief," *The Guardian,* August 1, 2007; Den Sorin, "Meas Muth, Ta Mok's Son-in-Law, Might Face Arrest," January 17, 2008, at http://www.scribd.com/doc/52628662/Charged-Persons-of-Case-003-004-Named-in-PUBLIC-Documents-a-Compilation; James O'Toole and Cheang Sokha, "Former Cadres in Complaint," *Phnom Penh Post,* p. 4; *see also* 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; Khmer Democrat, "Who are Meas Muth and Sou Met? Im Chaem, Ta An, Ta Tith?" May 5, 2011, available at http://khdoc.blogspot.com/2011/05/who-are-meas-muth-and-sou-met-im-chaem.html.

additional case (known as Case 004, and involving a further three suspects) appears destined for the same cursory review and premature closing.[6] The failure to conduct a full investigation raises clear questions of political interference, since senior Cambodian government officials, including the prime minister, have publicly opposed Cases 003 and 004.

Encouragingly, key actions by International Co-Prosecutor Andrew Cayley (UK),[7] victims, Cambodian and international civil society groups, and the media, have exposed the failure of the co-investigating judges to conduct a full investigation. However, the co-investigating judges refused any further involvement in the Case 003 investigation on June 7, when they rejected Cayley's bundle of requests for further investigative action.[8] Their decision—and the Justice Initiative's arguments about how it is erroneous—are discussed further below. There remains a possibility that the international co-prosecutor will appeal to the Pre-Trial Chamber (PTC); if that appeal is successful, the matter would be returned to the co-investigating judges for further investigative action. However, for reasons also discussed below concerning the composition of the PTC, such an outcome is highly unlikely. In either scenario, it is abundantly clear that if the court continues to give the appearance of having succumbed to political interference in Case 003, the legacy of the ECCC will be severely undermined.

All five suspects in Cases 003/004 were put forward for judicial investigation by the international co-prosecutor in September 2009 on the basis that they were either "senior leaders" of the Khmer Rouge or among those "most responsible" for Khmer Rouge era atrocities, a requirement to invoke the ECCC's jurisdiction. However, the idea of bringing any of these five additional suspects to justice has long been publicly opposed by the Cambodian government. Cambodia's minister for information recently said that those interested in pursuing Cases 003 and 004 "should just pack their bags and go home."[9] The government's position has been maintained by National Co-Prosecutor Chea Leang. Her position is that neither of the Case 003 suspects falls under the ECCC's jurisdiction.[10] In March this year, with both Cases 003 and 004 still pending judicial determination, the Cambodian deputy co-prosecutor declared at a public forum for civil party representatives: "There will be no Case 003 and 004."[11] These statements raise the question of whether the desk-based investigations have been tailored to provide legal cover for the politically-determined dismissal of politically-opposed cases.

The absence of any public response from donors or the United Nations to this blatant attempt by the Cambodian government to influence the tribunal raises further questions about the role of the

---

[6] Case 004 is widely believed (and reported) to concern suspects Ta An, Ta Tith, and Im Chaem. *See* James O'Toole, "Case 004 in the Spotlight," *Phnom Penh Post*, May 6, 2011, pp. 1-2.

[7] 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.

[8] ECCC Case File No. 003/07-09-2009, Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, June 7, 2011, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/5-D20-3-EN-Redacted.pdf.

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

[10] 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.

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

international community in defending judicial independence, and in meeting its own obligations as the court's official backer. The United Nations and international donors have done nothing more than repeat general statements affirming the importance of judicial independence, while taking no concrete action to defend the principle. A number of donors have underscored the importance of the court's second case (Case 002, involving four surviving senior leaders of the Khmer Rouge), seeming to imply that preserving the case may require ceding the ability to proceed with Cases 003 and 004. Others have highlighted budgetary constraints and general donor fatigue—a position which fails to recognize the potential impact of political interference in Cases 003/004 upon the entirety of the court's achievements to date, and its future viability.

At the same time, the ECCC has made progress in other areas since the Justice Initiative's last *Recent Developments* report, issued in December 2010.[12] At the end of March this year, the Supreme Court Chamber (SCC)—the ECCC's court of final appeal—sat to hear the appeal of Kaing Guek Eav, alias Duch, the subject of the ECCC's first case. The judgment of the SCC is expected to be delivered in late June 2011 and will examine crucial issues of personal jurisdiction that are likely to affect all suspects and accused persons potentially within the court's mandate.

In January, the Pre-Trial Chamber delivered its decision on the appeals against the indictment (known as a "Closing Order") in Case 002, thereby sending it to trial.[13] Case 002 involves the four senior surviving Khmer Rouge leaders: Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith. Since January, the court has been absorbed with ongoing preparations for their trial—which is often referred to in Phnom Penh as the biggest international criminal trial since Nuremberg. Prosecution, defense, and civil parties are litigating pretrial issues, finalizing witness and exhibit lists, and generally gearing up for the commencement of the trial. To this end, in their February plenary, the ECCC judges amended the court's Internal Rules "in order to promote efficient trial management and more expeditious trial proceedings."[14] The case will officially open on June 27, 2011, with a four-day initial hearing, and the evidentiary phase of the trial will likely commence in the third quarter of this year.

This report examines in greater detail the issues summarized above: recent critical developments in Cases 003/004, including questions of judicial independence, misconduct, and competency; developments in trial preparation for Case 002; the Duch (Case 001) appeal hearing; and other issues including personnel changes, amendments made to the ECCC's Internal Rules at the ninth

---

[12] Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: December 2010 Update* (OSJI December Update), at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.

[13] Douglas Gillison, "KR Leaders' Case Forwarded to Trial Chamber," *Cambodia Daily*, p. 27. On the appeals against the Closing Order, the Pre-Trial Chamber issued a number of orders outlining the disposition (on January 13, 2011), and subsequently delivered full reasons (on February 15, 2011). See *Co-Prosecutors v. Ieng Sary et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, January 13, 2011; Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order, January 13, 2011; Decision on Khieu Samphan's Appeal Against the Closing Order, January 13, 2011; Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, February 15, 2011.

[14] Press Release – Ninth ECCC Plenary Session Concludes, February 23, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_Plenary_23_Feb_2011%28Eng%29.pdf.

plenary, and fundraising. Ongoing concerns about the court's transparency are raised throughout the report.

Key Recommendations from this Report:

To the United Nations Special Rapporteur on the Independence of Judges and Lawyers:

- Take all available measures—including a country visit, the conduct of a full inquiry, and issuance of a report thereon—to assess the independence of judges at the ECCC, in particular of the co-investigating judges.

To the United Nations Office of the High Commissioner for Human Rights in Cambodia:

- Issue an analysis of the independence and impartiality of the ECCC as a tribunal, in order to assess the implementation of the fair trial rights guaranteed in the UN human rights treaties to which Cambodia is a party (such as the International Covenant on Civil and Political Rights). This can be done as a component of the office's monitoring function and in the context of its focus on the ECCC's legacy.

To the United Nations Special Rapporteur on the situation of Human Rights in Cambodia:

- As a follow up to his September 2010 report, issue a thematic report on the ECCC focusing specifically on the independence and impartiality of ECCC judges and the ability of the court to operate as a model for the Cambodian national judiciary and to enhance the Cambodian people's perception of justice.

To the UN Secretary-General:

- Initiate an internal investigation by the United Nations Office of Internal Oversight Services (OIOS) into allegations that UN officials (a title which can include judges as well as other experts) have acted contrary to the code of conduct set out by the Secretary-General's Bulletin of 2002 governing the status, basic rights, and duties of officials other than secretariat officials, and experts on mission.[15]

---

[15] Secretary-General's Bulletin, "Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission" U.N. Doc ST/SGB/2002/9, June 18, 2002, available at http://europeandcis.undp.org/files/hrforms/STSGB20029%20-%20Regulations%20Governing%20the%20Status,%20Basic%20Rights%20and%20Duties%20of%20non%20UN%20Secretariat%20Officials,%20and%20Experts%20on%20Mission.pdf. This Bulletin requires officials to "uphold the highest standards of efficiency, competence and integrity" (integrity has been defined as involving *honesty, truthfulness, fidelity, probity and freedom from corrupting influences")* and to " not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations." It also requires that "Officials and experts on mission shall discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all individuals covered by the present Regulations."

- Alternatively, to the extent that judges fall into the category of UN officials on mission and if the allegations raised in this report are considered not to fall within the OIOS's mandate, the Secretary-General should appoint an independent panel of experts comprised of current and/or former judicial officers of international standing to determine whether judicial misconduct has occurred.

To the UN Special Expert on the ECCC, and to the UN Office of Legal Affairs:

- Intensify monitoring of the ECCC's operations and to the extent that actions by either UN officials or the tribunal's operations as a whole fundamentally undermine the integrity of the UN's involvement—such as a failure to fully and genuinely investigate sensitive cases before the court—raise concerns with donors, and consider whether to advise the Secretary-General to withdraw from the ECCC if the situation is not rectified promptly.

To ECCC donors:

- Insist that the ECCC operate independently, fairly, transparently, and expeditiously, including in the resolution of the judicial investigations in Cases 003/004.

- Condition future funding to the ECCC on the receipt of independent reports by one or more of the special mandate holders or UN mechanisms identified above which clearly demonstrate that the ECCC and its judges are acting independently, impartially and with the integrity required of an international justice tribunal.

To all stakeholders in the ECCC and other interested parties:

- Write, email, and call the UN Secretary-General and the UN Office of Legal Affairs to insist that they increase efforts to ensure that the ECCC operates independently, expeditiously, transparently and fairly, including by performing full and genuine investigations into Cases 003/004.

- Write, email, and call donor governments to insist that further funds provided for the fulfillment of the ECCC's mandate be conditioned upon the receipt of independent reports by one or more of the special mandate holders or UN mechanisms identified above which clearly demonstrates that the ECCC and its judges are acting independently, impartially, and with the integrity required of an international justice tribunal.

Cases 003/004

The Justice Initiative has repeatedly received information from confidential sources within the court that the ECCC has allowed its mandate to pursue more than just five defendants covered by Cases 001 and 002 to be undermined by political and financial factors. Others knowledgeable about the identity of the five suspects in Cases 003/004 and their role in the Khmer Rouge regime insist the suspects meet the jurisdictional requirements and may in fact share more responsibility than Duch, who was convicted by the ECCC for his role in the deaths of some 12,272 inmates at S-21 prison.

The Justice Initiative recognizes that the ECCC has severe financial constraints. Nonetheless, once the UN partnered with the government of Cambodia to establish the ECCC, and donor governments agreed to fund it, the UN and donors undertook to assist the ECCC to fulfill its mandate. As noted in previous reports, it is not only possible, but desirable and far more efficient, for Cases 003/004 to proceed alongside Case 002.[16] Requiring the ECCC Trial Chamber to sit on two cases concurrently is consistent with the practice of other international criminal courts. It will also be more efficient because the age and health of the accused in Case 002 will limit the amount of hearing time the chamber will be able to sit each week.

The judicial investigations in Cases 003/004 were opened some 20 months ago (in September 2009), amid controversy between the international and national co-prosecutors.[17] As noted above, sources inside the court have long indicated that Cases 003/004 were likely to be dismissed through a "decision" from the co-investigating judges that the five are not "senior leaders" or "most responsible" and therefore do not fall under the court's jurisdiction (in line with the national co-prosecutor's now-publicly expressed view). Since the investigations began, the co-investigating judges and their staff have done little more than review information in their files. One of the two investigations (Case 003) has now been officially closed, prematurely. This raises two critical questions: (i) how can an investigation be closed when negligible investigative actions have been carried out; and (ii) how much damage will be done to the court's overall legitimacy (and the ongoing fight against impunity, both in Cambodia and internationally) if the cases against these five suspects are dismissed because of political interference, and without transparency or review?

This report will now turn to an examination of the Case 003/004 judicial investigations, focusing in particular on the Case 003 investigation. It will look at the investigations in light of the rights of victims and survivors, the rights of suspects under investigation, and standards of judicial

---

[16] *See* Justice Initiative Report: *Salvaging Judicial Independence, The Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia*, November 2010, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110.

[17] 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").

independence and judicial competence, and briefly consider potential mechanisms for addressing serious judicial misconduct or breach of duty.

The Rights of Victims, Survivors, and Post-Conflict Societies:

In September 2004, then-UN Secretary-General Kofi Annan appointed an independent expert to update the UN's principles on protecting and promoting human rights through combating impunity.[18] The expert issued a report and a set of updated principles (hereinafter "Impunity Principles") at the end of her one-year mandate.[19] These principles clarify a number of rights guaranteed to victims of atrocity crimes: the right to truth, the right to justice, and the right to reparation, with guarantees of non-recurrence. The first two of these rights will be examined below in the context of recent developments at the ECCC.

Right to truth

The Impunity Principles include the inalienable right of all peoples 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. Full and effective exercise of the right to the truth is considered a vital safeguard against the recurrence of violations.[20]

A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.[21] To be fair and credible, it must be conducted impartially. The fundamental place of "truth" in a judicial investigation is recognized in the language of the ECCC's Rules: the co-investigating judges are empowered to take any investigative action "conducive to ascertaining the truth."[22] The provisions that govern the conduct of judicial investigations set out a wide range of powers for the co-investigating judges. Some examples of possible investigative actions provided by the Rules are:

- To summon and question suspects and charged persons;
- To interview victims and witnesses and record their statements;
- To seize exhibits;
- To seek the opinion of expert(s);
- To conduct on-site investigations;

---

[18] *See* United Nations Press Release, "Secretary-General Appoints Independent Expert to Update Set of Principles to Combat Impunity," September 14, 2004, at http://www.unhchr.ch/huricane/huricane.nsf/0/F851F48DECAB6A26C1256F0F005714AF?opendocument.

[19] UN Doc. No. E/CN.4/2005/102, Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, February 18, 2005, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/111/03/PDF/G0511103.pdf?OpenElement and Addendum – Updated set of Principles for the protection and promotion of human rights through action to combat impunity.

[20] Impunity Principles, p. 7.

[21] 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_").

[22] IRs, Rule 55 (5).

- To seek information and assistance from another country, the United Nations or any intergovernmental or non-governmental organization, or any other sources;
- To issue orders, including summonses, arrest warrants, detention orders, and arrest and detention orders;
- To issue "Rogatory Letters" (formal requests to the judicial police or ECCC Investigators to undertake particular investigative actions).

The Introductory Submissions in Cases 003/004 cover crimes allegedly committed as part of a joint criminal enterprise constituting a systematic and unlawful denial of the rights of the Cambodian population. Together, the allegations concern a total of forty distinct factual situations, or crime bases, and five suspects.[23] Both former International Co-Prosecutor Robert Petit (Canada) and current International Deputy Co-Prosecutor William Smith (Australia) stated publicly that the prosecution of the suspects in Cases 003/004 "would lead to a more comprehensive accounting of the crimes that were committed under the DK regime during 1975-79,"[24] thereby recognizing the ECCC's role in establishing "truth" and in creating an historical record of Khmer Rouge atrocities. They also agreed not to pursue further investigations beyond Cases 003/004.[25]

Right to justice

The right to justice broadly encompasses two aspects: first, the duty of States (or, in the case of the ECCC, the court itself) to undertake prompt, thorough, independent, and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures; and second, the right of victims to meaningful participation in the process. In regard to Case 003, the co-investigating judges have failed to adhere to established international legal norms and ECCC Law in both respects.

(a) International investigative standards

The Impunity Principles require States to undertake prompt, thorough, independent, and impartial investigations into violations of human rights and international humanitarian law and to take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried, and duly punished. This reflects the state of international customary law.

International jurisprudence has consistently identified four components essential to conducting a genuine investigation. An investigation must be:

---

[23] *See* Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions, September 8, 2009, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf.
[24] *See* Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions, September 8, 2009, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf; *see also* Statement of the Co-Prosecutors, January 5, 2009, at http://www.eccc.gov.kh/sites/default/files/media/Statement_OCP_05-01-09_EN.pdf.
[25] Ibid.

(1) effective (capable of leading "to the identification and punishment of those responsible,"[26] and "undertaken in a serious manner and not as a mere formality preordained to be ineffective");[27]
(2) independent (based on, *inter alia*, "the existence of guarantees against outside pressures,"[28] specifically "the persons responsible for the injuries and those conducting the investigations should be independent of anyone implicated in the events";[29]
(3) prompt;[30] and
(4) open to an element of public scrutiny.[31] Significantly, the whole operation must also be analyzed, and not merely the immediate specifics of any one incident; the overall plan and its implementation must be analyzed.[32]

On May 9, 2011, International Co-Prosecutor Andrew Cayley (UK) issued a press release in response to the closure of the Case 003 investigation, indicating his intention to seek further investigative acts.[33] His statement was the first public recognition by an ECCC court official that there were glaring deficiencies in the Case 003 investigation. As confirmed by Cayley's statement, the co-investigating judges did not summon and question either of the suspects named in the Case 003 Introductory Submission. They did not even formally notify the suspects that they were under investigation. Witnesses were not interviewed. Crime sites were not examined. Some evidence already available from the 002 Case file was not transferred to the 003 file. The press statement showed that while there was some overlap between the Case 002 and Case 003 crime sites (formally used as a justification for limiting the investigations to paper review),[34] several crime sites in Case 003 had not formed part of the Case 002 investigation.[35] Cayley said in his statement that the crimes had "not been fully investigated." Later, in a media interview, he said that "a significant amount" of investigation was still to be carried out.[36] He said that taking this step was "not just a matter of law, but also a matter of conscience."[37]

[26] *Hugh Jordan v. the United Kingdom*, ECtHR, Application No. 24746/94, 4 August 2001, §107.
[27] *Chumbivilcas v. Peru*, Inter-American Commission on Human Rights, Case 10.559, 1 March 1996.
[28] *Findlay v. the United Kingdom*, ECtHR, Application No. 22107/93, 25 February 1997, §73.
[29] *Bati v. Turkey*, ECtHR, Application No. 33097/96, 57834/00, 3 September 2004, §135.
[30] *Bati v. Turkey*, ECtHR, Application No. 33097/96, 57834/00, 3 September 2004, §136.
[31] *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, 1 October 2003, §213.
[32] *McCann and Others v. the United Kingdom*, ECtHR, Application No. 18984/91, 27 September 1995.
[33] 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.
[34] "[I]ncluding the S-21 Security Centre, the Kampong Chnnang Airport Construction Site, purges of the East, Central and New North Zones, and incursions into Vietnam…"
[35] (i) S-22 Security Centre in the Phnom Penh area; (ii) Wat Eng Tea Nhien Security Centre in Kampong Som Province; (iii) Stung Hav Rock Quarry forced labour site in Kampong Som Province; (iv) capture of foreign nationals off the coast of Cambodia and their unlawful imprisonment, transfer to S-21 or murder; and (v) security centres operated in Rattanakiri Province.
[36] 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.
[37] James O'Toole, "Prosecutor Speaks Out," *Phnom Penh Post*, May 10, 2011, pp. 1-2.

The Case 003/004 judicial investigations raise serious questions about the ECCC's fulfillment of each of the four essential components of a genuine investigation. The co-investigating judges failed to carry out such basic investigative acts as interviewing suspects and other witnesses, or conducting basic field investigations. The Case 003 investigation stagnated for 20 months amid Cambodian government interference and lack of national cooperation within the court. The investigations were never undertaken in a serious manner: staff within the Office of Co-Investigating Judges (OCIJ) reported that any effort to push the investigations forward was met by judicial opposition.[38] Media reports confirm the departure of OCIJ staff due to the co-investigating judges' failure to investigate, lack of staff confidence in Judge Blunk's leadership, and general dysfunction in the office.[39] The co-investigating judges responded that they "welcomed" these departures.

Not only was no genuine investigation pursued, but efforts were apparently made to cover up that fact. Thus, as reports were emerging that the Case 003 investigation was about to be closed, staff from the Office of Co-Investigating Judges began stuffing the Case 003 file with "evidence" from the Case 002 file, to create the appearance that significant work had been done in the 003 investigation.[40] The April 29, 2011 press release announcing the close of the investigation went out of its way to note that there were 48,000 pages and 2,000 pieces of evidence in the Case 003 file. This may have given the false impression that significant investigations had been pursued.

An examination of the history of Cases 003 and 004 shows that the court has always been hobbled by the Cambodian government's opposition to these investigations. First, the suspects were originally referred for investigation only by then International Co-Prosecutor Robert Petit. His Cambodian counterpart opposed the investigation and filed an official disagreement under the court's Rules, triggering a special "supermajority" mechanism for resolution of the dispute. Second, on the question of whether the investigation should ultimately proceed to judicial investigation, the Pre-Trial Chamber split along national/international lines, but the supermajority mechanism meant the cases proceed to judicial investigation. Third, the cases languished for some 20 months with virtually no movement. Fourth, the Co-Investigating Judges You Bunleng and Marcel Lemonde also engaged in a battle over issuing Rogatory Letters for investigations.

In addition, suspects were never officially informed that they were under investigation; they were never questioned or assigned individual legal representatives; potential civil parties were never

[38] Interviews with confidential sources, Phnom Penh, 2011.

[39] 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.

[40] Interviews with confidential sources, Phnom Penh, 2011.

given a proper opportunity to join the proceedings; glaring additional gaps in the Case 003 investigation exist. In contrast to Cases 001 and 002, the investigations in Case 003 were conducted without transparency, prompting court observers to wonder why the secrecy was necessary and what it was hiding. A *prima facie* case for lack of independence in the conduct of the investigations is clear.

The investigations in both Cases 003 and 004 have stagnated. The Case 003 investigation was ongoing for some 20 months prior to its closure. The Case 004 investigation is officially still "ongoing." As of December 2010, when Judge Siegfried Blunk took office as international co-investigating judge, virtually no substantive investigation had been carried out in either case. Prior to the April 29 announcement that the 003 investigation was closed, the only official information from Co-Investigating Judges Blunk and Bunleng on the progress of the cases was a statement in early February saying that the judges were cooperating, that staff were reviewing material already on file, and that "no field investigations were being carried out."[41] This public statement was in response to a news article published that morning suggesting that the judges were finally moving forward with the investigation.[42]

Editions of the ECCC's Public Affairs Unit monthly publication *The Court Report* while Judge Marcel Lemonde was still in office cited some field investigations in 003/004, but those were reportedly conducted by internationals only.[43] That only internationals participated in field investigations demonstrates that national/international divisions between the co-prosecutors and between the co-investigating judges are longstanding. Issues of *The Court Report* published between the date on which Judge Blunk took office (December 2010) and the April 29 closing of the Case 003 investigation cited "no field investigations." Generally, the cited "progress" in the investigation was the review of documents already in OCIJ's possession, and the preparation of "memoranda on complex legal issues."[44] However, the May edition reported that: "The Co-Investigating Judges interviewed witnesses in the field and at the ECCC for Case 003."[45] Read alongside the April 29 press statement, this may also have given the false impression that

[41] 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.

[42] 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.

[43] "The Court Report," ECCC Publication, January 2011, p. 5, cites: "…one Case 003 related field mission in Phnom Penh on 1 December." This is the most recent reported field mission and was conducted on the day Judge Blunk officially took office. *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.

[44] *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.

[45] *See* "The Court Report," ECCC Publication, May 2011, p. 6, available at http://www.eccc.gov.kh/en/public-affair/publication.

significant investigations had been pursued—a fact clearly drawn into question by the absence of field investigations prior to this, and the May 9 press statement by the international co-prosecutor identifying major gaps in the investigation.

The secretive nature of the 003 and 004 investigations—conducted under the court's "confidentiality" provisions—has shielded the co-investigating judges from public scrutiny, and provides a marked contrast with the transparency found in the 001 and 002 investigations. For example, a review of available public information on the Case 002 investigation shows that the co-investigating judges used the full array of investigative tools available to them in ascertaining the truth. Within four months of the opening of that judicial investigation, all suspects had been brought before the co-investigating judges, arrested, and charged (i.e. officially informed of the allegations against them). The Case 002 Closing Order illustrates well the breadth and volume of investigative action taken during the course of the judicial investigation:

> In addition to the documents the Prosecutors filed in support of their Introductory Submission, the records on the Case File include:
>
> - 46 written records of interview of the Charged Persons;
> - more than 1,000 written records of interview of witnesses and civil parties;
> - 36 site identification reports;
> - one demographic expert report;
> - numerous medical expertise reports; and
> - more than 11,600 substantive documents placed on the Case File by the Co-Investigating Judges, the Co-Prosecutors, the Charged Persons, the Civil Parties and their lawyers, representing a total of more than 350,000 pages, including 223,000 pages relating to the facts of the cause.[46]

Overall, there are strong grounds upon which to base a preliminary inference that the investigations have failed to comply with international standards of effectiveness, independence, promptness, and public scrutiny. This requires the immediate attention of all relevant stakeholders.

(b) The right to meaningful victim participation

The Impunity Principles specify that victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes such procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.[47]

[46] *Co-Prosecutors v. Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, September 15, 2010 ("Case 002 Closing Order"), para. 17.
[47] Impunity Principles, Principle 19: Duties of States with Regard to the Administration of Justice.

Ordinarily, the co-investigating judges would solicit the participation of victims as civil parties during the course of the investigation. In Case 003, no public information was ever officially provided by the co-investigating judges—or any other branch of the court—thereby thwarting meaningful participation of victims in the investigative process. The fifteen day time limit for the filing of civil party applications started to run on April 29, 2011 (the date of notification of the closure of the investigation), when no official information about the crimes was in the public domain.

In order to join the proceedings, victims require basic information about crime sites, general allegations and, preferably, the names of suspects, so victims can submit informed applications for status as civil party participants. The judges neglected to provide this information. In his May 9 statement, and in recognition of this omission, International Co-Prosecutor Cayley provided basic, albeit extremely limited, information about the Case 003 investigation, to enable potential civil parties to apply. Cayley also indicated that he would seek a six-week extension of the deadline for civil party applications "in order to allow reasonable time" for individuals to apply. Additionally, he asked those in possession of any information about the crimes under investigation to contact the Office of the Co-Prosecutors.

By way of comparison, in Case 002 the co-investigating judges ruled upon the admissibility of a total of 3,988 applications for civil party status. While judicial investigations are required to be conducted confidentially,[48] the Rules also empower the judges to provide information to the public during the course of investigation.[49] In Case 002, the judges regularly exercised this transparency power, providing updates to the public on the progress of the investigation. Most notably, for the benefit of potential civil parties, the co-investigating judges issued a public statement detailing the facts falling within the scope of the investigation and urging those who felt they fell within that scope to contact the Victims Support Section "as soon as possible." [50] Additionally, the court actively sought to maximize the number of civil party applicants, even extending the business hours of the Victims Support Section.[51] This information was provided more than two months before the official close of the judicial investigation, and some ten months before the Closing Order was filed, thereby affording victims their proper place in the proceedings as both participants in the investigation and as the ultimate beneficiaries of justice.

Despite the lack of similar transparency in Cases 003/004, in April two individuals brought applications for civil party status in Case 003, naming two of the five suspects as Sou Met, commander of the Khmer Rouge air force, and Meas Muth, navy commander.[52] That the Case

[48] Rule 56.
[49] Rule 56 (2) (a).
[50] Statement from the Co-Investigating Judges: Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications, November 5, 2009, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_Press_Release_5_Nov_2009_Eng.pdf.
[51] 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.
[52] James O'Toole and Cheang Sokha, "Former Cadres in Complaint," *Phnom Penh Post,* p. 4; *see also* 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; *see also* Lars

003 suspects are Sou Met and Meas Muth has been widely reported in the press, including recent media reports that confidential court documents confirm this fact.[53] One of the two civil party applicants, Theary Seng, has already been granted civil party status in Case 002 in relation to the killing of her parents by the Khmer Rouge. The other applicant, Rob Hamill, whose status stemmed from the execution of his brother at S-21 prison, was a civil party in Case 001. Rob Hamill's application seemed to have a particularly strong connection with the Case 003 investigation because his brother was captured by the Khmer Rouge navy (under the alleged authority of Meas Muth), transferred to S-21, and subsequently executed. Both applicants were rejected as civil parties in Case 003 by the co-investigating judges, and they subsequently filed appeals.[54] Further, the rejection of the applications was done confidentially and without any stated reason.

A further 316 individuals submitted applications for civil party status in Case 003 in nine days (between May 9, 2011 and May 18, 2011), amid an international public outcry from victims for access to ECCC justice.[55] Of these, 178 also filed for civil party status in Case 004. However, the limited information available about 003 makes it nearly impossible for victims to file applications properly, stoking fears that the applications will be rejected. This lack of adequate time and information was specifically mentioned in a public statement signed by 35 members of the Cambodian NGO community.[56] Further, the president of the Cambodian Center for Human Rights, Ou Virak, wrote to UN Special Expert on the ECCC Clint Williamson, calling upon the United Nations to take immediate action to prevent the ECCC from once again failing the victims of Khmer Rouge atrocities.[57] These sentiments have been echoed by the Cambodian diaspora. Some 750 members of the Cambodian diaspora in the United States (mainly survivors and those working in the survivor community) signed a petition calling on the UN–backed Tribunal to investigate Case 003 properly.[58]

Olsen, "Response to Theary Seng from ECCC," *Phnom Penh Post,* April 8, 2011, p. 16; *see also* Julia Wallace, "Another Civil Party Application for Case 003," *Cambodia Daily,* April 8, 2011, p. 24.

[53] *See* Douglas Gillison, "UN Prosecutor Seeks Charges, Names Crimes: Statement Exposes Inactivity of Investigation Judges," *Cambodia Daily*, May 10, 2011, p. 1; James O'Toole, "Hamill's 003 Bid Denied," *Phnom Penh Post,* May 18, 2011, p. 4.

[54] 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.

[55] Julia Wallace, "Government Opposes 318 Civil Party Applications," *Cambodia Daily,* May 19, 2011, p. 22; James O'Toole, "KRT Judges Rap Cayley: Court Staff Divided on Case 003," *Phnom Penh Post,* May 19, 2011, p. 1.

[56] Joint Media Statement: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out, available at http://www.chrac.org/eng/CHRAC%20Statement%20in%202011/05_19_2011_Joint%20Press%20Release%20about%20Judicial%20Independence%20in%20En.pdf

[57] Ou Virak, President of the Cambodian Center for Human Rights, "Open Letter to Tribunal's Clint Williamson"

[58] Rob Carmichael, "US Group Condemns UN Tribunal in Cambodia," May 26, 2011, available at http://www.voanews.com/english/news/US-Group-Condemns-UN-Tribunal-in-Cambodia-122651214.html "ASRIC says the Tribunal cannot decide on the merits of its third case without a proper investigation. Leakhena Nou is the founder of ASRIC, which is the only Khmer Rouge survivors' organization in the United States." ; *see also* Sophinarath Cheang, "US Victims Add Calls for More Tribunal Cases," *Voice of America,* May 11, 2011, at http://www.voanews.com/khmer-english/news/US-Victims-Add-Calls-for-More-Tribunal-Cases-121634269.html.

Asked whether he thought potential civil parties had been unfairly prevented from participating in the Case 003 investigation, Judge Blunk is reported to have given a surprising response: that such parties had had "ample opportunities" to find out what was going on through the court's Victims Support Section.[59] This statement is simply inaccurate. Until Andrew Cayley put basic crime scene information in the public domain, neither the Victims Support Section nor any other arm of the court provided information about Case 003 to enable potential civil parties to join the proceedings. Moreover, the Victims Support Section has no budget or instructions to conduct outreach to Cambodian communities for Cases 003/004.

In May, the court posted a "Frequently Asked Questions about Case 003" memo on its website.[60] This memo—from the ECCC's Public Affairs Section—gave rise to concerns about the ECCC's official attitude toward Cases 003 and 004. The memo stated, in part, that: "The public has no say in the investigations, and the public is not party to them." Yet the Cambodian public—including victims, their families, and Cambodian society at large—are the intended beneficiaries of ECCC justice. Furthermore, the ECCC's founding documents clearly intend for civil parties to form an integral part of the proceedings at all stages, including during judicial investigations.

Additionally, the memo attempted to explain away the distinctions between investigative transparency in Case 002, and absolute opacity in relation to Case 003. It postulated, "[…] it would be difficult to make public the scope of investigation without incurring the risk of compromising the future legal process of this case." This is disingenuous, considering that after concluding the investigation, no further investigative acts were contemplated by the co-investigating judges. The memo also suggested that potential civil parties had not been invited to participate in the Case 003 investigation because their applications were likely to be rejected.[61] In a feat of circular logic, the memo argued that because the scope of investigations had not been released, potential civil parties would not be able to file properly-founded applications, and because their applications were likely to be uninformed and hence rejected, there was no point in informing potential applicants about the investigations.

In a further concerning turn of events, the co-investigating judges obstructed the lone court official who tried to carry out a genuine investigation and afford potential victims access to the legal process. A number of news media outlets reported that the co-investigating judges were considering charging International Co-Prosecutor Andrew Cayley with contempt for, *inter alia*,

[59] 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.

[60] As of the date of this report, the "FAQ's" appear to have been removed from the website, but are available at http://dara-duong.blogspot.com/2011/05/frequently-asked-questions-about-case.html.

[61] "The experience from Case 002 showed that a substantive number of the Civil Party applicants were deemed by the Co-Investigating Judges to fall outside of the scope of investigation, and hence their applications were rejected. Most of the rejected Civil Party Applications had been filed before the scope of the investigation had been made public. Since the scope of investigation in Case 003 at this point has not been made public, it would be a risk that most Civil Party Applications filed would fall outside of the scope of the investigation."

having named the crime sites to enable individuals with information to come forward.[62] The judges later denied that this was ever the case.[63] Instead, they issued an order that Cayley retract the allegedly offensive parts of his statement "within three days."[64] First, even if complied with, the judges' order would be of no effect since the apparently offending material had already been made public in two public documents (Cayley's original statement and the judges' own public order repeating it), rather than one. Second, while the judges' investigation of Case 003 lacked rigor, their response to a senior UN appointee seeking to rectify the situation was overzealous. Additionally, the judges claimed that the purpose of the order was to "restore public confidence in the legality and confidentiality" of the case, yet their actions only served to fuel concerns about abuse of judicial power, masquerading as the need for confidentiality.

Cayley appealed the order on a number of grounds—including that the judges had abused their power—to the Pre-Trial Chamber.[65] The appeal was still pending when this report was published, however the Pre-Trial Chamber issued an interim order suspending the enforcement of the judges' decision until the appeal has been finally determined.[66] The Pre-Trial Chamber is proportioned three-to-two between national and international judges, respectively. Special legal provisions designed to safeguard against voting along national/international lines are unlikely to mandate further investigation, unless the Pre-Trial Chamber radically departs from past voting patterns on politically sensitive issues. [67]

Cayley's appeal has been met by public silence from the UN and the international community.

The lack of transparency in the 003/004 investigations is further demonstrated by the fact that until the launch of the ECCC's new website at the end of March 2011, Cases 003/004 were not even listed as part of the court's docket.[68] Ironically, however, since the investigation was closed, the co-investigating judges have issued a number of press statements seeking to minimize

[62] *See*, for example, "Cayley in the Crosshairs," *Phnom Penh Post,* May 13, 2011, p. 1; Rob Carmichael, "Cambodia War Crimes Judge Threatens Suit Against Prosecutor," Deutsche Presse-Agentur, May 13, 2011; Douglas Gillison, "Judges Consider Contempt Action Over Case 003," *Cambodia Daily,* May 13, 2011, p. 1.
[63] Order on International Co-Prosecutor's Public Statement Regarding Case File 003, May 18, 2011, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_EN.PDF; *see also* James O'Toole, "KRT Judges Rap Cayley: Court Staff Divided on Case 003," *Phnom Penh Post,* May 19, 2011, p. 1; Douglas Gillison, "Cayley Ordered to Retract His 003 Statement," *Cambodia Daily,* May 19, 2011, p. 1.
[64] Reports coming out of the court were that the co-investigating judges were considering charging Cayley with contempt for his press statement. *See*, for example, "Cayley in the Crosshairs," *Phnom Penh Post,* May 13, 2011, p. 1; Rob Carmichael, "Cambodia War Crimes Judge Threatens Suit Against Prosecutor," *DPA,* May 13, 2011.
[65] International Co-Prosecutor's Appeal Against the 'Order on International Co-Prosecutor's Public Statement Regarding Case File 003,'" May 27, 2011, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_1_1_EN.PDF.
[66] Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003", Case File No: 003/07-09-2009-ECCC-OCIJ (PTC 003), June 13, 2011 (document not yet available on ECCC website).
[67] R. 77 (13).
[68] *See* Julia Wallace, "KR Tribunal Website Offers Better Public Access," *Cambodia Daily,* March 26-27, 2011, p. 14.

the damage to their reputation caused by the widespread criticism of their (in)action and lack of transparency.[69]

Furthermore, there is already a large volume of information in the public domain about the identity of the five suspects in Cases 003/004 and the allegations against them with regard to their roles in Khmer Rouge atrocities.[70] It is therefore too late to try to sweep the cases under the carpet under the fiction that the proceedings are confidential or that the suspects are neither "senior leaders" nor "those most responsible." (Please see the "Duch Appeal Hearing" section beginning on page 23 for a discussion of these jurisdictional issues).

The Rights of Suspects

The Impunity Principles also provide guarantees for those implicated (i.e. suspects), including that they be afforded an opportunity to put forth their version of the facts either at a hearing convened by the commission while conducting its investigation, or through a written submission.[71] Under the ECCC Law, during a judicial investigation, suspects have an unconditional right to assistance of counsel of their own choosing and to have legal assistance assigned to them free of charge.[72]

Neither of the Case 003 suspects has been afforded this right specified under the Law; rather, attempts by the Defence Support Section to assign one lawyer to represent the interests of all five suspects in Cases 003/004 were rejected by the co-investigating judges.[73] In mid-May, following the flurry of media attention around the troubling Case 003 developments, the ECCC's Defence Support Section issued a press statement "to all of those who are concerned that they may be subject to investigations before the ECCC," informing them of their rights, including the right to

[69] *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.

[70] In relation to Sou Met and Meas Muth, *see, for example*, further discussion below on the 2001 publication by Steve Heder and Brian Tittemore; *see also* Jared Ferrie, "Leaked Document Cases Doubt on Impartiality of Khmer Rouge Judges," *Christian Science Monitor*, June 8, 2011, available at http://www.csmonitor.com/World/Asia-Pacific/2011/0608/Leaked-document-casts-doubt-on-impartiality-of-Khmer-Rouge-judges.

[71] Impunity Principles, Principle 9: Guarantees for Persons Implicated.

[72] ECCC Law, Article 24 new.

[73] 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, 2011, 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."

remain silent when questioned by the media.[74] The statement also highlighted the right to counsel, but suggested that this right did not come into play until suspects were officially informed that they were under investigation, or officially questioned. While the distinctions between common law and civil law traditions may explain differences in interpreting this right, the ECCC Law unequivocally guarantees the right to counsel of one's own choosing from the commencement of the judicial investigation.[75]

Because Sou Met and Meas Muth were never officially informed that they were under investigation, never offered the opportunity to put forth their respective versions of the facts, and never assigned counsel of their own choosing, the co-investigating judges appear to have made additional errors in their conduct of the investigation, therefore failing to adhere to international legal norms and the ECCC Law.[76] Additionally, the suspects were under investigation for some 20 months without the court's official recognition of this fact, raising serious equality of arms issues. During this period, Sou Met and Meas Muth were repeatedly approached by members of the media and questioned without being informed of their right to remain silent or their right against self-incrimination.

Timeline for Closing an Investigation: Next Steps

The procedure for closing an investigation and establishing the next steps in the case is governed by Internal Rule 66.[77] First, the co-investigating judges must notify the parties and their lawyers that the investigation has been concluded.[78] This has now been done in Case 003. The parties (in this case, the only party are the co-prosecutors, since the suspects were never informed that they were under investigation, defense counsel was never assigned, and no civil party has ever been admitted) then have fifteen days to request further investigative action. In this case, the deadline for these requests fell on May 18, 2011, which was also the deadline for the filing of any civil party application. International Co-Prosecutor Cayley requested a number of further investigative acts in relation to Case 003, as outlined above. He also requested a six-week extension of the filing deadline for civil party applicants.

The co-investigating judges rejected Cayley's requests for further investigative action (and application for extension of the deadline for civil party applications) on the basis that they were invalid because Cayley acted alone.[79] The reasoning relied on Rules 13 (3)[80] and 71 (1),[81] and

[74] Press Statement – Defence Support Section: Information on Fair Trial Rights, May 18, 2011 at http://www.eccc.gov.kh/sites/default/files/media/ECCC%20DSS%2018%20May%202011.pdf.
[75] ECCC Law, Article 24 new reads: "*During the investigation, Suspects shall be unconditionally entitled* to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation as necessary, into and from a language they speak and understand." (Emphasis added.)
[76] Impunity Principles, Principle 9; and ECCC Law, Article 24 new.
[77] Rule 66: Notice of Conclusion of Judicial Investigation.
[78] Rule 66 (1).
[79] ECCC Case File No. 003/07-09-2009, Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, June 7, 2011, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/5-D20-3-EN-Redacted.pdf. *See also* Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor, June 7, 2011, available at http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-related-case-003-requests-

said that those Rules left "no room for a solitary action by one Co-Prosecutor, unless either a delegation of power ha[d] taken place according to Rule 13 (3), or a Disagreement between Co-Prosecutors ha[d] been recorded pursuant to Rule 71 (1)." This decision is erroneous for the following reasons:

The decision failed to mention Rule 1 (2), which provides—in relevant part—as follows:

> In the present document [the Rules], the masculine shall include the feminine *and the singular the plural, and vice-versa*. In particular, *unless otherwise specified*, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation; and *a reference in these IRs to the Co-Prosecutors includes both of them acting jointly and each of them acting individually, whether directly or through delegation*, as specified in these IRs. This provision does not have any grammatical impact on the document in Khmer.[82]

Rule 66 (1) states that once an investigation has been concluded, the "parties" have fifteen days to request further investigative action. The glossary to the Rules defines "party" as including "the Co-Prosecutors." Because Rule 66 (1) does not specifically require the co-prosecutors to act together (i.e. it is not "otherwise specified"), nor a delegation of duty under Rule 13 (3), Rule 1 (2) applies. Accordingly, Cayley had a clear legal basis for requesting further investigative action alone.

Rule 71 (1) provides a technical procedure for recording disagreements, but Rule 71 (2) makes clear that an individual prosecutor does indeed have authority to act alone.

Further, in line with the Pre-Trial Chamber's decision on the disagreement between the co-prosecutors regarding whether Case 003 should be referred for judicial investigation, the obligation to bring a Disagreement would fall on the co-prosecutor who *disagrees* with the action taken.[83]

---

international-co-prosecutor. Note that, even though the decision purported to recognize as validly filed any civil party application received within three weeks of the May 18 deadline, the effect of the decision was to provide only one day for applicants to file.

[80] Rule 13 (3) states: "Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Prosecutors may delegate power to one of them, by a joint written decision, to accomplish such action individually."

[81] Rule 71 (1) entitled "Settlement of Disagreements between the Co-Prosecutors" states: "In the event of disagreement between the Co-Prosecutors, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Prosecutors."

[82] Rule 1 (2) (emphasis added). Notably, the co-investigating judges did not mention Rule 1 in the preamble to their decision: "Noting Rules 13, 21, 66, 71 and 72 of the ECCC Rules."

[83] Disagreement No.: 18-11-2008/ECCC-PTC, "Annex 1: Public Redacted Version Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71," August 18, 2009, para. 27, available at 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_%28English%29.pdf.

Therefore, Rules 1 (2) and 66 (1) provide a clear legal basis for either co-prosecutor to bring a request for further investigative action alone. A Rule 13 (3) delegation of power is not required. Further, neither co-prosecutor invoked the Pre-Trial Chamber's formal disagreement process. This means the co-investigating judges erred, and were clearly legally obligated to consider the merits of Cayley's request for further investigative action.

Aside from the legal failings of the co-investigating judges' decision, it further demonstrates a lack of judicial consideration for the applicable law. It also leaves the judges open to the suggestion that they are availing themselves of every opportunity to shut down these investigations prematurely—even at the risk of falling into legal error. This is not only a matter which requires correction on appeal, but which warrants further consideration as part of the mounting evidence of judicial misconduct by the co-investigating judges in Case 003.

There is now an available avenue of appeal to the Pre-Trial Chamber (in this case, likely by the international co-prosecutor, acting alone).[84] But repairing the damage done to the court's reputation through appellate action in this case is unlikely. Again, the Pre-Trial Chamber will likely split along national/international lines and—because the default position in the absence of a supermajority is that the original order (notice of conclusion of investigation) stands—Case 003 will never be properly investigated, unless the UN and the international community insist upon it.[85]

Following the resolution of any appeal to the Pre-Trial Chamber, the next step in the procedure would be for the co-investigating judges to forward the case file to the co-prosecutors for the preparation of their final submission. The final submission has to be submitted within three months of the co-prosecutors' receipt of the case file from the co-investigating judges, in the event that the suspects are not in custody (as neither of them is, in Case 003).[86] Following the filing of this submission, the co-investigating judges issue their Closing Order in the form of an indictment (sending the individuals for trial) or a dismissal order (dismissing the allegations against them). There is also an appeals process attached to the judges' decision. If either of Cases 003/004 is dismissed and the co-prosecutor appeals, any admitted civil parties can join the appeal.[87] Again, however, the Pre-Trial Chamber will likely split along national/international lines, and the default position in absence of a supermajority is that the original order—dismissal—stands.[88]

The UN continues to be largely silent on this threat to the court's independence and credibility, despite the combination of factors giving rise to deep concern about the fate of Cases 003/004: intentionally concealing the court's work from public view, failing to inform ("charge") the suspects in these cases of the allegations against them, failing to assign them legal counsel, neglecting to conduct field investigations, neglecting to employ the broad spectrum of investigative powers available, leaving potential civil parties uninformed regarding the most

[84] Rule 66 (3).
[85] Rule 77 (13) (a).
[86] Rule 66 (4).
[87] Rule 74 (4) (f).
[88] Rule 77 (13) (b).

basic crime base information, and wasting precious resources by ignoring the cases while dozens of staff trained to investigate sit and wait for permission to do their jobs.[89] Recently, the UN publicly denied having given any instructions to ECCC employees to shut down the investigations.[90]

The United Nations, the donor community, and international leaders and staff in the court should give careful consideration to the harm caused if the very institution established to put an end to impunity in Cambodia ends up encouraging it. This is a legacy that neither Cambodians nor the international community want the ECCC to leave. The international community is expected to be the foundation of the court's independence, not a silent partner to its demise. Moreover, the credibility of the United Nations, including that of the Secretary-General, is undermined if it fails to investigate consistent and credible reports that the ECCC's Office of Co-Investigating Judges is failing to perform its mandate in Cases 003/004 and is instead intentionally wasting precious resources by not allowing staff to perform their jobs.

As discussed further below, the Duch Appeal may be significantly affected by current developments in Cases 003/004. Similarly, Case 002 may be altered by 003 and 004.

[89] In March 2011, confidential sources inside the court confirmed that some 40 staff members were employed in OCIJ—both nationals and internationals—including lawyers, investigators, analysts and administrative staff. News media reported "dissent" within OCIJ ("among Tribunal investigators"), giving rise to the need for a special UN delegation to visit in late May – *see* Douglas Gillison, "Dissent Reported Among Tribunal Investigators: UN Sending Delegation of Human Resources Officers," *Cambodia Daily*, May 24, 2011, p. 1. The article reported that Judge Blunk's decision not to pursue Cases 003/004 had "put him at odds with his own investigators and legal analysts…"

[90] Rob Carmichael, "UN Denies Interfering in Cambodian War Crimes Tribunal Cases," May 27, 2011, available at http://www.monstersandcritics.com/news/asiapacific/news/article_1641824.php/UN-denies-interfering-in-Cambodian-war-crimes-tribunal-cases: " 'Neither the secretary-general nor the United Nations Secretariat plays any role in the independent judicial process before the ECCC [Extraordinary Chambers in the Courts of Cambodia, the tribunal's official name],' Nesirky said. 'And I can confirm, in response to your question, that no instructions have been issued by any United Nations officials to any judge or other official at the (tribunal) to prevent Cases 003 and 004 moving forward as part of this independent judicial process,' he said."

Duch Appeal Hearing: Jurisdictional Issues

The Supreme Court Chamber sat in full session for the first time, from March 28-30, 2011, to hear the appeals in the 001 Case of Kaing Guek Eav, alias Duch.[91]

Discretion or Jurisdiction?

Prior to the Duch appeal hearing, the Supreme Court Chamber (SCC) issued a list of questions, inviting the parties to address particular aspects of the issues raised on appeal.[92] Of particular interest was a question concerning personal jurisdiction. The SCC asked the parties whether "…the language, 'senior leaders of Democratic Kampuchea and those who were most responsible' in the ECCC Agreement and the ECCC Law constitutes a "*jurisdictional requirement that is subject to judicial review*," or is a "*guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review*."[93] In other words, the SCC wanted to know whether it should consider the ECCC's jurisdiction over Duch at all, or simply accept that the co-prosecutors and co-investigating judges had discretion in relation to this issue.

This question remained largely unaddressed during the Duch appeal hearing, other than a few superficial statements,[94] yet the implications of the SCC's answer to this question are hugely significant. A finding that the determination of personal jurisdiction is a discretionary matter not subject to judicial review would mean that any decision of the co-investigating judges to dismiss Cases 003/004 on jurisdictional grounds might not be appealable.

This issue was considered by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) in its judgment in the case known as the "AFRC case."[95] The SCSL is another hybrid, or internationalized tribunal, with a limitation placed on its personal jurisdiction similar to that in the ECCC Law and Agreement: it has power to prosecute "persons who bear the greatest responsibility" for crimes falling under its jurisdiction, including "leaders" who have threatened the peace process.[96] In the AFRC case, the SCSL Appeals Chamber resolved a difference in opinion in each of its two Trial Chambers on the question of whether the wording in Article 1 of

[91] Transcripts of the proceedings for each of the three days are available at http://www.eccc.gov.kh/en/document/court/transcript-appeal-proceedings-kaing-guek-eav-duch. The Supreme Court Chamber is the ultimate court of appeal within the ECCC court structure.
[92] *Duch*, Case No. 001/18-07-2007-ECCC/SC, Order Scheduling Appeal Hearing (hereinafter Duch Scheduling Order), March 4, 2011, at http://www.eccc.gov.kh/en/documents/court/order-scheduling-appeal-hearing.
[93] Duch Scheduling Order, March 4, 2011 (emphasis added).
[94] See *Duch* appeal hearing transcript, March 28, 2011, at pp. 90-91 (per Noguchi J, and Ms. Chea Leang, National Co-Prosecutor); and p. 106, lines 17-24 (per Ms. Jacquin, Civil Party lawyer).
[95] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigue Borbor Kanu*, Case No. SCSL-2004-16-A (hereinafter "AFRC case"), Judgment (Appeals Chamber), February 22, 2008 at http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx (hereinafter "AFRC Appeal Judgment").
[96] Article 1, Statute of the Special Court for Sierra Leone, annexed to the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone*, January 16, 2002, 2178 U.N.T.S. 138.

its Statute was a "jurisdictional requirement" or a matter of "prosecutorial discretion."[97] The Appeals Chamber agreed with the finding of Trial Chamber I, that the special wording in Article 1 was only intended to guide the prosecutor's discretion.[98]

The ECCC's Supreme Court Chamber should not follow the SCSL's Appeals Chamber on this point, for a number of reasons. First, at the SCSL the decision to prosecute is a decision taken solely by an independent, international prosecutor. The ECCC, unlike the SCSL, is based on the civil law tradition whereby an investigation into crimes within its jurisdiction is conducted first by two co-prosecutors (one Cambodian and one international) and, then again (after being seized of a case referred by the co-prosecutors) by two co-investigating judges (one Cambodian and one international). A decision to indict an individual is therefore a judicial decision which must be subject to appellate review in order to comply with international standards. Furthermore, no discretionary power, whether prosecutorial or judicial, is absolute. A prosecutor's discretion is subject to review if it is exercised in bad faith;[99] similarly, appellate courts are required to intervene with a lower court's exercise of discretion where it constitutes an abuse of power.[100] In sum, whether labeled a matter of "prosecutorial" or "judicial" discretion, the ECCC's final court of appeal must retain the power to review a decision of the co-investigating judges to dismiss a case on the basis of personal jurisdiction because it could constitute an abuse of judicial discretion, or involve a misinterpretation of the law. This is also consistent with the ECCC Agreement, which expressly requires that its own provisions be interpreted in good faith and in accordance with their ordinary meaning.[101]

Defining "Senior Leaders" and "Those Most Responsible"

The ECCC Law and Agreement empower the court to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible" for the crimes under the court's jurisdiction.[102] Neither the ECCC Agreement nor the ECCC Law expressly defines "senior leaders" or "those who were most responsible."

---

[97] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* Case No. SCSL-04-14-PT (hereinafter "CDF Case"), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, March 3, 2004, para. 27, "[T]he Chamber therefore concludes that the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion." *Cf.* AFRC Case, Judgment (Trial Chamber), June 20, 2007, paras. 640-659 at 653: "The Trial Chamber, with the greatest respect, does not agree with the finding of Trial Chamber I… that the issue of personal jurisdiction is a jurisdictional requirement… The Trial Chamber cannot accept the idea that the drafters of the Statute purported to make 'the greatest responsibility requirement' a jurisdictional threshold which, if not met, would oblige a Trial Chamber to dismiss the case without considering the merits."

[98] AFRC Appeal Judgment, paras. 272-285.

[99] AFRC Appeal Judgment, para. 282: "That discretion must be exercised by the Prosecution in good faith, based on sound professional judgment…"

[100] In an international criminal context, *see,* for example, *Prosecutor v. Callixte Kalimanzira,* Case No. ICTR-05-88-A, Judgment (Appeals Chamber), para. 14: "A trial chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion."

[101] Article 2.2 of the ECCC Agreement, which states that the Vienna Convention on the Law of Treaties (23 May 1969) – in particular, Articles 26 and 27 – applies to the Agreement. Article 26 of the Vienna Convention states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[102] Article 1 of the ECCC Law, and Article 1 of the ECCC Agreement.

On July 26, 2010, the Trial Chamber found Duch guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions in connection with his role as the commander of the infamous S-21 prison, located in Phnom Penh.[103] Duch was sentenced to 35 years in prison, with a reduction of five years as compensation for his illegal detention by the Cambodian Military Court.

The defense, the prosecution, and three out of the four civil party groups appealed specific aspects of the trial judgment. The defense sought acquittal on the basis that Duch should never have been tried by the court at all. Duch claimed that because he was not one of those "most responsible" for Khmer Rouge era atrocities, he never properly fell under the ECCC's jurisdiction.[104] The prosecution sought to have Duch's sentence increased to life imprisonment.[105] A number of civil parties whose applications had been rejected by the Trial Chamber sought to be recognized, and others asked that the issue of reparations be revisited.[106]

Although Duch accepted responsibility for most of the allegations against him during the majority of his trial, he radically changed his position during the trial's closing arguments, requesting that he be acquitted.[107] The Trial Chamber considered this defense in its judgment, although an argument of this kind is required to be brought prior to the commencement of the trial.[108]

---

[103] *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment (Trial Chamber), 26 July 2010, available at http://www.eccc.gov.kh/en/documents/court/judgement-case-001 (hereinafter "Duch Trial Judgment").

[104] *Duch*, Notice of Appeal by the Co-Lawyers for Kaing Guek Eav alias Duch Against the Trial Chamber Judgment of 26 July 2010, 24 August 2010, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E188_8_EN.PDF; *Duch*, Appeal Brief by the Co-Lawyers for Kaing Guek Eav alias "Duch" Against the Trial Chamber Judgment of 26 July 2010, 18 November 2010, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F14_EN-1.PDF. The jurisdiction of the ECCC is limited by both of its founding documents—the ECCC Law and the ECCC Agreement—to try "senior leaders" of Democratic Kampuchea and "those who were most responsible" for the crimes falling under the court's jurisdiction. *See* 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. *See also* Preamble, and Articles 1, 5.3 and 6.3 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.

[105] *Duch*, Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav alias Duch, October 13, 2010, at http://www.eccc.gov.kh/en/document/court/co-prosecutors-appeal-against-judgement-trial-chamber-case-kaing-guek-eav-alias-duch.

[106] *Duch*, Co-lawyers for Civil Parties Group 2: Appeal Against Rejection of Civil Party Applicants in the Judgment, October 22, 2010; *Duch*, Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, October 5, 2010.

[107] *See* Duch Trial Judgment, para. 14, and fn. 19.

[108] Duch Trial Judgment, paras. 15-16: "The Chamber notes that these arguments were also belated and consequently rejects them [however, it] has evaluated on its own motion the question of whether there was any lack of jurisdiction over the Accused in the instant case." *See also* Internal Rules (Rev. 7), February 23, 2011 at http://www.eccc.gov.kh/en/document/legal/internal-rules. (All references to the Internal Rules are to this version unless otherwise stated and will be referred to as "Rule___"). Rule 89 entitled "Preliminary Objections," requires any objection to the jurisdiction of the Chamber to be made "no later than thirty (30) days after the Closing Order becomes final, failing which it shall be inadmissible." For the full reasoning as to how Duch was said to have properly fallen within the court's jurisdiction, s*ee generally* Duch Trial Judgment, paras. 13-25.

The issue of who might properly be deemed to fall under the ECCC's jurisdiction is of central importance, particularly at this stage in the court's life. The issue will not only affect the outcome of Duch's appeal, but also Case 002, involving four surviving "senior leaders" of the Khmer Rouge regime, and Cases 003/004. The following paragraphs examine some of the issues concerning the critical question of the court's jurisdiction.

According to the Closing Order, the co-investigating judges alleged that Duch fell within the category of "those most responsible" for crimes committed during the period of Democratic Kampuchea.[109] As noted by the Trial Chamber in its judgment, other international criminal tribunals have considered somewhat similar terminology, namely, the notion of "most senior leaders suspected of being most responsible."[110]

Originally, neither the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) had any specific limitations placed on their respective personal jurisdictions of the kind contemplated by the ECCC Law and Agreement.[111] Limitations on the tribunals' jurisdictions mainly concerned the crimes committed (subject-matter jurisdiction), the place where the crimes were committed (geographical jurisdiction), and the period during which they were committed (temporal jurisdiction).

Nonetheless, providing justice for international crimes "is characterized by finite financial and human resources, making the trial of all individuals suspected of committing atrocities a practical impossibility."[112] Given such concerns, the United Nations Security Council passed a resolution requiring the ICTY to complete its work "by concentrating on the prosecution and trial of *the*

[109] A "Closing Order" is an instrument indicting an individual with crimes under the court's jurisdiction. *See Duch,* Amended Closing Order, para. 129: "The judicial investigation demonstrated that, while DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979, *due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee*" (emphasis added).

[110] *See* Duch Trial Judgment, para. 22.

[111] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), Article 1: Competence of the Tribunal, "The International Tribunal shall have power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute," at http://www.icty.org/sid/135. *See also* Statute of the International Tribunal for Rwanda (ICTR Statute), Article 1: Competence of the International Tribunal for Rwanda, "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute," at http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx. Limits on "personal jurisdiction" concern the fact that the tribunals could only prosecute "natural persons" (as opposed to States, or corporate entities, for example), and the types of criminal liability that could attach to those natural persons—for example, planning, instigating, ordering, committing, aiding and abetting, and command responsibility (*see* Article 6 and 7 of the ICTY Statute, and Articles 5 and 6 of the ICTR Statute).

[112] John H. Ralston and Sarah Finnin, "Investigating International Crimes: A Review of International Law Enforcement Strategies: Expediency versus Effectiveness," pp. 47-68 at 48, in David A. Blumenthal and Timothy L.H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (2008, Martinus Nijhoff Publishers, Leiden).

most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction…"[113] These concerns were later taken onboard by the drafters of the Statute of the Special Court for Sierra Leone[114] and the ECCC Law and Agreement, resulting in language limiting the personal jurisdiction of these two institutions, so that the number of individuals prosecuted by them (and consequent cost) would be restricted. In the case of the ECCC, these limitations were contrary to the advice given by the United Nations by the Group of Experts appointed to examine the possibility of a transitional justice mechanism for Cambodia.[115]

Case law of the ICTY provides some guidance on how an international/ized court might determine the scope of its personal jurisdiction, if limitations are placed on it. After the UN Security Council resolution, amendments were made to the ICTY's Rules of Procedure and Evidence, laying down criteria for determining who can be defined as "most senior leaders suspected of being most responsible." Rule 11 *bis* requires judges to consider the gravity of the crimes charged and the level of responsibility of the accused.[116] While the ICTY language conflates both "senior leaders" and "those most responsible," its jurisprudence is illuminating.

In relation to the gravity of the offense, the ICTY referral bench in the case of *Prosecutor v. Milan and Sredoje Lukić* said that it could consider:

- the number of victims;
- the timeframe and geographic area in which the crimes were allegedly committed;
- the number of separate incidents;
- the way in which the crimes were allegedly carried out; and
- any other circumstances.[117]

---

[113] Security Council Resolution 1503, UN Doc. S/RES/1503 (2003), 28 August 2003 (Resolution 1503) (emphasis added).

[114] The Special Court for Sierra Leone (SCSL) was established in 2002, and is similar in basis to the ECCC. Article 1 of the Statute for the SCSL provides: "The Special Court shall, except as provided in subparagraph (2), have the power to prosecute *persons who bear the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, *including those leaders who*, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" (emphasis added). The SCSL's "greatest responsibility" requirement is, by definition, more narrow than the language selected for the ECCC Law and Agreement ("senior leaders" and "persons most responsible"), *see* AFRC Appeals Judgment, para. 656, outlining the then-United Nations Secretary-General's definition of "persons most responsible" to "include political and military leadership, others in command authority down the chain of command may also be regarded 'most responsible' judging by the severity of the crime or its massive scale. 'Most responsible' therefore denotes both a leadership or authority position of the accused, and a sense of gravity, seriousness or massive scale of the crime." (Taken from S/2000/915, "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone", October 4, 2000, para. 30.)

[115] UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated February 18, 1999) (Hereinafter "Group of Experts Report"), para. 111: "[T]he decision on whom to indict should rest solely with the prosecutor… A fortiori, the Group opposes the creation of a tribunal that would explicitly be limited in advance to the prosecution of named individuals."

[116] Rule 11 *bis* (C). Note that no similar provision exists in the ICTR's Rules of Procedure and Evidence.

[117] *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.

In considering the term "level of responsibility," the same referral bench found that it related both to the role of an accused in the commission of the alleged offenses and to the position and rank of the accused in the civil, political, or military hierarchy, based on his or her *de facto* or *de jure* authority.[118] The referral bench noted, however, that the notion "most senior leaders" is not limited to the architects of an overall policy forming the basis of an alleged crime.[119]

Milan Lukić was the leader of a local paramilitary group and his brother, Sredoje Lukić, one of the group's members. They were both alleged to have committed crimes in one municipality in Bosnia (Višegrad). They were charged with responsibility for the brutal killing of some 140 persons and the serious injury of others in two incidents. Milan Lukić was also charged with having killed another 13 persons in three separate incidents. While the ICTY Appeals Chamber did not disturb most of the legal analysis of the referral bench outlined above (and in fact the same factors have been examined in several other referral cases since),[120] it ultimately found that the referral bench had erred in its factual assessment of whether Milan Lukić was a "most senior leader."[121] Thus Lukić, alleged to be responsible for the deaths of at least 150 persons, was found to be among those "most senior leaders suspected of being most responsible" for crimes committed in the former Yugoslavia. The Appeals Chamber held that he must be tried in the ICTY rather than transferred to domestic courts. This was despite the existence of a mixed international and national War Crimes Chamber in Bosnia.[122]

Whereas the language of the Security Council Resolution contemplates one category of offenders ("the most senior leaders suspected of being most responsible"), the relevant ECCC language clearly contemplates two separate and distinct categories of offenders, namely "senior leaders of Democratic Kampuchea" or "those most responsible."[123] On this point, the Group of Experts said:

---

[118] *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. 28.

[119] *Ibid.*

[120] *See* Duch Trial Judgment, footnote 29, for references to ICTY jurisprudence establishing these criteria; *see also* the jurisprudence of the International Criminal Court (ICC) employing a similar analysis, *Situation in the DRC, Prosecutor v. Nataganda*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC Pre-Trial Chamber I, Case No. ICC-01/04-02/06-20-Anx2, February 10, 2006, paras. 51-64, 68-71, 78-89.

[121] *Prosecutor v. Milan Lukić,* Case No. IT-98-32/1 AR 11*bis*, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para. 22: "The Appeals Chamber also considers that the Referral Bench placed too much stress on the local character of the Appellant's crimes. Of course, this is a relevant factor and in some situations can be a significant one. [...] Since the criminal acts of paramilitary leaders are likely to be limited to a municipal (or at most regional) scope, an undue emphasis on geographic scope might thwart the intent of the Security Council that the Tribunal retain jurisdiction over at least the most significant paramilitary leaders. There is no necessary nexus between, on the one hand, leadership responsibility for the most serious crimes and, on the other hand, a broad geographic area. [...] The Appeals Chamber also takes note of the fact that the Appellant's paramilitary group appears to have operated for at least two years. In light of these facts, the Appeals Chamber considers that the Referral Bench underestimated the level of responsibility allegedly held by the Appellant."

[122] *See* website for the Bosnian War Crimes Chamber at http://www.sudbih.gov.ba/.

[123] During the appeal hearing, Duch's co-lawyers repeatedly argued that the provision should be read conjunctively rather than disjunctively—that is, since Duch was not a "senior leader" he could not be one of "those most responsible" (*See* Transcript of Proceedings, 28 March 2011, pp. 53-57, especially pp. 56-57). This position is inconsistent with basic principles of statutory interpretation, the ECCC's own interpretation, and the intention of the legislators. For example, in the Amended Closing Order, at para. 129, the Co-Investigating Judges found that while

> The Group does not believe that the term "leaders" should be equated with all persons at the senior levels of Government of DK or even of the CPK. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. *This seems especially true with respect to certain leaders at the zonal level*, as well as officials of torture and interrogation centres such as Tuol Sleng.[124]

Application of "Senior Leaders" and "Those Most Responsible" Definitions to Case 003 Suspects

There has long been speculation in the media that two of the five suspects in Cases 003/004 are Sou Met and Meas Muth.[125] This is due, in part, to the two being amongst seven names put forward by a leading Khmer Rouge scholar, Dr. Stephen Heder, in his 2001 publication *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*.[126] The report examines the responsibility of "seven senior officials" for their roles in developing and implementing Khmer Rouge atrocities,[127] and aims to "contribute to the creation of an accurate historical record... [I]t is hoped that the results of this study will *serve as a benchmark against which to measure the progress of any tribunal* established to investigate and prosecute CPK-era crimes."[128]

The report places Sou Met and Meas Muth in a group of senior Khmer Rouge officials, alongside five other individuals. Of the other five individuals, three are co-accused in Case 002 (their trial

---

"DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979…" In the Trial Judgment, at para. 25, the Chamber considered that the since Duch was "one of those most responsible for crimes committed during the period", there was "no need to examine the issue of whether [he] was a senior leader…" *See also* Duch Trial Judgment, fn. 28, "Article 1 of the ECCC Law…instead refers to two distinct categories of suspects, "senior leaders" and "most responsible." *See also Co-prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith* (Case 002), Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, September 15, 2009, paras. 1327-28: "The judicial investigation establishes that Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan were senior leaders of Democratic Kampuchea during the period of ECCC temporal jurisdiction, due to their *de facto* and *de jure* hierarchical authority, in the respective positions set out… In addition or in the alternative, due to their personal participation in the implementation of the CPK's common purpose […] each of them may be considered as falling within the category of those most responsible…" *See*, for example, the Group of Experts Report, which recommended that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of DK. This would include senior leaders with responsibility over the abuses *as well as* those at lower levels who are directly implicated in the most serious atrocities."

[124] Group of Experts Report, para. 109 (emphasis added).

[125] See references above, at fn. 5.

[126] Stephen Heder with Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office, Washington College of Law, American University and Coalition for International Justice, June 2001.

[127] *Seven Candidates for Prosecution*, p. 5.

[128] *Seven Candidates for Prosecution*, p. 6 (emphasis added).

before the ECCC will commence sometime later this year),[129] and the remaining two—Ta Mok and Kae Pok—are now deceased. This means that of the recommended seven candidates for prosecution, Sou Met and Meas Muth are the only two surviving "senior officials" whose prosecution by the ECCC remains in question.[130]

The report describes Sou Met and Meas Muth as "two surviving CPK cadre who held predominantly military ranks within the CPK just below the senior level, which positioned them to implement Party policies and influence the conduct of lower-level cadre."[131] Sou Met and Meas Muth held positions of significant *de jure* authority in the CPK hierarchy, and also exercised *de facto* control over subordinates falling within their jurisdiction.[132] Sou Met was secretary of Central Committee Division 502, which included the DK air force, and Meas Muth was secretary of Central Committee Division 164, which included the DK navy. Both had risen through the military ranks of the Southwest Zone and had family connections to its leadership. Sou Met's father had previously been secretary of the Southwest Zone (until his death in 1968); Meas Muth was the son-in-law of notorious Khmer Rouge leader Ta Mok, who died in 2006.[133]

According to *Seven Candidates for Prosecution*, the documents analyzed (mostly from archival material at the Documentation Centre of Cambodia) implicate Sou Met and Meas Muth in mass executions and related atrocities.[134] The report alleges that Sou Met and Meas Muth "directed or facilitated the arrest and transfer of cadre under their authority to S-21, where they at the very least had reason to believe the transferred cadre would be interrogated and then executed..."[135] "[I]n several cases, particularly those of Sou Met and Meas Muth, the suspects lauded implementation of the execution policies as necessary steps to protect the Communist party against its enemies."[136] The "evidence goes further by tying senior and other high-level CPK officials to records that explicitly refer to large-scale killings and the torture of prisoners. [It] also confirms that arrests and executions in rural areas were reported by lower-level officials to central authorities and reveals that arrests and executions were discussed in meetings of military commanders."[137] "[M]any, if not all, of these crimes were committed as a matter of policy and senior officials were knowingly involved in their development and implementation."[138] Taken at face value, it is difficult to comprehend how senior officials such as Meas Muth and Sou Met could legitimately be found not to fall under either limb of the ECCC's jurisdiction, either being senior leaders or those most responsible. In fact, it could be said that it was precisely this type of offender that the language of the ECCC Law and Agreement was intended to capture.

[129] Nuon Chea, Ieng Sary, and Khieu Samphan (see p. 11).
[130] *Seven Candidates for Prosecution*, p. 5.
[131] *Seven Candidates for Prosecution*, p. 99.
[132] *Seven Candidates for Prosecution*, p. 52.
[133] *Seven Candidates for Prosecution*, p. 99.
[134] *Seven Candidates for Prosecution*, p. 52.
[135] *Seven Candidates for Prosecution*, p. 52.
[136] *Seven Candidates for Prosecution*, p. 52.
[137] *Seven Candidates for Prosecution*, p. 10.
[138] *Seven Candidates for Prosecution*, p. 10.

Independence of the Judiciary

Developments in the Case 003/004 investigations—both historical and recent—give rise to serious questions about the independence of the ECCC's co-investigating judges, as well as about the (non)fulfillment of their legal and ethical obligations. These serious concerns require immediate attention and appropriate action.

The fundamental requirement of judicial independence stems from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which recognize that every human being is entitled to a fair and public hearing by an independent and impartial tribunal.[139] These words are mirrored in the ECCC's founding laws.[140]

As recently noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, the "principle of an independent judiciary is directly related to that of a separation of powers… [The independence of the judiciary] means that both the judiciary as an institution and also individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by other branches of power or other external and internal sources."[141]

The UN Basic Principles on the Independence of the Judiciary (hereinafter "Basic Principles") further elaborate on the principle of an independent judiciary.[142] The Bangalore Principles of Judicial Conduct 2002 (hereinafter "Bangalore Principles") provide further guidance on the limitations of judicial conduct and circumstances under which political intervention may be required.[143]

According to the Bangalore Principles, "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."[144] The Basic Principles state that it is the duty of "all governmental and other institutions" to respect and observe the independence of the judiciary.[145]

---

[139] Article 10, Universal Declaration of Human Rights, December 10, 1948, (GA Res. 217 A III) available at http://www.un.org/en/documents/udhr/index.shtml ; Article 14, International Covenant on Civil and Political Rights, entered into force on 23 March 1976, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[140] ECCC Law, Articles 10 new and 25; ECCC Agreement, Articles 3 and 5. *See also* Article 13, ECCC Agreement, Rights of the Accused.

[141] "Preliminary Conclusions and Observations by the Special Rapporteur on the Independence of Judges and Lawyers: Visit to Romania, May 24, 2011, available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11058&LangID=E.

[142] 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.

[143] The Bangalore Principles of Judicial Conduct, 2002, at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11058&LangID=E.

[144] Bangalore Principles, Principle 1.

[145] Basic Principles, Principle 1.

However, judicial independence is not absolute. Judges can and should be held accountable for any serious misconduct or breach of duty. As noted by an Independent Commission of Jurists report, "[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 behaviour."[146] 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."[147] The Bangalore Principles of judicial conduct are intended to establish standards for ethical conduct of judges. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards.[148] 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."[149]

The 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."[150] They further state that "Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made."[151] The principle of the independence of the judiciary "entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[152] As explained in the UNODC commentary on the Bangalore Principles:

> Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench, or his or her associations and activities outside the court.[153]

---

[146] An International Commission of Jurists Report on *INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS - A PRACTITIONERS' GUIDE* (http://www.mafhoum.com/press7/230S24.pdf).

[147] 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.

[148] Bangalore Principles, *Preamble.*

[149] Bangalore Principles, Principle 3.1.

[150] Basic Principles, Principle 2.

[151] Bangalore Principles, Principle 2.

[152] Basic Principles, Principle 6.

[153] UNODC Commentary on the Bangalore Principles of Judicial Conduct (2007), para. 52, available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

Furthermore, a judge must not only be "free from inappropriate connections with, and influence by, the executive branch of government, but *must also appear to a reasonable observer to be free therefrom*."[154]

Competence and due diligence are prerequisites to the due performance of judicial office.[155] The UNODC commentary further elaborates on the principle of due diligence:

> To consider soberly, to decide impartially, and to act expeditiously are all aspects of judicial diligence. Diligence also includes striving for the impartial and even-handed application of the law, and the prevention of the abuse of process. The ability to exhibit diligence in the performance of judicial duties may depend on the burden of work, the adequacy of resources (including the provision of support staff and technical assistance), and time for research, deliberation, writing and judicial duties other than sitting in court.[156]

The Basic Principles on the Independence of the Judiciary similarly state that "it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."[157] Applying this principle to the context in which the ECCC operates, it is incumbent upon the UN, the court's donors, and the Cambodian government to ensure adequate financial and human resourcing for the court. The conventional wisdom regarding why the UN and the court's international donors have remained publicly silent on the Case 003/004 crisis focuses on the lack of political will among donors to continue to fund the court beyond Case 002. This may well have created an atmosphere for the co-investigating judges to find a "judicial solution" to Cases 003/004. Regardless of why the cases were not credibly investigated, which should itself be investigated, the situation must be remedied.

Judicial Misconduct and Breach of Judicial Duty: Definition and Possible Redress

Unlike most domestic courts, the ECCC's laws do not set out a mechanism for dealing with the various types of judicial misconduct. Yet the Bangalore Principles lay down an obligation on States to adopt "effective measures… to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdiction."[158] The Rome Statute of the International Criminal Court (ICC) provides useful guidance. Under the Rome Statute, a procedure is established by which a senior court official, including a judge, may be removed from office for "serious misconduct" or "a serious breach of his or her duties."[159] It also provides a legal basis for disciplinary action against the same category of officials for

[154] Bangalore Principles, Principle 1.3 (emphasis added).
[155] Bangalore Principles, Principle 6.
[156] UNODC Commentary on the Bangalore Principles of Judicial Conduct (2007), para. 193, available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.
[157] Principle 7, United Nations Basic Principles on the Independence of the Judiciary.
[158] Bangalore Principles, "Implementation".
[159] Article 46, Rome Statute of the International Criminal Court (ICC Statute), available at http://untreaty.un.org/cod/icc/index.html.

misconduct of a less serious nature.[160] Generally both are dealt with, in the first instance, by configurations of their judicial peers.

"Serious misconduct" is defined as conduct which, if occurring in the course of official duties, is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the court or the proper internal functioning of the court.[161] A "serious breach of duty" is said to occur where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.[162] In the ICC Rules, examples are given of these definitions.

"Misconduct of a less serious nature," if it occurs in the course of official duties, is defined as conduct which causes or is likely to cause harm to the proper administration of justice before the court or the proper internal functioning of the court.[163] International and hybrid courts, like domestic courts, cannot function without judicial oversight. If judicial oversight mechanisms are not built into the statutes or rules, they can and must be created if credible improprieties are alleged.

The Special Rapporteur on the Independence of Judges and Lawyers (currently Gabriela Carina Knaul de Albuquerque e Silva, of Brazil) has a mandate which includes conducting inquiries into any substantial allegations transmitted to her, and to report on her conclusions and recommendations thereon.[164] She is requested to cooperate closely with relevant United Nations bodies, mandates, and mechanisms, and with regional organizations in order to fulfill this mandate.

The actions and omissions of the co-investigating judges in the Case 003 investigation raise serious questions, including the possibility of gross negligence in the performance of—or that the judges knowingly acted in contravention of—their judicial duties. The available evidence—including the official closing of the Case 003 judicial investigation, the May 9 press statement of the international co-prosecutor, as well as internal reports indicating that no true investigations were ever conducted—suggests that a genuine investigation in line with international standards was never carried out.

According to the UNODC commentary on the Bangalore Principles, "Not every failure of a judge to conform to the principles will amount to misconduct (or misbehaviour). Whether disciplinary action is appropriate or not may depend on other factors, such as the seriousness of the transgression, whether or not there is a pattern of improper activity, and the effect of the improper activity on others and on the judicial system as a whole."[165] It is therefore clear not

[160] Article 47, ICC Statute.
[161] Rule 24 (1) (a) of the Rules of Procedure and Evidence of the International Criminal Court (ICC RPE).
[162] Rule 24 (2) ICC RPE.
[163] Rule 25 (1) (a) ICC RPE.
[164] Human Rights Council, Resolution 8/6: Mandate of the Special Rapporteur on the independence of judges and lawyers. The mandate acknowledges the importance of other international documents, such as the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct.
[165] UNODC Commentary on the Bangalore Principles of Judicial Conduct (2007), para. 19, available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

only that disciplinary action is possible, and that an independent and impartial investigation *must be* conducted where there is suspicion of significant misconduct.

Allegations of a serious breach of judicial duty or judicial misconduct require independent investigation. The appellate process alone is not the most effective remedial mechanism for judicial misconduct. The fact that the appellate process for Cases 003/004 is unlikely to remedy apparent breaches in investigative duties of the judges—due to likely splits on these issues along national/international lines in the Pre-Trial Chamber—further compounds the problem. Nonetheless, even if the situation could be remedied this way, the proper scope of appellate review is not to "correct" judicial misconduct or lack of judicial independence.

The questions of misconduct raised in this report are far more serious than any questions raised in respect of other international and/or hybrid tribunals. This is not simply a case in which a judge has exercised his discretion in good faith but in a manner with which others may disagree—but which relied upon legitimate and appropriate criteria. Nor does it involve, for example, whether a prosecutor may unduly have called attention to himself, or whether judges have allowed a trial to lag for too long. Rather, the court's actions suggest that the outcome of a case has been pre-determined, and that judges have refused to gather evidence or investigate facts, possibly in response to repeated and publicly expressed demands of senior political leadership. Such egregious misconduct would violate the very core principle of judicial independence.

The Justice Initiative is not now calling for any individual judge to be disciplined. Rather, it is calling for an investigation into repeated allegations that gross misconduct has occurred. Such an investigation should be carried out in full compliance with international due process standards. Only once such an investigation has been conducted, would it be proper to consider what, if any, action must be taken.[166]

---

[166] *See* The IBA Standards on Judicial Independence (1982), available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=BB019013-52B1-427C-AD25-A6409B49FE29: Which provide guidelines for disciplinary procedures against judges, again confirming that they can take place (see principles 27 onwards:
"The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.
The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held in camera or in public, may be published.
The grounds for removal of judges shall be fixed by law and shall be clearly defined.
b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.
In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary."

As in most domestic courts and in the ICC, a committee of judges can be created to provide oversight into serious judicial misconduct or breach of duty. Because no internal mechanism for judicial oversight is provided in the ECCC statute or rules, it is incumbent upon the United Nations to establish such a mechanism or to employ one of its existing mechanisms (such as the UN Special Rapporteur) to investigate, consistent with international due process standards, allegations that judicial independence has been breached or other forms of judicial misconduct or breach of duty have occurred.

Developments in Case 002

There have been a number of developments in Case 002 since the Justice Initiative's *Recent Developments* update of December 2010. The indicted persons in Case 002 are former Head of State Khieu Samphan, former Deputy Prime Minister in Charge of Foreign Affairs Ieng Sary, former Deputy Secretary of the Communist Party of Kampuchea Nuon Chea and former Minister of Social Affairs Ieng Thirith. The most recent developments concern the appeal of the Closing Order indicting the four accused in Case 002; ongoing trial management issues; and the filing of preliminary objections by the accused. Recently, the Trial Chamber listed the case for an initial hearing between 27 and 30 June, 2011. Currently, the trial is expected to commence in the third quarter of 2011.

On January 13, 2011, the Trial Chamber became officially seized of Case 002, following the Pre-Trial Chamber's decision on the appeals of the Closing Order.[167] The Pre-Trial Chamber confirmed and partially amended the indictments against the four co-accused, and ordered that they remain in provisional detention pending trial.

The Trial Chamber rejected applications for immediate release of Nuon Chea, Khieu Samphan, and Ieng Thirith.[168] Other significant decisions since the December *Recent Developments* report include the rejection of motions for disqualification of Trial Chamber President Nil Nonn, as well as the entirety of the Trial Chamber.

In early April, the Trial Chamber held a Trial Management Meeting (TMM) to begin preparations for trial. It was closed to the public, as contemplated by the Rules, though the public agenda for the meeting listed a number of legal and practical matters for discussion.[169]

The next scheduled court date in this case will be the initial hearing, which will take place from June 27-30, and will be open to the public.[170] During that hearing, the Trial Chamber will hear arguments concerning the lists of potential factual and expert witnesses, and preliminary

[167] Press Release – Case 002 Sent for Trial, January 13, 2011, at http://www.eccc.gov.kh/sites/default/files/media/PR-ECCC_13_Jan_2011_%28Eng%29.pdf
[168] Press Statement – Trial Chamber Rejects Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, February 17, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_17_Feb_2011_%28Eng%29.pdf
[169] *See* Agenda for Trial Management Meeting, March 17, 2011, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E9_5_1_EN-2.PDF
[170] *See* Memorandum to all Case 002 Parties, from Trial Chamber President, Nil Nonn, dated May 11, 2011, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E86_EN.PDF

objections pursuant to Internal Rule 89. These objections include challenges to the court's jurisdiction to hear the case. The Chamber will also hear arguments from the lead co-lawyers for civil parties on the substance of the reparations awards that they intend to seek within the final claim for collective and moral reparation. In its scheduling advisory, the Trial Chamber indicated that further hearings in Case 002 may be listed in August 2011.

The Chamber is also dealing with other substantive and procedural pretrial issues, including managing the assignment of medical officers to assess the mental and physical fitness of the accused to stand trial. Whether all four co-accused are found to be mentally fit to stand trial, it is likely that the physical condition of some of the accused will be a significant factor in the court's ultimate sitting schedule to hear the evidence.

Other Issues

Key Personnel Changes

The Justice Initiative's December 2010 *Recent Developments* update reported on the resignation of the head of the Defence Support Section, Richard Rogers, and called for his immediate replacement, as well as for filling the deputy head position which was vacant.[171] In January, the deputy position was filled by the recruitment of Nisha Valabhji (Seychelles). However, to date there has been no replacement for the head of the section, nor are there any indications of this happening soon.

Elisabeth Simonneau Fort (France) was appointed as international civil party lead co-lawyer just prior to the issuance of the Justice Initiative's last update report; she arrived to take up the position in January.[172] She will appear alongside her national counterpart, Pich Ang, to represent the interests of more than 2,000 civil parties in Case 002. There are concerns about how this system will work in practice, and developments on this front will continue to be monitored before and during trial.

On June 1, 2011, the court announced new appointments of Cambodian nationals in its Public Affairs Section, following the death of the chief of the Public Affairs Section, Reach Sambath (Cambodia) on May 11, 2011.[173] One of the appointees, Neth Pheaktra, most recently of the *Phnom Penh Post*, was criticized in an article by the *Cambodia Daily*.[174] The basis of the criticism was an editorial published by the *Post* in which Pheaktra had expressed support for the position taken by the Cambodian government that expanding prosecutions beyond the five Khmer Rouge detainees currently in custody could provoke civil war.

---

[171] OSJI December Update, p. 15.
[172] Press Release – Elisabeth Simmoneau Fort Appointed as International Civil Party Lead Co-Lawyer, December 2, 2010, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_PR_2_Dec_2010_%28Eng%29.pdf
[173] Press Release – New Appointments in the Public Affairs Section, June 1, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC%20Press%20Release%201%20June%202011%28Eng%29.pdf
[174] Douglas Gillison, "Tribunal Hires Media Rep with Partisan Views," *Cambodia Daily*, June 2, 2011, p. 26.

Overall, personnel changes continue to reinforce the court's national representation while failing to fill gaps on the court's international side in administration, victims' support and defense.

Modification of the Internal Rules in Preparation for the Case 002 Trial

The ECCC held its ninth plenary session of judges from February 21-23, 2011, adopting five proposed amendments to the court's Internal Rules.[175] The amendments mainly concerned revision of trial management powers in anticipation of the commencement of the court's second case against four elderly and ailing former Khmer Rouge leaders. One of the provisions allows the chamber to continue proceedings in the absence of an accused under certain circumstances by ordering his or her participation in the proceedings via video-link. The Trial Chamber can also separate proceedings, and/or charges, in relation to one or more accused, in the interests of justice. The amendments demonstrate that the court is concerned about judicial expediency in light of the age of the accused, their health status, and the need for Case 002 to proceed as expeditiously as possible. The next plenary session will be held within the next six months.

Fundraising

The Impunity Principles state that a body set up to combat impunity following the commission of mass atrocities must be provided with transparent funding to ensure that its independence is never in doubt, as well as sufficient material and human resources to ensure that its credibility is never in doubt.[176] The ECCC is funded through voluntary contributions from the Member States of the United Nations.

Since the Justice Initiative issued its December 2010 *Recent Developments* update—and despite continued generous support from some donors—budgetary issues have continued to be a major concern for the ECCC's ongoing operations. The court's administration has been under pressure to wind down the work of the Office of the Co-Investigating Judges this year, so that court funding can be fully invested in Case 002. Additionally, funding for the Victims' Support Section has been exclusively limited to Case 002. The Defence Support Section has also reportedly been refused further funding for Case 003/004 legal representation if and until suspects are indicted.

Despite these issues, key donors have continued to support the ECCC. In late January, the Japanese government pledged USD $11.7 million to the ECCC (approximately $8.7 million to the court's international side and $3 million to the Cambodian side), covering about 25 percent of the court's overall budget for 2011.[177] Japan is the court's single largest donor, having met almost 50 percent of the court's total operating costs since its establishment. However, reports indicate that Japan does not intend to continue to fund the court at this level for its remaining lifespan. The recent natural disasters in Japan may also prevent it from being able to continue to fund the court at past levels.

---

[175] Press Release – Ninth ECCC Plenary Session Concludes, February 23, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_Plenary_23_Feb_2011%28Eng%29.pdf

[176] Impunity Principles, Principle 11: Adequate Resources for Commissions

[177] Press Release – Japan Pledges US$11.7 million to the ECCC, January 28, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_PR_28_Jan_2011_%28Eng%29.pdf

Following the Japanese pledge, in February the ECCC issued a revised budget for 2010 and 2011 reducing the court's total budget for the period 2010-2011 by $15.1 million.[178] The total budget for 2011 is $40.7 million, of which $9.9 million is the national component, and $30.8 million the international component. The ECCC plans to cut its budget by not filling select staff vacancies as they occur.[179]

In April 2011, the United Kingdom pledged a further £1,000,000 (approximately $1.6 million)[180] and in May, Norway pledged about $1.1 million, both to the international component of the ECCC.[181] In June, Australia confirmed its additional pledge of $2.1 million.[182] These pledges make for a current budgetary shortfall of approximately $9 million for 2011.[183] A recent press statement by the ECCC advised that the court's total expenditures as of December 2010, were $109.1 million, and would be approximately $149.8 million by the end of 2011.[184]

In consideration of the above, existing and prospective donors must provide the court with adequate resources to ensure that financial concerns do not drive judicial decision-making. This is essential to the court's ongoing ability to act independently of political concerns.

[178] Press Release – Revised ECCC Budget for 2010-2011, February 7, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC_7_Feb_2011_%28Eng%29.pdf
[179] Douglas Gillison, "Tribunal Budget Under the Knife, UN Rep Says," *The Cambodia Daily*, April 1, 2011, p. 22.
[180] Press Release - United Kingdom Contributes £1,000,000 to ECCC, April 11, 2011, at http://www.eccc.gov.kh/en/articles/united-kingdom-contributes-%C2%A3-1000000-eccc
[181] Press Release – Norway Contributed NOK 6,000,000 to ECCC, April 21, 2011.
[182] Press Release – Australia Confirms Donation of AUD 2 Million to ECCC, June 3, 2011, at http://www.eccc.gov.kh/sites/default/files/media/ECCC%20PR%20%203%20June%202011-ENG_0.pdf
[183] *See* James O'Toole, "Looking Ahead at the KR Tribunal," *Phnom Penh Post*, April 1, 2011, p. 4.
[184] Note to Media: Correct ECCC Financial Data, May 20, 2011, at http://www.cambodiatribunal.org/images/CTM/note_to_media.pdf

OPEN SOCIETY
JUSTICE INITIATIVE

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, Asma Jahangir, Anthony Lester QC, Jenny S. Martinez, Juan E. Méndez, Wiktor Osiatyński, Herman Schwartz, Christopher E. Stone, and Hon. Patricia M. Wald.

The staff includes James A. Goldston, executive director; Robert O. Varenik, program director; Zaza Namoradze, Budapest office director; Kelly Askin, senior legal officer, international justice; David Berry, senior officer, communications; Sandra Coliver, senior legal officer, freedom of information and expression; Clair Duffy, Khmer Rouge Tribunal monitor, international justice; Tracey Gurd, senior advocacy officer; Julia Harrington Reddy, senior legal officer, equality and citizenship; Ken Hurwitz, senior legal officer, anticorruption; Katy Mainelli, director of administration; Chidi Odinkalu, senior legal officer, Africa; Martin Schönteich, senior legal officer, national criminal justice; Amrit Singh, senior legal officer, national security and counterterrorism; and Rupert Skilbeck, litigation director.

E-mail: info@justiceinitiative.org

Belgium - Brussels
Rue d'Idalie 9-13
B-1050 Brussels, Belgium
Phone: +32-2-505-4646
Fax: +32-2-502-4646

Hungary - Budapest
Oktober 6. u. 12
H-1051 Budapest, Hungary
Phone: +36 1 882 3102
Fax: +36 1 882 3103

Bishkek – Kyrgyzstan
55A, Logyinenko St.
Bishkek 720040 Kyrgyzstan
Phone: +996 312 663475
Fax: +996 312 663448

Nigeria - Abuja
Plot 1266/No.32
Amazon Street
Maitama, Abuja, Nigeria
Phone: + 234 98-74-83-45/6
Fax: + 234 94-13-66-49

Sierra Leone- Freetown
38 Murray Town Road
Murray Town
Freetown, Sierra Leone
Phone: +232-22-234552
Fax: +232-22-235497

United Kingdom - London
Cambridge House
100 Cambridge Grove
Hammersmith London
W6 0LE United Kingdom
Phone: +44 207 031 0200
Fax: +44 207 031 0201

USA - New York
400 West 59th Street
New York, NY 10019 USA
Phone: +1 212-548-0157
Fax: +1 212-548-4662

USA - Washington DC
1730 Pennsylvania Avenue
N.W., 7th Floor
Washington, D.C. 20006
Phone: +1 202-721-5600
Fax: +1 202-530-0128

www.justiceinitiative.org

OPEN SOCIETY
FOUNDATIONS