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The ECCC – A Failure of Credibility

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Glossary of acronyms

BPJC	Bangalore Principles of Judicial Conduct 2002
CHRAC	Cambodian Human Rights Action Committee
CIJ	Co-Investigating Judge
ECCC	Extraordinary Chambers in the Courts of Cambodia
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
JIG	Judicial Integrity Group
ORP	Office of the Royal Prosecutor
OSJI	Open Society Justice Initiative
PQRU	Press Quick Reaction Unit
SCM	Supreme Council of Magistracy
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties 1969

Foreword

This is the second in a series of reports focused on the Extraordinary Chambers in the Courts of Cambodia (ECCC), and mixed tribunals. The first report, entitled *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, was published in September 2011. Both reports are the result of my own interest in the area of international criminal justice. As an outspoken proponent of international justice as a way to counter impunity and support accountability, I believe strongly in the role of the international, mixed and domestic war crimes tribunals.¹

Since 1945, there have been 313 armed conflicts in which an estimated 92–101 million people have lost their lives; twice the number of the victims who lost their lives in the First and Second World Wars combined.² Yet, to date, only 823 persons have been indicted by international and regional courts.³ The disparity between these numbers is staggering. Projected into the future, the need to focus on accountability and international justice becomes paramount – as will the reliance on war crimes courts.

Certainly, international justice took a leap forward on 1 July 2002, with the establishment of the International Criminal Court (ICC). Created as a permanent institution to prosecute individuals accused of the most egregious international crimes – namely, genocide, war crimes and crimes against humanity – this vanguard court is a remarkable development in international law.

Of course, international, mixed and domestic courts must ensure that the trials they undertake are consistent with international standards of independence and fairness. The assumption is that most of these courts – certainly the international and mixed courts – diligently apply international standards to their judicial proceedings. However, this assumption is not always correct. These courts, on occasion, fail to adhere to international standards of justice. Yet, advocates of international justice often remain silent in their criticism of these failures, which reflect poorly on the international community. If we are serious in promoting international justice, we must also be willing to criticise those courts that do not meet international standards.

I was an early supporter of the Extraordinary Chambers in the Courts of Cambodia (ECCC, or the ‘Court’). Consistent with my belief that we must fight impunity through accountability, I believed in the ECCC’s overall mission, including its ability to help bring justice to victims, and accuracy to the historical record. However, as the ECCC’s activities increased, my confidence in its judicial process started to decrease. I observed a growing number of problems that made me question the very legitimacy of the Court. I also knew that such concerns were relevant to any defendant appearing before the ECCC. Subsequently, I approached the international co-lawyers, Michiel Pestman and Victor Koppe, who were representing the defendant Nuon Chea. I mentioned my interest in looking more deeply into my concerns about the ECCC. I asked to join their team and for permission to draft this series of reports. They agreed.

1 **International** (International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda); **mixed** (East Timor (ie, the Serious Crimes Panels), Cambodia (the ECCC), the War Crimes Chamber of the State Court of Bosnia and Herzegovina, the Special Court for Sierra Leone, Kosovo (ie, ‘Regulation 64’ Panels in the Courts of Kosovo)); and **domestic** (Iraq, Serbia). The war crimes courts listed here have previously faced these same challenges.

2 M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Cambridge: Intersentia, 2010).

3 *Ibid.*

In September 2011, I published my first report, setting forth my concerns about the ECCC. The feedback was positive and ultimately led me to look at additional concerns at the ECCC. From Monday 16 January, I spent a week at the Court, observing first-hand the trial proceedings and talking to many of the stakeholders. When I returned to London, I worked with Oliver Oldman, a very talented LLM trained lawyer working with the IBA, to draft this second report.

As with the first report, this second report does *not* represent the views or the opinion of the IBA, nor any single individual who assisted me in the drafting process, nor any individual who was interviewed for the report. I take full responsibility for the report's content and conclusions.

In the end, this continues to be a personal journey, reflecting my desire simply to raise concerns about the establishment and operation of international war crimes courts, so that future efforts towards embracing international justice mechanisms can be improved. I hope these reports contribute to that effort.

Dr Mark Ellis
Executive Director, IBA

Executive Summary

- The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 to prosecute senior leaders and those most responsible for crimes committed under the Khmer Rouge between 1975 and 1979.
- Despite intense public concern over executive interference in the judiciary, an 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 (the ‘Agreement’) established the ECCC.
- The Cambodian Constitution provides for a separation of powers,⁴ including an independent judiciary,⁵ and specifies that the legislative and executive branches shall not have judicial power.⁶ However, while the ECCC’s legal framework complies de jure with international standards of fair trial and due process, it falls short of complying de facto due to a lack of practical, effective safeguards on judicial independence. The Court’s handling of Case 003⁷ and the Supreme Council of Magistracy’s⁸ (SCM) rejection of Judge Kasper-Ansermet, the international reserve Co-Investigating Judge⁹ (CIJ), only highlight these shortcomings.
- The Cambodian judicial selection mechanism is not de facto independent from the government. Because Cambodia falls short of operating a transparent and autonomous judicial selection process and cannot guarantee that the SCM is free from political bias, there exists serious concern about the ECCC’s legitimacy. The UN and several non-governmental organisations have identified flaws in Cambodia’s judicial selection process as a primary factor undermining the ECCC’s credibility.
- A history of corruption within the Cambodian justice system, coupled with a weak disqualification mechanism, fails to adequately safeguard internationally accepted standards of judicial integrity. The creation of the Independent Counsellor, tasked with responding to corruption allegations within the ECCC, is a significant step forward. However, no progress report has yet been made public.
- Allowing Judge Nil Nonn¹⁰ to sit on the ECCC panel, despite his established history of accepting bribes, self-evidently contravenes international standards protecting the integrity and independence of the judiciary. These standards are set out in the 2002 Bangalore Principles of Judicial Conduct (BPJC).
- The premature closure of Case 003 by Co-Investigative Judges Blunk and Bunleng has been heavily criticised, particularly given suggestions that it was based on the government’s view that further prosecutions should not go forward.

4 Constitution of the Kingdom of Cambodia, as amended in 1999; unofficial translation taken from the *UNDP Legal*, Art 51.

5 *Ibid*, Art 128.

6 *Ibid*, Art 130.

7 Defendants in Case 003 are Khmer Rouge army commanders Meas Muth and Sou Met.

8 The Supreme Council of Magistracy is the non-governmental body headed by the King of Cambodia, responsible for making judicial selections and disciplining judges.

9 The ECCC has two Co-Investigating Judges responsible for investigating the prosecutors’ submissions, and deciding whether to send the case for trial or order its dismissal; one Cambodian and one international.

10 President of the Trial Chamber in the ECCC.

- The Office of the Royal Prosecutor recently ‘file[d] without processing’ defence counsel’s criminal complaint, in which Prime Minister Hun Sen and several senior Cambodian Government officials were accused of: interfering with justice and the defendants’ right to a fair trial in breach of the Cambodian Constitution and Cambodian Penal Code; publicly indicating that certain witnesses should not testify in Case 002;¹¹ publicly opposing further investigation and proceedings in Cases 003 and 004;¹² ignoring ECCC summonses to appear for testimony in Case 002 without a valid reason; and preventing ECCC letters inviting King Father Norodom Sihanouk (the former King) to testify in Case 002 from reaching him. This decision demonstrates the pervasive and institutionalised nature of the executive interference with the Cambodian judiciary, and the deeply concerning failure by judicial bodies to deal with it.
- A crisis evolved following the controversial resignation of International Co-Investigating Judge (CIJ) Blunk in October 2011. The Supreme Council of Magistracy (SCM), rather than replacing the former international CIJ with the reserve international CIJ, Judge Kasper-Ansermet, entered a prolonged period of deliberation. It emerged that this was due to posts made by Judge Kasper-Ansermet on his Twitter page, in which he had demonstrated an interest in allegations of executive interference at the ECCC and wished to investigate cases 003 and 004. Domestic CIJ Bunleng immediately and publicly rejected Judge Kasper-Ansermet. The Council of Ministers maintained that the SCM was under no obligation to formally appoint Judge Kasper-Ansermet. Ultimately, on 20 January 2012, the SCM rejected Judge Kasper-Ansermet, in the face of repeated calls by the UN to formally appoint him.
- According to Articles 5.5 and 5.6 of the Agreement and the rules set out in Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT), which enjoys customary status, the SCM is *required* to replace a resigning international CIJ with the reserve international CIJ and leaves no room for deliberation. In fact, no further ‘appointment’ process needs to take place in these circumstances. Quite simply, the appointed reserve international CIJ *must* replace the resigning international CIJ – Judge Kasper-Ansermet *must* replace Judge Blunk.
- The SCM acted outside of its powers by deciding not to replace Judge Blunk with Judge Kasper-Ansermet. This is particularly troubling, given the politically biased composition of the SCM, as well as the membership of Judge Bunleng. Involvement by an ECCC judge in the appointment process of other members of the ECCC constitutes a significant conflict of interest.
- While a valid concern, Judge Kasper-Ansermet’s Twitter posts fall short of infringing on international standards regarding judges’ public involvement in controversial topics and government criticism. He can be said to have exercised appropriate restraint in his communications to the public.
- The CIJ appointments fiasco is the most recent example of Cambodian Government interference in the Khmer Rouge proceedings. It highlights the urgent need to introduce ECCC mechanisms to safeguard the actual and perceived independence and integrity of the judiciary.

11 Defendants in Case 002 are Nuon Chea (former Deputy Secretary of the Communist Party of Kampuchea), Ieng Sary (former Deputy Prime Minister for Foreign Affairs), Khieu Samphan (former Head of State) and Ieng Thirith (former Minister of Social Affairs).

12 Defendants in Case 004 are Aom An (former Deputy Secretary of the Khmer Rouge Central Zone), Yim Tith (former Deputy Secretary of the Khmer Rouge’s Northwest Zone) and Im Chem (a former Khmer Rouge district chief).

1. Introduction

The Extraordinary Chambers in the Courts of Cambodia (ECCC, or the ‘Court’) has come under repeated fire for failing to adequately safeguard the judiciary from influence by the Cambodian Government. Amid considerable public concern about judicial independence, the ECCC was established in 2003 under 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 (the ‘Agreement’). The Agreement requires the ECCC to comply with international standards of justice, fairness and due process of law¹³ but does not include safeguards to sufficiently guarantee the independence and impartiality of the judiciary.

Reserve international Co-Investigating Judge (CIJ) Kasper-Ansermet’s recent rejection by the Supreme Council of Magistracy (SCM)¹⁴ is the latest in a stream of events to have cast doubt on the judiciary’s independence from the Cambodian Government. Cambodia’s flagrant disregard of the Agreement provisions and its refusal to formally replace the former international CIJ Siegfried Blunk with reserve international CIJ Kasper-Ansermet has caused significant disruption to Cases 003 and 004 and highlights fundamental deficiencies that threaten the very legitimacy of the ECCC.

This report considers the lawfulness of CIJ Kasper-Ansermet’s rejection within the context of the existing debate on the independence of the ECCC judiciary.

¹³ Art 12.2 of the Agreement, as set out in Arts 14 and 15 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

¹⁴ See note 8 above.

2. The background to Judge Blunk's Resignation

The controversy surrounding Judge Kasper-Ansermet's formal appointment as international CIJ of the ECCC has unfolded against a background of stringent criticism levelled at the mixed¹⁵ Court by observers and independent bodies. As outlined in the 2011 report by the IBA's Executive Director¹⁶ (available at <http://tinyurl.com/Ellis-ECCC-Report-1>), the ECCC's legal framework complies de jure with international standards of fair trial and due process but falls short of de facto compliance due to a lack of practical, effective safeguards on judicial independence.¹⁷ De jure protections are provided by the Cambodian Constitution,¹⁸ the Law governing the ECCC¹⁹ and the ECCC's Code of Judicial Ethics.²⁰ However, a closer look at the operation of the judiciary reveals several shortcomings. These weaknesses were made all the more apparent by the Court's handling of Case 003.

2.1 Executive interference in selection of ECCC judges

The Cambodian judiciary is not de facto independent from the government. Cambodia has been criticised by the United Nations (UN) for failing to 'develop neutral State institutions, checks on executive power, and the means to enforce rights guaranteed in the law and the Constitution'. This has resulted in a judiciary that continues to be 'subjected to executive interference and open to corruption'.²¹ Of particular concern and relevant to the issue at hand is executive interference in the process of selecting ECCC judges. The SCM – the body responsible for making judicial selections and disciplining judges – is constitutionally isolated from the political branch.²² However, reports by both the UN and non-governmental organisations (NGOs) have identified 'flaws in the Cambodian judicial selection process' as constituting the primary factor currently undermining the ECCC's credibility.²³

A 2006 report by the Secretary-General's Special Representative for Human Rights in Cambodia found that '[a]ll members but one belong to the Cambodian People's Party, and two members are on its Central Committee.'²⁴ In addition, '[t]here is a tendency in the Government to use the King in his capacity as chair of the Council as a rubber stamp instead of the real decision maker as he is under

15 The term 'mixed' or 'hybrid' refers to the fact that the ECCC is composed of both Cambodian and international judges.

16 Mark Ellis, *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, September 2011, available at: <http://tinyurl.com/Ellis-ECCC-Report-1>.

17 *Ibid*, at 21.

18 Constitution of the Kingdom of Cambodia, as amended 1999, unofficial translation taken from the *UNDP Legal*, Art 132.

19 See Art 12(2) of the UN-Cambodia Agreement (ECCC must exercise its jurisdiction 'in accordance with international standards of justice, fairness and due process of law, as set out in Arts 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR], to which Cambodia is a party') and Art 33 (new) of the ECCC Law ('The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Art s 14 and 15 of the [ICCPR]').

20 Art 2.1 ('judges shall be impartial and ensure the appearance of impartiality in the discharge of their functions') and Art 7.1 ('[j]udges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality').

21 Special Representative of the Secretary-General for Human Rights in Cambodia, *Continuing Patterns of Impunity in Cambodia*, October 2005, available at: http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf.

22 Cambodian Constitution, see note 18 above, Arts 132–34.

23 OSJI, *Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia*, June 2007, at 7, available at: www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20070627.

24 UN Economic and Social Council, 'Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai', 24/01/2006, at para 16 (E/CN.4/2006/110).

the Constitution.’²⁵ Following several complaints, the Special Representative concluded that the SCM must be made ‘broadly representative and free from political party and executive interference’ in order to ‘safeguard the integrity of the judiciary more generally’.²⁶ The Cambodian Government fundamentally fails to operate a transparent and autonomous judicial selection process.

2.2 Corruption within the Cambodian justice system

Linked to the issue of executive interference in the judicial selection process is the broader problem of corruption within the justice system, principally among Court officials and government representatives.²⁷ ECCC Trial Judge Nil Nonn is on record admitting to taking bribes²⁸ in relation to his cases. Moreover, there have been allegations that several other judges and Court officials secure their positions by paying bribes to members of the executive.²⁹

The current disqualification mechanism³⁰ notably fails to address corruption allegations. Requests to disqualify Judge Nil Nonn from the ECCC were met with a unanimous refusal by the Trial Chamber, which insisted that even if judges exhibited bias or engaged in misconduct in previous cases, this should not disqualify them from the case at hand; that only a ‘pattern of improper conduct... may call into question a person’s qualification to act as a judge at the ECCC’.³¹ This hands-off approach is an insufficient way of tackling institutional corruption and can only damage the Court’s legitimacy.

The 2002 Bangalore Principles of Judicial Conduct (BPJC) – a document which is increasingly regarded as having applicability in jurisdictions worldwide³² – asserts that ‘[i]ntegrity is essential to the proper discharge of the judicial office’ – ‘[a] judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer’ and ‘[t]he behaviour of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.’ Allowing a judge that has an established history of bribery to remain on a judicial panel contravenes such international standards. Put simply, Judge Nil Nonn should have been disqualified.

A succession of corruption allegations levelled at the Cambodian judiciary ultimately resulted in the conclusion of the Agreement to Establish an Independent Counsellor at the Extraordinary Chambers in the Courts of Cambodia on 12 August 2009.³³ Under this agreement, the Independent Counsellor was tasked with investigating and responding to corruption allegations within the ECCC.³⁴ To safeguard the independence of the position, the Independent Counsellor must not be an employee of the ECCC, UN, or political appointee of the Cambodian Government. While this is a significant

25 *Ibid*, at para 17.

26 *Ibid*, at para 29.

27 See note 16 above, at 30.

28 LICADHO, *Human Rights in Cambodia: The Charade of Justice*, December 2007, at 22, available at: www.licadho-cambodia.org/reports/files/113LICADHOReportCharadeJustice07.pdf.

29 *Ibid*.

30 Rule 34(2) of the ECCC Internal Rules (Rev 2) as revised on 5 September 2008: ‘Any party may file an application for disqualification of a judge in any case in which the judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.’ Such a rule *could* plausibly have been used to disqualify Judge Nil Nonn. In any case, compliance with international standards *requires* his disqualification.

31 ‘Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests’ (No 002/19-09-2007IECCCITC), 28 January 2011, at 4–5.

32 The Judicial Integrity Group, ‘Commentary on The Bangalore Principles of Judicial Conduct’, March 2007, at 5, available at: www.coe.int/t/dghl/cooperation/cjje/textes/BangalorePrinciplesComment.PDF.

33 For more information, see above note 16, at 33.

34 Michael Saliba, ‘Allegations of Corruption at ECCC: Overview, 28 September 2009,’ available at: www.cambodiatribunal.org/images/CTM/ctm_blog_9-28-2009.pdf.

step forward for the ECCC, the first corruption report written by the Independent Counsellor was denied public disclosure in October 2010.³⁵ To date, no information by the Independent Counsellor regarding corruption at the ECCC has been made available to the public.

2.3 Executive interference in ECCC cases and the closure of case 003

Also under scrutiny is the ECCC's perceived bias in favour of the government vis-à-vis its desire to prosecute only five members of the Khmer Rouge in Cases 001 and 002.³⁶ Various government officials publicly stated that Cases 003 and 004 will not proceed, despite the fact that the ECCC has sole responsibility for making this decision. Prime Minister Hun Sen said in an October 2010 meeting with UN Secretary-General Ban Ki-Moon that 'Case 003 will not be allowed... The Court will try the four senior leaders successfully and then finish with Case 002.'³⁷ In early 2011, the Cambodian Minister for Information publicly discouraged the pursuance of Cases 003 and 004³⁸, and in March of that year, the Deputy Co-Prosecutor stated that 'there will be no Case 003 and 004'.³⁹

Indeed, following an incomplete investigation, Judges Blunk and Bunleng ultimately closed Case 003.⁴⁰ It perhaps comes as no surprise that the case was widely criticised for being half-hearted and lacking transparency. The ECCC failed to summon, charge or question either of the suspects, and failed to interview key witnesses or examine crime sites.⁴¹ Furthermore, the Open Society Justice Initiative (OSJI) reports that staff members of the Office of CIJs made a concerted effort to 'create the illusion of a genuine investigation'⁴² by adding documents to the case file; this was but one of many serious allegations by the international judges of the Pre-Trial Chamber concerning the CIJs tampering with the case file.⁴³

Those attempting to justify the closure of Case 003 argued that the suspects involved fell outside of the Court's jurisdiction to prosecute 'senior leaders' of the Khmer Rouge and 'those most responsible' for the atrocities committed. However, a leaked ECCC document revealed that the Case 003 suspects were in fact alleged to have participated in a plan to eliminate 'undesirable elements' from the Revolutionary Army of Kampuchea, possibly resulting in tens of thousands of murders.⁴⁴ Additionally, the OSJI has asserted that 'a judicial investigation is compulsory for crimes within the ECCC's jurisdiction,⁴⁵ and must be directed at "ascertaining the truth."⁴⁶ They concluded that '[i]t is legally erroneous to limit a criminal investigation or to direct it toward a pre-determined

35 James O'Toole, 'UN Keeps Corruption Probe Confidential', *The Phnom Penh Post*, 18 October 2010.

36 See note 16 above, at 26.

37 'Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC', *The Phnom Penh Post*, 27 October 2010.

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

39 Alice Foster and Chhorn Chansy, 'Prosecutor Says Tribunal Lacks Money, Time', *The Cambodia Daily*, 18 March 2011, 23.

40 See note 16 above, at 28.

41 Open Society Justice Initiative Report, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011,' [hereinafter 'OSJI Report'] at 13.

42 *Ibid*, citing confidential interviews with court employees, Phnom Penh, April-June 2011.

43 *Ibid*, citing 'Considerations of the Pre-Trial Chamber Regarding the Appeal Against order on the Admissibility of Civil Party Applicant Robert Hamill (D11/2/4/4),' 24 October 2011, available at: www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil. The international judges stated at para14, '[w]e note that the modifications were aimed at improperly curing fundamental defects in the Impugned order... [and that they were] so fundamental that they affect[ed] its very substance...'

44 Jared Ferrie, 'Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges' *Christian Science Monitor*, 8 June 2011, available at: www.csmonitor.com/World/Asia-Pacific/2011/0608/Leaked-document-casts-doubt-on-impartiality-of-Khmer-Rouge-judges.

45 Internal Rule 55(1). ECCC Internal Rules (Revision 7), available at: www.eccc.gov.kh/en/document/legal/internal-rules.

46 Internal Rules, Rule 55 (5), see note19 above.

legal conclusion. Rather, investigations must be full, genuine and fact-based.⁴⁷ It follows that the premature closure of Case 003 was ill-founded.

Refusal to reopen the case led to an outcry by Cambodian civil rights groups, who in May 2011 collectively issued a press release, accusing the Court of interfering with the people's 'right to know what happened in the hands of the Khmer Rouge' and with their 'right to justice'.⁴⁸ Several UN Court workers also resigned to protest the CIJs' decision. UN Khmer Rouge expert Stephen Heder wrote in his resignation to Judge Siegfried Blunk that the decision to close Case 003 was 'unreasonable', that there was a growing 'lack of confidence' in Judge Blunk's leadership among UN staff, and that Judge Blunk's 'management of what is now a professionally dysfunctional office' had generated a 'toxic atmosphere of mutual mistrust'.⁴⁹ These resignations marked a new low for ECCC credibility.

On 24 October 2011, ECCC defence counsel filed a criminal complaint⁵⁰ alleging that Prime Minister Hun Sen and senior government officials⁵¹ had interfered with justice and the defendants' right to a fair trial. The allegations stated that the officials and the Prime Minister:

- publicly indicated that certain witnesses should not testify in Case 002;
- publicly opposed further investigation and proceedings in Cases 003 and 004;
- breached ECCC summonses to appear for testimony in Case 002 without valid reason; and
- prevented ECCC letters inviting King Father Norodom Sihanouk to testify in Case 002 from reaching him.⁵²

The defence counsel argued that the obstructions contravened the constitutional separation of powers, thus unduly disrupting ECCC proceedings and breaching various provisions of the Cambodian Penal Code.⁵³ The complainants requested the Office of the Royal Prosecutor (ORP) to initiate criminal proceedings against the co-accused.

The ORP responded with an official decision to 'file without processing' the criminal complaint due to lack of evidence. This decision was made without any apparent independent investigation into the allegations.⁵⁴ With regard to statements made by Prime Minister Hun Sen, it was asserted by the ORP that the Prime Minister 'has an obligation to ensure political stability, peace, and the wellbeing of the Kingdom of Cambodia'⁵⁵ which, as interpreted by the defence counsel, 'suggests that he is

47 OSJI Report, at 14–15.

48 Asian Human Rights Commission, 'Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out,' 20 May 2011, available at: <http://humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011>.

49 James O'Toole, 'Outgoing Consultant Blasts Tribunal Judges', *The Phnom Penh Post*, 14 June 2011, available at: <http://kimedia.wordpress.com/2011/06/14/ki-media-outgoing-consultant-blasts-tribunal-judges-blunk-and-you-bunleng>.

50 Criminal Complaint by Michiel Pestman and Andrew Ianuzzi in the Municipal Court of Phnom Penh before the Office of the Royal Prosecutor, 24 October 2011, available at: www.bohler.eu/user/file/11-10-24_complaint_re_witness.pdf.

51 Criminal Complaint lists Kong Sam Ol, Hun Sen, Chea Sim, Heng Samrin, Hor Namhong, Keat Chhon, Ouk Bunchoeun, Sim Ka, Khieu Kanharith, Khieu Sopheak and Phay Siphon, at 2–8.

52 Press Release, 24 October 2011, available at: www.sithi.org/temp.php?url=media_view.php&mid=4948&.

53 Criminal Complaint by Michiel Pestman and Andrew Ianuzzi, see note 50 above. Lists breaches of: Art 538 of the Penal Code ('Refusal to Appear'); Art 522 of the Penal Code ('Publication Aimed at Putting Pressure on a Jurisdiction'), at 6–7; Arts 520/525 ('Interference in the Performance of Functions of the Court'); and Art 549 ('Publication Aimed at Putting Pressure on a Witness').

54 Press Release, 1 February 2012, available at: www.bohler.eu/en/list-of-news-items/notice-of-appeal-re-criminal-complaint-against-prime-minister-hun-sen-and-others.

55 *Ibid.*

entitled to make any statement or take any action to further these ends'.⁵⁶ On 1 February 2012, the defence counsel issued a statement detailing the intention to take his complaint to appeal, claiming that 'the justifications advanced by the ORP are factually and legally absurd'. He called for an '*actual investigation*' [emphasis in original] into the facts of the original complaint and sought further criminal charges against Hun Sen, who has made further public statements about the defendant's character, yet continues to 'reign with impunity'.⁵⁷

This recent altercation demonstrates the pervasive and institutionalised nature of executive interference with the Cambodian judiciary, and the deeply concerning failure by judicial bodies to deal therewith.

56 *Ibid.*

57 *Ibid.*

3. Judge Blunk's resignation

On 8 October 2011, Judge Blunk submitted his resignation to the UN Secretary-General, citing interference by Cambodian Government representatives.⁵⁸ He made reference to the aforementioned meeting between Cambodian Prime Minister Hun Sen and UN Secretary-General Ban Ki-Moon on 27 October 2010, during which the Prime Minister was purported to have 'clearly affirmed that Case 003 will not be allowed'.⁵⁹ Judge Blunk noted the Minister of Information's 10 May 2011 declaration that anyone wishing to prosecute Cases 003 and 004, 'should just pack their bags and leave'. The Cambodian Foreign Minister also stated that the further prosecution of Khmer Rouge leaders 'is a Cambodian issue' and as such 'must be decided by Cambodia'. Judge Blunk felt that these statements would be 'perceived as attempted interference by Government officials with Cases 003 and 004,' meaning that 'his ability to withstand such pressure by Government officials and to perform his duties independently, could always be called into doubt'.⁶⁰ The extent of the impact that any such pressure by the Cambodian Government might have had on judicial investigations in Cases 003 and 004 remains unclear.

The government denied any misconduct and attributed Judge Blunk's resignation to a 'sustained campaign by international organisations' and 'persistent media interference', both of which have 'long opposed the ECCC'.⁶¹ The UN meanwhile demonstrated a reluctant willingness to address the issue, initially disregarding Judge Blunk's suggestions of executive interference. Later, however, UN Secretary-General for Legal Affairs, Patricia O'Brien 'strongly urged the [Cambodian Government] to refrain from statements opposing the progress of Cases 003 and 004 and to refrain from interfering in any way whatsoever with the judicial process'.⁶²

3.1 The lead-up to the SCM's refusal

Soon after Blunk's resignation was announced on 10 October 2011, the UN declared itself to be 'working urgently to ensure that the reserve Judge, Kasper-Ansermet of Switzerland, was available as soon as possible to replace Blunk, so that the work of the ECCC is not disrupted'.⁶³ This reinforced the widely held expectation that Judge Kasper-Ansermet would automatically replace Judge Blunk, just as Judge Blunk, himself a former reserve CIJ, had replaced Judge Marcel Lemonde following Lemonde's resignation amid a purportedly difficult relationship with Judge Bunleng.⁶⁴ The relevant provision of the UN-Cambodian Agreement establishing the Court appeared to be straightforward in its contemplation of these circumstances, stating in Article 5.6, that 'In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.'

58 Press release: 'Statement by the International Co-Investigating Judge', 10 October 2011, available at: www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge.

59 As Foreign Minister Hor Namhong told reporters, see: Thomas Miller, 'More questions for KRT Case 003', *The Phnom Penh Post*, 29 June 2011.

60 See note 58 above.

61 'Statement of the Spokesperson of the Press and Quick Reaction Unit of the Office of the Council of Ministers', 13 October 2011, available at: www.cambodiatribunal.org/sites/default/files/Judge%20Blunk%20resignation%20bow%20to%20NGOs%20pressure.pdf.

62 Press Statement, available at: www.cambodiatribunal.org/sites/default/files/Press%20Statement%2020%20Oct%202011.pdf.

63 Reported, for example, at: www.un.org/apps/news/story.asp?NewsID=39997&Cr=Cambodia&Cr1.

64 Brigit Di Certo, "'Urgent' efforts to replace departing judge... UN failed to deliver, again", *The Phnom Penh Post*, 11 October 2011, available at: <http://khamerlogue.wordpress.com/2011/10/11/urgent-efforts-to-replace-departing-judge-un-failed-to-deliveragain/>.

However, the SCM did not replace Judge Blunk with Judge Kasper-Ansermet. Rather, what followed was a three-month period of supposed deliberation by the SCM, in the face of sustained disapproval by commentators and international organisations, and notwithstanding the self-evident need to continue the prosecutions without unnecessary delay. A press release leaked on 12 January 2012 by the Press and Quick Reaction Unit of the Office of the Council of Ministers ('PQRU') revealed that on 18 October 2011, the UN Secretary-General had written to the Cambodian Government, requesting that it call on the SCM to appoint Judge Kasper-Ansermet.⁶⁵ The press release also revealed that, in accordance with its established record of incompetence and obfuscation in matters relating to Cases 003 and 004, the government had failed to relay the request to the SCM until 20 December 2011.⁶⁶ This caused another significant delay in the proceedings.

3.1.1 THE CAMBODIAN RESPONSE

In mid-January, reports began to detail the reaction of Cambodian CIJ You Bunleng to the requested appointment of reserve international CIJ Kasper-Ansermet. Judge Kasper-Ansermet was 'immediately and publicly rejected' by Judge Bunleng, who declared that he 'does not have legal accreditation'⁶⁷ to sit on the panel in the ECCC without approval by the Cambodian Government.⁶⁸ Judge Bunleng had earlier expressed 'deep disappointment with the working manners of reserve international CIJ Judge [Kasper-Ansermet]. Judge Bunleng felt that his colleague lacked mutual understanding and consideration of the legal principles and common practices applied so far within the Office of the Co-Investigating Judge[s], but who acts as an Outreach Officer.'⁶⁹ These comments followed a series of provocative comments posted by Judge Kasper-Ansermet on his Twitter page before and after Judge Blunk's resignation. Judge Kasper-Ansermet tweeted about the credibility crisis surrounding the ECCC, circulating his opinions and linking to reports by the OSJI and Human Rights Watch, including one that called for the resignation of Judges Blunk and Bunleng.⁷⁰ He also posted links to Court documents that detail Case 002 defendant Khieu Samphan's calls for investigating judges to be removed.⁷¹ Of particular significance – and something that might explain some of the resistance to his nomination – is the fact that Judge Kasper-Ansermet tweeted in early January that he was determined to investigate Cases 003 and 004.⁷²

65 Bridget Di Certo, 'KRT judge backflip', *The Phnom Penh Post*, 13 January 2012, available at: www.phnompenhpost.com/index.php/2012011353932/National-news/krt-judge-backflip.html.

66 As reported: Julia Wallace, 'A Glimpse into UN-Gov't Talks on New Judge', *The Cambodia Daily*, 13 January 2012.

67 Douglas Gillison, 'Cambodia Rejects UN Genocide Judge', *The Investigative Fund*, 15 January 2012, available at: www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge.

68 Cambodian Center for Human Rights, 'Scant Justice Expected from Khmer Rouge Trials', 22 December 2011, available at: www.cchrcambodia.org/admin/media/news/news/english/2011_12_22_Epoch_Scant%20justice%20expected%20from%20khmer%20rouge%20trials.pdf.

69 Julia Wallace and Kuch Naren, 'Turmoil Again Plagues Office of KRT Judges', *The Cambodia Daily*, 10 January 2012.

70 'Tweeting Judge's Cyber Diary', available at: www.travelto-cambodia.info/742-tweeting-judge%E2%80%99s-cyber-diary/.

71 *Ibid.*

72 Monsters and Critics News, 'LEAD: Cambodia claims final say over appointment of tribunal judge', 16 January 2012, available at: www.monstersandcritics.com/news/asiapacific/news/article_1685758.php/LEAD-Cambodia-claims-final-say-over-appointment-of-tribunal-judge.

Judge Bunleng's reaction to Judge Kasper-Ansermet's appointment is especially disconcerting when one considers the impact that his personal opinions had on the eventual pronouncement of Judge Blunk's replacement. Despite being the domestic CIJ at the ECCC, Judge Bunleng also sits on the SCM,⁷³ the very body responsible for formally replacing absent judges. Clearly, as the Cambodian Human Rights Action Committee (CHRAC) has also noted,⁷⁴ any involvement by an ECCC judge in the appointment process of other members of the ECCC judiciary creates a significant conflict of interest.

The Cambodian Government and the SCM remained silent on the issue until the PQRU issued a press release on 12 January 2012, detailing several communications between the UN and the Cambodian Government. This original release was swiftly withdrawn and replaced with a second redacted version, which stated that the PQRU '[did not wish] to reveal details about the communications'.⁷⁵ According to the original press release, Cambodian Prime Minister Hun Sen had written to the UN Secretary-General on 3 November 2011, suggesting 'prudent consideration' of the appointment of Judge Kasper-Ansermet, due to 'certain activities by Mr Laurent Kasper-Ansermet that have been brought to public attention'. It is believed that this refers to the same Twitter posts about which Judge Bunleng had expressed unease. Importantly, the UN reviewed these 'ethical concerns' and determined that they were 'unfounded'.⁷⁶ The UN continued to request Judge Kasper-Ansermet's appointment.

As mentioned above, the UN Secretary-General's request that Judge Kasper-Ansermet be appointed was not forwarded to the SCM until 20 December 2011. In mid-January, the PQRU stated that the SCM was 'independently carrying out its normal procedures and legal considerations before a decision would be made'.⁷⁷ Defending its ability to do so, the Council of Ministers' PQRU spokesman, Keo Remy, professed that the SCM was under 'no obligation' to approve the reserve international CIJ, and 'would not be forced' to make a decision.⁷⁸ Apparently aware that this position would generate controversy, Remy reiterated that there had been 'no interference at all by the government'.⁷⁹ The SCM made its position clear: Article 5.6 of the Agreement creates no obligation to replace the resigning international CIJ with the reserve international CIJ. This stance has sparked widespread turbulence.

The ECCC provided little assistance in mitigating the evolving crisis. Wiping his hands of any duty to act, the ECCC's spokesman on legal affairs, Lars Olsen, stated that 'since there is seemingly a disagreement between the national CIJ and the international reserve CIJ about what a reserve judge can do, I am not in a position to comment'.⁸⁰ The ECCC's hands-off approach demonstrated the fundamental lack of any internal mechanism to resolve disputes concerning judicial appointments.

73 Bridget Di Certo and Vong Sokheng, 'Judge Rejection "A Breach"', *The Phnom Penh Post*, 23 January 2012, available at: www.cambodiatribunal.org/sites/default/files/news/Judge%20Rejection%20%E2%80%98A%20Breach%E2%80%99.pdf.

74 Cambodian Human Rights Action Committee, 'CAMBODIA: CHRAC expresses grave concern about the work of ECCC's co-investigating judges', *Asian Human Rights Commission*, 19 January 2012, available at: www.humanrights.asia/news/forwarded-news/AHRC-FPR-004-2012.

75 See note 65 above.

76 Statement by UN Secretary-General, 'Secretary-General Says Decision by Cambodia not to Appoint Current Reserve Judge to Position on Extraordinary Chambers "Matter of Serious Concern"', (SG/SM/14072), 20 January 2012, available at: www.un.org/News/Press/docs/2012/sgsm34072.doc.htm.

77 See note 65 above.

78 Bridget Di Certo and Cheang Sokha, 'Judge OK not a "must"', *The Phnom Penh Post*, 17 January 2012, available at: www.phnompenhpost.com/index.php/2012/01/17/53981/National-news/judge-ok-not-a-must.html.

79 *Ibid.*

80 Julia Wallace and Kuch Naren, 'Turmoil Again Plagues Office of KRT Judges', *The Cambodia Daily*, 10 January 2012.

3.1.2 THE UN RESPONSE

While various commentators, including the OSJI, initially criticised the UN's failure to address the judicial independence issue at an early stage,⁸¹ subsequent statements made by UN representatives have clarified its position. Speaking at an informal meeting of the legal advisers of the Ministries of Foreign Affairs on 24 October 2011, UN Under-Secretary-General for Legal Affairs Patricia O'Brien went into some depth about the situation as it was unfolding in the wake of Judge Blunk's resignation. She reaffirmed that the ECCC is 'required under the Agreement between the UN and the Cambodian Government to function in accordance with international standards of justice, fairness and due process of law' and stressed that '[t]he [UN] Secretary-General has written to the Prime Minister, Hun Sen, to request [Judge Laurent Kasper-Ansermet's] appointment, and we are asking that the Supreme Council of the Magistracy meet as soon as possible for this purpose'.⁸²

After making it clear that the Deputy Spokesperson for the UN Secretary-General had 'underlined that the United Nations had consistently called upon all persons to refrain from interfering with the work of the ECCC' and had 'reiterated that the United Nations would continue to monitor the situation closely,' O'Brien assured her listeners that she had met with Deputy Prime Minister Sok An, with senior ECCC officials and with NGOs, emphasising 'our consistent message that the ECCC must be permitted to proceed with its work without interference from any entity, including the Royal Government of Cambodia, donor States or civil society.' She also described how she had 'reiterated the need to respect judicial independence and to co-operate fully with the Court' during her meeting with Sok An.⁸³

Similarly, Mark Nesirky, spokesman for the UN Secretary-General, has made repeated statements to the media clarifying the UN's position. On 11 January 2012, he stated that the UN had 'made every effort to secure the appointment of [Judge Kasper-Ansermet],' and that the UN is 'concerned that, more than three months after the resignation of the international Co-Investigating Judge, the Supreme Council of the Magistracy has not appointed the reserve international Co-Investigating Judge to replace him.'⁸⁴ More significantly, Nesirky stressed the UN's view that 'Cambodia is under an obligation to appoint the reserve international Co-Investigating Judge as the international Co-Investigating Judge when there is a vacancy'⁸⁵ and has since stated that the UN will 'continue to call upon Cambodia to fulfil its obligation.'⁸⁶ In the lead-up to Judge Kasper-Ansermet's ultimate rejection by the SCM, the UN made its views clear: failure by the SCM to formally appoint Judge Kasper-Ansermet would constitute a breach of Cambodia's obligation to appoint the reserve international CIJ under the Agreement; more broadly it noted the Cambodian Government's obligation to uphold the judicial independence of the ECCC.

81 OSJI Report, at 6.

82 Transcript of 'Informal Meeting of the Legal Advisers of the Ministries of Foreign Affairs: Remarks by Ms Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, The Legal Counsel,' 24 October 2011. Transcript available at: http://untreaty.un.org/ola/media/info_from_lc/POB%20to%20Legal%20Advisers_Oct%202011.pdf.

83 *Ibid.*

84 'UN "concerned" over Khmer Rouge judge's legal limbo', *AFP News*, 11 January 2011, available at: www.google.com/hostednews/afp/article/ALeqM5hOXohCdEqLxPiO4_jEai2Hpinxiw?docId=CNG.113cd0c7de7b144690fc421deab49b3a.731.

85 Sok Khemara, 'UN Says Government Must Choose Investigating Tribunal Judge', *VOA News*, 20 January 2012, available at: www.voanews.com/khmer-english/news/UN-Says-Government-Must-Choose-Investigating-Tribunal-Judge-137686363.html.

86 Bridget Di Certo, 'Judge's OK an "obligation", UN says', *The Phnom Penh Post*, 19 January 2012, available at: www.phnompenhpost.com/index.php/2012011954034/National-news/judges-ok-an-obligation-un-says.html.

3.2 The rejection of Judge Kasper-Ansermet

On 19 January 2012, the Cambodian Government formally notified the UN Secretary-General of the SCM's decision not to appoint Judge Kasper-Ansermet.⁸⁷ Critically, despite the declared independence of the ECCC from the government, the SCM decision was first sent to the Council of Ministers. This irregular move suggests that the government in fact played a prominent role in blocking Judge Kasper-Ansermet's formal appointment. As Phil Robertson from Human Rights Watch said to the *Phnom Penh Post*, '[t]he government maintains that the Supreme Council of Magistracy is an independent body, so why are they sending their decision to the Council of Ministers?'⁸⁸ Additional concerns⁸⁹ have been voiced about the UN's apparent inability to effectively influence a decision regarding an agreement to which it is a party.

The UN Secretary-General responded to the decision in a statement released 20 January 2012. He described the SCM's decision as a 'matter of serious concern',⁹⁰ and stated unequivocally that it constitutes a 'breach of Article 5, paragraph 6, of the Agreement between the United Nations and the Royal Government of Cambodia'.⁹¹ The statement declared that the UN 'continues to support Judge Kasper-Ansermet and Cambodia should take immediate steps to appoint him as the International Co-Investigating Judge'.⁹² This was followed a few days later with a press conference by David Scheffer, the UN's Khmer Rouge Special Expert. Scheffer said simply that Judge Kasper-Ansermet 'has clear authority' to fulfil his role as CIJ, despite the SCM's refusal.⁹³ He further asserted that under the 2003 Agreement the decision to appoint a reserve CIJ is solely up to the discretion of the UN Secretary-General.⁹⁴ In support of this position, Anne Heindel of the Documentation Center of Cambodia – an NGO – stated that '[i]f, under Cambodian national law, it's required that the SCM re-appoints [the judge]... that's fine, but the UN made sure the agreement with Cambodia would be a binding treaty and they can't use provisions of national law to subvert a treaty.'⁹⁵

Ek Tha of the PQRU retorted that '[i]f someone wants to work as international CIJ at the ECCC without legal appointment by the Supreme Council of Magistracy, that does not make sense in terms of the legal authority of the Supreme Council of Magistracy.'⁹⁶ He concluded that, should Judge Kasper-Ansermet proceed with investigations as the UN says he is so entitled, the ECCC has the authority to decide what action to take against him.⁹⁷

87 See note 76 above.

88 Bridget Di Certo and Vong Sokheng, 'KRT judge decision with ministers', *The Phnom Penh Post*, 20 January 2012, available at: www.phnompenhpost.com/index.php/2012012054051/National-news/krt-judge-decision-with-ministers.html.

89 OSJI Report at 6: describes the UN's response as giving 'further cause for concern'; and Clair Duffy in an interview reported by ABC Radio Australia, 'Khmer rouge trial undermined by legal spat', 17 January 2012, available at: www.radioaustralia.net.au/asiapac/stories/201201/s3410075.htm.

90 See note 76 above.

91 *Ibid.*

92 *Ibid.*

93 Reported by David Boyle, 'UN holds firm on Judge,' *The Phnom Penh Post*, 26 January 2012, available at: www.phnompenhpost.com/index.php/2012012654160/National-news/un-holds-firm-on-judge.html.

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

4. Should Judge Kasper-Ansermet have been appointed?

This latest crisis over judicial appointments at the ECCC is just one more example of executive influence in the Khmer Rouge proceedings. Cambodia's stubbornness in spite of the chorus of calls for Judge Kasper-Ansermet to replace Judge Blunk only demonstrates how deeply rooted the problem is. The following provides an argument in support of Judge Kasper-Ansermet's appointment, based on an assessment of the pertinent provisions of ECCC in light of international treaty interpretation rules, and the proper functions of the relevant Cambodian bodies.

4.1 *The 2003 Agreement, ECCC Law, and Internal Rules on judicial appointments*

The 2003 Agreement was signed following a series of complex, protracted negotiations, which were dominated by the issue of the Cambodian Government's waiver of sovereignty.⁹⁸ Prime Minister Hun Sen described the questions as 'whether Cambodia should be cooperating with the UN or the UN should be cooperating with Cambodia'.⁹⁹ Ultimately, the General Assembly approved the draft Agreement, disregarding a series of adjustments advanced by the Secretary-General to ensure the 'impartiality, independence, and credibility of investigations, prosecutions and trials', including the suggestion that 'both the prosecutor and investigating judge should be international personnel'.¹⁰⁰

Under the resulting ECCC structure, there are two CIJs; one Cambodian and one international. Both the Cambodian and international CIJ must agree before pursuing an investigation. To help safeguard the Court from political interference, a dispute resolution mechanism refers any disagreement over whether to pursue an investigation to the Pre-Trial Chamber, which itself must reach a supermajority (four out of five judges; two of whom are international) for a decision to be made.¹⁰¹

As identified by the UN and various ECCC commentators, the key provisions of the Agreement concerning the appointment of CIJs are Articles 5.5 and 5.6. Article 5.5 provides that:

'... the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.'

98 See note 16 above at 16.

99 David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', abridgement of the much lengthier and footnoted book chapter of the same name: in M Cherif Bassiouni, (ed), *International Criminal Law* (Martinus Nijhoff Publishers, 3rd ed, 2008), at 7, available at: www.cambodiatribunal.org/CTM/Cambodia%20Scheffer%20Abridged%20Chapter%20July%202007.pdf.

100 'Report of the Secretary-General on Khmer Rouge Trials', 31 March 2003, (UN Doc A/57/769), at para16.

101 Art 7(4) of the Agreement: 'A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.'

Article 5.5 is supported by a near-identical provision in Article 26 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the ‘ECCC Law’). Accordingly, Judge Kasper-Ansermet was appointed as reserve international CIJ on 1 December 2010.¹⁰² Article 5.6 importantly goes on to clarify that:

‘In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post **must** be the reserve international co-investigating judge.’ [emphasis added]

Article 26 of the ECCC Law provides support for Article 5.6, stating that:

‘...The reserve Investigating Judges **shall** replace the appointed Investigating Judges in case of their absence.’ [emphasis added]

Furthermore, in Article 27 (new) ECCC Law it states clearly that:

‘... In the event of the absence of the foreign Co-Investigating Judge, he or she **shall** be replaced by the reserve foreign Co-Investigating Judge.’ [emphasis added]

Finally, Article 7 of the revised ECCC Internal Rules expressly confirms that, in the event of a CIJ’s resignation, Article 26 of the ECCC Law and Article 5 of the Agreement ‘**shall be applied**’ [emphasis added].

4.1.1 THE VIENNA CONVENTION ON THE LAW OF TREATIES

Since the 2003 Agreement is between a state (Cambodia) and an international organisation (the UN), the 1969 Vienna Convention on the Law of Treaties (VCLT) does not *by itself* apply to it.¹⁰³ However, it follows from Article 3(b) of the VCLT¹⁰⁴ that some provisions that reflect customary international law do apply to agreements between states and international organisations. The VCLT provisions on treaty interpretation (Articles 31 to 33) are widely recognised as reflecting customary international law.¹⁰⁵ Several judgments of the International Court of Justice (ICJ), most recently the *Kasikili/Sedudu Island* case,¹⁰⁶ reflect this interpretation, and the ICJ has twice confirmed that Article 31 VCLT in particular reflects customary international law.¹⁰⁷ Thus, the 2003 Agreement is subject to the treaty interpretation rules set out in the VCLT. The relevant provisions of Article 31 of the VCLT include the following:

102 Announcement on ECCC website, see: www.eccc.gov.kh/en/judicial-person/judge-laurent-kasper-ansermet-reserve.

103 Vienna Convention on the Law of Treaties 1969, Art 1 (‘The present Convention applies to treaties between States’) and Art 2(1)a (‘“treaty” means an international agreement concluded between States...’).

104 VCLT, Art 3(b) (‘the application to [international agreements concluded between states and other subjects of international law] of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.’).

105 See for example: M Fitzmaurice, OA Elias, Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, (Brill, 2010), 153–4.

106 *Case Concerning Kasikili/Sedudu Island* (Botswana v Namibia), Judgment of 13 December 1999, 1999 *ICJ Rep* 1045.

107 *Territorial Dispute* (Libya v Chad), Judgment of 3 February 1994 *ICJ Rep* 4, at para 21; *Oil Platforms case* (Iran v United States), Preliminary Objections, Judgment of 12 December 1996, 1996 *ICJ Rep* 812, at para 23.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.’

Thus under VCLT Article 36(1), Article 5.6 of the 2003 Agreement must be interpreted in ‘good faith in accordance with the ordinary meaning given to the terms of the treaty in their context’ and in light of the treaty’s ‘object and purpose’.

The good faith requirement in the process of interpreting a treaty provision is commonly understood as underlying the concept that an interpretation should not lead to a manifestly absurd or unreasonable result.¹⁰⁸ By specifically stipulating that the person appointed to fill the vacant post ‘must’ be the reserve international CIJ, the provision has left no room for negotiation. Interpreting Article 5.6 to mean that a person *other* than the reserve international CIJ should fill the vacant post would be manifestly absurd and unreasonable.

The obligation to interpret treaty provisions ‘in accordance with the ordinary meaning given to the terms of a treaty’ is understood to be more than a linguistic assessment, but also requiring account to be taken of ‘all the consequences which normally and reasonably flow from that text’.¹⁰⁹ Under Sir Gerald Fitzmaurice’s ‘principle of contemporaneity’, ‘the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in light of current linguistic usage, at the time when the treaty was originally concluded’.¹¹⁰ Article 5.6 of the Agreement must therefore be interpreted according to the meaning it possessed at the time of the Agreement’s conclusion in 2003, in light of current linguistic usage.

¹⁰⁸ Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press Melland Schill Studies, 2nd Revised Edition, June 1984), at 120.

¹⁰⁹ *Ibid*, at 121.

¹¹⁰ Fitzmaurice, 33 BYIL (1957), at 212.

Perhaps more pertinent to the interpretation in this case is the requirement that it takes into account the ‘context’ of the terms as well as the ‘object and purpose’ of the treaty. Article 31(2)b) of the VCLT specifies that the context is comprised of the treaty’s text, its preamble and annexes, and ‘any instrument which was made by one or more parties in connection with conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’. The ECCC Law constitutes such an instrument since it was created by Cambodia, a party to the 2003 Agreement. Moreover, while it was passed in 2001, it was heavily amended in 2004 in light of the 2003 Agreement; and it is widely accepted as a domestic instrument related to the Agreement. As such, the interpretation of Article 5.6 of the Agreement must take account of Article 26 and 27 (new) of the ECCC Law, which make clear that the reserve international CIJ shall replace the international CIJ in the event of his or her absence. This logically supports the interpretation of Article 5.6 to mean that the reserve international CIJ shall replace the international CIJ in the event of his resignation.

Also relevant under Article 31(3)b) of the VCLT, is that ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ must be followed. In November 2010, ex-international CIJ Marcel Lemonde was replaced with ex-international reserve CIJ Blunk after Judge Lemonde resigned. This constitutes adherence to an application of Article 5.6 to which all parties agreed, under which the reserve international CIJ must replace a resigning international CIJ. Under Article 31(3)(b), any interpretation of Article 5.6 should take account of this previous application.

Finally, Article 31(1) of the VCLT requires the interpretation to be made in light of the ‘object and purpose’ of the treaty as a whole. Article 1 of the Agreement sets out clearly its intended purpose:

‘The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia [...].’

Since the Agreement’s object and purpose is to regulate cooperation between the UN and the Cambodian Government in bringing to trial those ‘most responsible’ among Khmer Rouge leaders, an interpretation of Article 5.6 *must* have at its core the ultimate underlying goal of bringing these persons to trial. Therefore, any interpretation of Article 5.6 that necessarily and intentionally results in extensive delays to and disruption of these trials must be invalid.

Correct application of Article 31 of the VCLT requires that Article 5.6 of the Agreement be interpreted such that if the international CIJ resigns, the reserve international CIJ takes his or her place. This is in full agreement with Martin Nesirky, who considers it plain that ‘Cambodia is under an obligation to appoint the reserve international Co-Investigating Judge as the international Co-Investigating Judge when there is a vacancy.’¹¹¹ Amnesty International,¹¹² the Cambodian Human Rights Action Committee (CHRAC) and the OSJI all uphold this view.¹¹³ Clair Duffy, the OSJI’s Khmer Rouge Tribunal Monitor, has similarly described the Agreement as providing a ‘clear and unequivocal’ obligation to appoint the reserve international CIJ.¹¹⁴

It may also be argued, as the CHRAC has done,¹¹⁵ that under ECCC law, the reserve international CIJ has *already* been appointed (Article 26 clearly states that the SCM shall ‘appoint one [foreign] Investigating Judge and one reserve [foreign] Investigating Judge’). Therefore, no further formal ‘appointment’ process needs to take place when a reserve CIJ replaces a CIJ, since under Article 5.6 of the Agreement and Article 27 (new) of the ECCC law, it is part of the reserve CIJ’s role to fill the vacant position.

4.2 Ultra vires decision-making by the Supreme Council of Magistracy

It follows that the SCM has acted outside of its powers by ‘deciding’ not to formally appoint the reserve international CIJ. The SCM is responsible for judicial appointments and discipline within the judiciary and is widely regarded to be the body charged with ‘rubber stamping’ the reserve CIJ as he or she replaces the resigning CIJ.¹¹⁶ Clair Duffy proclaimed that by rejecting the reserve CIJ, the SCM has ‘totally overstepped its authority’.¹¹⁷ She expressed this concern earlier when the PQRU announced that the SCM would be making a ‘decision’, since ‘under the Agreement, the Supreme Council of Magistracy approving a nominated judge is more of a technical procedure, not a “decision”’.¹¹⁸ According to Duffy, the SCM only has authority to ‘ensure that [the reserve international CIJ] is confirmed’. In this case, the SCM only had the power and responsibility to endorse the appointment of Judge Kasper-Ansermet, not to challenge it.¹¹⁹

As explained, Article 5.5 provides that, from the list of two nominees submitted by the UN Secretary-General, the SCM shall appoint one international CIJ and one reserve international CIJ. The decision as to which judge is appointed to each position is the only ‘decision’, strictly understood, that the SCM is given authority to make. After this stage is complete, Article 5.6 – as the above discussion shows – provides a mechanism for the appointed reserve international CIJ to replace the resigning international CIJ without any input by the SCM. By asserting the authority to make a ‘decision’

111 Sok Khemara, ‘UN Says Government Must Choose Investigating Tribunal Judge,’ *VOA News*, 19 January 2012, available at: www.voanews.com/khmer-english/news/UN-Says-Government-Must-Choose-Investigating-Tribunal-Judge-137686363.html.

112 Amnesty International released a public statement on 10 January 2012, calling for the SCM to ‘meet immediately and appoint reserve Judge Laurent Kasper-Ansermet as the International Co-Investigating Judge’, which it described as being ‘required in accordance with the agreement establishing the Tribunal between the UN and Cambodian government’. (Amnesty International, ‘Public Statement – Cambodia: Immediately appoint International Co-Investigating Judge at Khmer Rouge Tribunal’, 10/1/2012, ASA 23/001/2012).

113 OSJI Report, at 2: requests the UN to ‘take all necessary measures to ensure the immediate appointment of International Co-Investigating Judge Kasper-Ansermet to office in full accordance with Art 5.6 of the ECCC Agreement’.

114 See note 89 above.

115 See note 74 above.

116 See note 84 above .

117 See note 72 above.

118 See note 72 above.

119 See note 89 above.

about whether or not to replace Judge Blunk with Judge Kasper-Ansermet, the SCM manifestly misinterpreted its authority under the Agreement.

This comes as no surprise when given the SCM's composition. The conflict of interest arising out of CIJ Bunleng's membership on the SCM has already been mentioned. The General Assembly Human Rights Council Report of the Special Rapporteur on the situation of human rights in Cambodia¹²⁰ identifies a 'conflict of interest' that arises as a result of the fact that the SCM consists of active judges and prosecutors, and includes the Minister of Justice, a representative of the executive, as an *ex officio* member.¹²¹ The SCM is constitutionally independent of the Cambodian Government and is headed by the King of Cambodia, so to have a representative of the executive as one of its members compromises its independence. This is especially pertinent when the executive has made its position regarding the continuation of Cases 003 and 004 publicly clear. The presence of Judge Bunleng and an executive member on the SCM undermines the independence of the judicial appointment process and indeed the legitimacy of the ECCC.

4.3 Judge Kasper-Ansermet's Twitter posts: reason for concern?

The Cambodian Government's concern with Judge Kasper-Ansermet's Twitter posts deserves attention. As mentioned before, Judge Kasper-Ansermet's 'tweets' have unsettled both the government and domestic CIJ Bunleng. They not only demonstrated his awareness of the controversies surrounding the Court, but provided links to human rights reports calling for the resignation of CIJs, and importantly, stated his determination to investigate Cases 003 and 004. In one tweet, he asked readers: 'What's your answer about criticism (OSJI) for UN handling of a controversial case at the #KhmerRouge Tribunal? #asktheSG #Cambodia.'¹²²

The UN claimed that it had 'thoroughly reviewed' the 'ethical concerns' held by the Cambodian Government in relation to these posts, and 'determined that they were unfounded'.¹²³ Yet, the nature of these posts might warrant *some* of the concern that they attracted. Judicial conduct of this nature is neither dealt with in the 2003 Agreement nor the ECCC Law, and is inadequately addressed by the Internal Rules of the ECCC.¹²⁴ The ECCC Code of Judicial Ethics, however, is more helpful. Article 2.1 states that 'judges shall be impartial and ensure the appearance of impartiality in the discharge of their functions' and Article 7.1 reiterates that '[j]udges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.' Further guidance can be found at the international level. The 2002 Bangalore Principles of Judicial Conduct (BPJC) provides clear standards for the ethical conduct of judges. Value 2.2 BPJC states that:

120 Surya P Subedi, 'Report of the Special Rapporteur on the situation of human rights in Cambodia', (A/HRC/15/46), 16 September 2010, available at: www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.46_en.pdf.

121 *Ibid*, at 7.

122 See note 70 above.

123 See note 76 above.

124 The ECCC Internal Rules (Rev 2) 2008 contain some relevant provisions regarding the disqualification of a judge from the ECCC; specifically Art 34(2) which reads: 'Any party may file an application for disqualification of a judge in any case in which the judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.'

‘A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.’

The Judicial Integrity Group’s (JIG) Commentary on Value 2.2 further outlines that ‘out of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality’.¹²⁵ The Commentary goes on to say that some exceptions exist where comments are made in ‘defence of fundamental human rights and the rule of law’.¹²⁶ It remains vital, in such cases, that a judge be ‘careful, as far as possible, to avoid entanglements in current controversies that may reasonably be seen as politically partisan’. To the extent that Judge Kasper-Ansermet’s Twitter posts were in the defence of fundamental human rights and the rule of law, they could constitute appropriate conduct. However, by posting challenges by organisations such as Human Rights Watch and the OJSI to the legitimacy of actions taken by the ECCC judges, Judge Kasper-Ansermet has done the opposite of enhancing public confidence in the impartiality of the judiciary.

Value 4.6 of the BPJC states that:

‘A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.’

A judge’s freedom of expression is clearly limited by the need for the judiciary to both be and appear impartial and independent. The JIG’s Commentary states that a judge ‘should not involve himself or herself inappropriately in public controversies’,¹²⁷ since it is ‘important that the judge should be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which is the hallmark of a judge’. By entering into a public debate on controversial subjects or by publicly criticising the government:

‘...the judge will not be seen to be acting judicially when presiding as a judge in court and deciding disputes which either touch the subjects in respect of which the judge has expressed public opinions, or perhaps more importantly, when the public figures or government departments that the judge has previously criticized publicly are parties or litigants or even witnesses in cases that he or she as a judge is adjudicating upon.’¹²⁸

It might be argued that Judge Kasper-Ansermet’s involvement in the ECCC legitimacy debate constitutes improper judicial involvement in a public debate and improper public criticism of public figures and the Cambodian Government. However, the Commentary goes on to provide that it is understood that there are *limited* circumstances in which a judge may appropriately speak out about a politically controversial matter. The Commentary says those can be:

125 See note 32 above, at 58

126 *Ibid.*

127 *Ibid.*, at 89.

128 *Ibid.*

‘... when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge.’¹²⁹

Importantly, judges are still required to act with ‘great restraint’ in these situations. A judge must not appear to ‘lobby’ the government and must give no indication how a decision might be made should a particular matter come before them in court.¹³⁰

Judge Kasper-Ansermet has not overstepped that line. Involving himself publicly in a controversial debate might be considered unwise, particularly given his pending position as international CIJ. But his Twitter posts fall short of either lobbying the government or indicating his position regarding the guilt or innocence of suspects in Cases 003 and 004. Rather, he drew the public’s attention to the controversy at hand, and expressed his eagerness to *investigate* Cases 003 and 004. He exercised appropriate restraint and one can conclude that Judge Kasper-Ansermet’s actions should not be used as a reason to justify his rejection by the SCM.

129 *Ibid*, at 90.

130 *Ibid*.

5. Conclusion

The legitimacy problems that have plagued the ECCC since its inception come as no surprise when one recalls the General Assembly's hasty approval of an Agreement that failed to safeguard the principles of fair and independent trials. Thus far, the ECCC has convicted one Khmer Rouge leader, former prison chief Kaing Guek Eav (better known as 'Duch'), who was eventually given a life sentence for war crimes and crimes against humanity. Case 002, the trial of senior leaders Ieng Sary, Nuon Chea and Khieu Samphan, began in November, and the future of Cases 003 and 004 remains uncertain.

The events outlined in this report, which culminated in the SCM's *ultra vires* decision not to replace former international CIJ Judge Blunk with reserve international CIJ Kasper-Ansermet, constitute the latest in a long line of incidents that raise concern about the Cambodian Government's relationship with the ECCC judiciary. Analysis of the relevant law has made it clear that the SCM overstepped its authority; under the Agreement, properly interpreted in light of the VCLT, the appointed reserve international CIJ *must* replace a resigning international CIJ.

The decision to reject Judge Kasper-Ansermet is the inevitable result of improper influence over the judiciary by an executive that clearly does not want Cases 003 and 004 to go forward. It highlights both the lack of effective mechanisms to protect judicial independence and the ECCC's resulting inability to enforce the rule of law – which has been exploited in accordance with the Cambodian Government's agenda, potentially at the expense of trying those individuals 'most responsible' that justice so strongly demands. Indeed, as Amnesty International has argued, the obstruction of Cases 003 and 004 'amounts to impunity'¹³¹ for those who committed crimes against humanity.

The future of the ECCC depends on ensuring international due process is guaranteed and protected. Safeguards must be put in place to enable the Court to respond effectively to allegations of executive influence. David Tolbert, the former UN special expert on the Khmer Rouge trials, has identified the core problem that '[t]he ECCC is built on the assumption that the international judges and prosecutors will safeguard the process as well as uphold the highest standard of integrity' but that this will fail when the judges fail to provide that safeguard. It would thus be prudent to consider a mechanism 'for reviewing the conduct of judicial officials for misconduct or for violations of judicial or ethical standards'.¹³² Similarly, the OSJI called for an independent panel of experts comprised of three international judges with relevant experience, to conduct 'a full inquiry into allegations of misconduct, incompetence, and lack of independence in the judicial investigations of Cases 003/004 by Judge Siegfried Blunk and Judge You Bunleng'.¹³³ Ensuring the effective investigation of alleged governmental influence in judicial matters would go some way to tackling the actual and perceived institutional legitimacy problems that threaten the future of the ECCC.

¹³¹ See above, note 112.

¹³² Reported at: www.theinvestigativefund.org/blog/1586/genocide_judges_duel_it_out_in_phnom_penh/.

¹³³ OSJI Report, 'Recent Developments at the ECCC: November 2011', 2.



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