

REPORT

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

February 2012

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA has been shaken by the battle over the appointment of International Co-Investigating Judge Laurent Kasper-Ansermet, even as the court achieves important milestones, including issuing a final verdict in its first case and opening substantive hearings in its second. This report examines these recent events, as well as the continuing controversy over Cases 003/004, and offers recommendations for action by the UN, the Royal Government of Cambodia, and donors to the court.

This report is part of a series issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/sub_listing.



I. EXECUTIVE SUMMARY AND RECOMMENDATIONS

There have been many significant developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since the Open Society Justice Initiative's last update on the court, issued in November 2011. These developments—examined in this report—include the issuing of a final verdict in Case 001, the opening of substantive hearings in Case 002, and the continuing controversy over Cases 003/004, including the ongoing battle over the appointment of International Co-Investigating Judge Laurent Kasper-Ansermet. The Cambodian government's refusal to endorse Judge Kasper-Ansermet must be addressed immediately, before it does permanent, perhaps fatal, damage to the court.

RECOMMENDATIONS

To United Nations Secretary-General Ban Ki-moon and United Nations Special Expert on the United Nations Assistance to the Khmer Rouge Tribunal David Scheffer:

- Publicly and privately maintain the UN's stance on the required appointment and legitimate authority of Judge Laurent Kasper-Ansermet to perform his judicial functions, including investigating Cases 003/004 should he decide to do so.
- Continue to publicly and privately insist that the Royal Government of Cambodia (RGC) immediately endorse Judge Laurent Kasper-Ansermet's appointment.
- Provide every reasonable form of assistance—including financial and human resources—to enable Judge Kasper-Ansermet to fulfill his legal and ethical obligations, including in Cases 003/004.¹
- Continue to monitor the RGC's good faith compliance with the terms of the ECCC *Agreement* to determine whether the RGC is in fact "causing [the court] to function in a manner that does not conform with the terms of the [...] Agreement."²

¹ Note that, as per Article 2.2 of the ECCC *Agreement*, the Vienna Convention on the Law of Treaties (in particular, Articles 26 and 27) applies to the *Agreement*. Article 26 of the Vienna Convention ("*pacta sunt servanda*") states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Further, and also according to the terms of the *Agreement*, the Royal Government of Cambodia is under an obligation to assist (*inter alia*) the co-investigating judges. As per Article 25, the RGC "shall comply without undue delay with any request by the co-investigating judges... or an order issued by any of them, including, but not limited:

- a. identification and location of persons;
- b. service of documents;
- c. arrest and detention of persons;
- d. transfer of an indictee to the [ECCC]."

² Article 28 of the *Agreement* ("Withdrawal of cooperation").

- Take all necessary measures to ensure that adequate financial and human resources are available for the entire court for the 2012-13 budget cycle.

To the ECCC's donors:

- Continue to publicly and privately insist that the RGC immediately endorse Judge Laurent Kasper-Ansermet's appointment and provide every reasonable form of cooperation to enable Judge Kasper-Ansermet to fulfill his legal and ethical obligations, including in Cases 003/004.
- In your consideration of the ECCC's budget for 2012-2013, ensure:
 - that adequate financial provision is made for the conduct of full outreach activities, including to solicit applications for civil party status in Cases 003/004;
 - that any human resource allocation to the national side of the court (in particular regarding determinations about ECCC legacy and residual mechanism) is adequately matched on the international side;
 - that determinations about legacy and residual mechanism within the ECCC include adequate consultation with international stakeholders;
 - greater transparency in the court's budgetary planning, including more regular provision of public information on the budget process and the court's financial needs and status;
 - the provision of more public information about the substance of any planned legacy activities, including information on who will take responsibility for such activities, and how.
- Insist on the appointment of an international head of the Defence Support Section (P-5), which is essential to the proper functioning of the ECCC, given that this position must advocate for observance of fundamental fair trial rights of all accused persons and suspects within the court's purview.

To the Royal Government of Cambodia:

- Take all necessary measures to remove any and all obstacles preventing Judge Laurent Kasper-Ansermet and the court's national and international staff from conducting full and genuine investigations in Cases 003/004.
- Immediately endorse Judge Laurent Kasper-Ansermet's appointment as full co-investigating judge and provide all necessary forms of cooperation and assistance to him, as good faith cooperation with the ECCC requires.

II. SUMMARY OF RECENT DEVELOPMENTS

During 2011, the Justice Initiative issued two reports—in June and November, 2011—on developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC).³ The November report focused on the crisis of credibility facing the ECCC because of mounting political pressure to shut down judicial investigations into two of its cases (known as 003/004). The report was released shortly after the public resignation of then-International Co-Investigating Judge Siegfried Blunk (Germany) due to “perceived” government pressure.⁴ Both the June and the November reports documented evidence of political interference by the Royal Government of Cambodia (RGC) in Cases 003/004, as well as judicial misconduct by the co-investigating judges.⁵ The November 2011 report also called for the swift appointment of Judge Blunk’s replacement, Judge Laurent Kasper-Ansermet (Switzerland),⁶ as mandated by the agreement establishing the ECCC.⁷ Throughout 2011, the Justice Initiative repeatedly called upon the United Nations (UN) and the court’s donors to convene a panel to conduct an inquiry into allegations of gross impropriety in the Office of Co-Investigating Judges.

There have been many critical developments at the ECCC in recent weeks. The ECCC’s court of final appeal—the Supreme Court Chamber—rendered its first final verdict, in the case of Kaing Guek Eav, alias Duch (known as Case 001), increasing the 30 year sentence imposed on him by the Trial Chamber to life imprisonment. While a considerable milestone for the ECCC, the judgment also raised significant human rights concerns which will be discussed in the next section of this report. In another notable achievement, the court’s second case (Case 002), involving the (now) three alleged senior-most surviving Khmer Rouge leaders—Nuon Chea, Ieng Sary and Khieu Samphan—got underway. The Trial Chamber delivered important legal and procedural decisions concerning the management of the case, including decisions severing a fourth co-accused (Social Affairs Minister Ieng Thirith) from the case due to her mental unfitness to stand trial, and breaking the large and complex case into smaller portions.

³ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update* (hereinafter “June 2011 Update Report”), available at: http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf; and Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011 Update* (hereinafter “November 2011 Update Report”), available at: http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114/eccc-developments-20111114.pdf.

⁴ See press release by the international co-investigating judge, October 10, 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

⁵ The two judges were Judge You Bunleng (Cambodia) (hereinafter, “Judge You”), and Judge Siegfried Blunk (Germany) (hereinafter, “Judge Blunk”).

⁶ Hereinafter, “Judge Kasper-Ansermet.”

⁷ Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, July 2003, ratified October 19, 2004, (hereinafter “ECCC Agreement” or “Agreement”) available at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf. Article 5.6 of the *Agreement* states that “[i]n case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post **must be** the reserve international co-investigating judge.” (Emphasis added.)

The Trial Chamber recently completed its second session of substantive hearings on evidence in Case 002.

Meanwhile, controversies surrounding Cases 003/004 have continued to plague the court and threaten its overall viability. In perhaps the most worrisome development in this saga to date, the Cambodian government declined to endorse the UN judicial appointee, Judge Kasper-Ansermet, to fill the vacancy created by Judge Blunk's resignation. Judge You and Judge Kasper-Ansermet have publicly sparred as the latter has attempted to move forward with the Cases 003/004 investigations. Most notably, Judge Kasper-Ansermet issued an order in December 2011,⁸ reopening the Case 003 investigation, which had been prematurely closed in April 2011 amid widespread public outcry. Determinations in this order were consistent with the findings of International Co-Prosecutor Andrew Cayley and International Pre-Trial Chamber Judges Rowan Downing (Australia) and (then) Katinka Lahuis (Netherlands) about serious deficiencies in the Case 003 investigation, including prejudice to suspects and victims alike. Judge Kasper-Ansermet's order to resume the Case 003 investigation resulted in the filing of a disagreement (by him) before the court's Pre-Trial Chamber (PTC). While Cambodian Judge Prak Kimsan, president of the PTC, refused—purportedly on behalf of the whole PTC—to “register” the disagreement, International Pre-Trial Chamber Judges Rowan Downing (Australia) and Chang-Ho Chung (Korea) subsequently issued an opinion condemning the president's actions and effectively ordering the resumption of the Case 003 investigation in line with Judge Kasper-Ansermet's intentions.⁹ Judge Kasper-Ansermet (as a party to the disagreement) also called for the (voluntary) recusal, or (court-ordered) disqualification of Judge Prak Kimsan. This issue is still pending.

Also, the United Nations appointed David Scheffer (United States) as Special Expert to the Secretary-General on the United Nations Assistance to the Khmer Rouge Tribunal, replacing Clint Williamson, who resigned in mid-2011. Scheffer's first visit to Cambodia in this role showed promise as he dealt firmly with Cambodia's “breach” of the ECCC *Agreement* regarding the Kasper-Ansermet appointment, and offered increased engagement on behalf of the UN in the troubles facing the court. As Cambodia angles for a non-permanent seat on the UN Security Council,¹⁰ Scheffer's resolve and continued engagement in addressing the ECCC's current problems are crucial.

This report looks at recent developments in Case 001, Case 002, Cases 003/004, and concerns over the court's budget and general administration.

⁸ Although this order was filed in December 2011, it was made public in early February, 2012.

⁹ “Public Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72,” dated February 10, 2012, but made public on February 13, 2012, and available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Opinion10022012_0.pdf.

¹⁰ See Kate Bartlett, “Envoy Weighs Outcomes if Cambodia Wins Security Council Seat,” February 13, 2012, *Cambodia Daily*, p. 17: “Cambodia has been lobbying friendly countries for support of its bid for a 2013 to 2014 UN seat for months, with the Ministry of Foreign Affairs in January claiming that so far, Cambodia had the backing of about 100 countries. The Ministry has refused to release the names of all 100 countries, but Cuba, Lebanon, China Spain, Iran and all nine Asean countries have publicly declared their support for Cambodia.”

III. CASE 001: KAING GUEK EAV, ALIAS DUCH

On February 3, 2012, the ECCC’s final court of appeal—the Supreme Court Chamber (SCC)—pronounced its judgment in the court’s first case, that of S-21 (Tuol Sleng) prison commander Kaing Guek Eav, alias Duch.¹¹ By five votes to two—the requisite super-majority to have legal effect¹²—the SCC increased Duch’s sentence from 30 years to life imprisonment.

The co-prosecutors, Duch himself, and three out of four groups of civil parties appealed certain aspects of the Trial Chamber’s judgment. While Duch sought acquittal on grounds that he did not properly fall under the court’s jurisdiction and therefore should never have been tried by the ECCC at all, the co-prosecutors argued for an increase in Duch’s sentence, saying it was manifestly inadequate. The co-prosecutors also challenged certain aspects of the Trial Chamber’s legal findings, including its characterization of Duch’s offenses. Civil parties whose applications were rejected by the Trial Chamber sought admission on appeal. They also sought additional reparations which had previously been rejected by the court.

Unanimously, the SCC rejected Duch’s appeal in relation to the court’s personal jurisdiction. It also unanimously rejected Duch’s appeal for a reduction in sentence. The SCC unanimously agreed on other legal issues such as the Trial Chamber’s mischaracterization of Duch’s offenses, and upholding the Trial Chamber’s findings on the scope of its reparations power. Nonetheless, one critical issue concerning the treatment of Duch’s eight-year illegal detention by Cambodian military authorities caused the court to split. These features of the SCC’s findings will be discussed further below.

This is the first and only case—thus far—in which a final verdict has been pronounced by the ECCC. It marks a significant milestone in fulfilling the ECCC’s mandate. As of late February, however, only a non-authoritative summary of the judgment was available (the written reasons are still undergoing translation). Therefore, this analysis is based on findings in that summary, and may be revised at the time the full decision becomes available. Nonetheless, at this preliminary stage, the overriding questions presented by this milestone are: (i) does the *Duch* appeal judgment render a just outcome; and (ii) how does this judgment appear in the broader context of the ECCC’s operations.

¹¹ *Duch* Summary of Appeal Judgment, available at: <http://www.eccc.gov.kh/sites/default/files/articles/03022012Summary-Eng.pdf>. Duch was the deputy, then chairman of S-21 (Tuol Sleng) prison in Phnom Penh for some three years. In that role, he oversaw the torture and execution of at least 12,272 individuals.

¹² According to Article 9 new of the ECCC Law (Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, October 27, 2004, (hereinafter, *ECCC Law*)), the Supreme Court Chamber (which serves as both appellate chamber and final instance) is composed of seven judges, of whom four are Cambodian judges, with one as president, and three are foreign judges. Pursuant to Article 4 of the *ECCC Agreement* and Article 14 new of the *ECCC Law*, a decision of the Supreme Court Chamber requires the affirmative vote of at least five judges (known as a “supermajority”). The combination of these provisions effectively means that at least one foreign judge must vote with the four national judges to render a decision.

Duch was found guilty at trial of persecution on political grounds as a crime against humanity,¹³ and war crimes.¹⁴ He was sentenced to 35 years imprisonment, with a reduction of five years as a remedy for his eight-year unlawful detention by Cambodian military authorities prior to his transfer into the custody of the ECCC.¹⁵ He was also given credit for time spent in pretrial detention.¹⁶ There was widespread public dissatisfaction in Cambodia—and in Cambodian diaspora communities—with Duch’s original sentence. The Cambodian public—including victims joined to the proceedings as civil parties—was largely unhappy with the 30 year term.

By super-majority, the SCC overturned the sentence imposed on Duch at trial, increasing it to life imprisonment.¹⁷ In addition, it reversed the Trial Chamber’s decision to grant a remedy for the violation of Duch’s eight-year illegal detention.¹⁸ It also made a number of significant legal findings, which are explored below.¹⁹

A. Personal Jurisdiction

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.²⁰

Although Duch admitted his guilt to the majority of the allegations against him at trial—and expressed remorse on numerous occasions—he then retreated almost entirely from this position in his closing submissions. Duch’s national counsel ultimately argued for Duch’s acquittal on the basis that Duch was not among those “most responsible” for Khmer Rouge atrocities and, as such, should never have been prosecuted by the ECCC at all.

The Trial Chamber considered this defense in its judgment, although it noted that an argument of this kind must be brought prior to the commencement of the trial.²¹ The SCC

¹³ Subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts. *See Duch Trial Judgment*, para. 568, available at: <http://www.eccc.gov.kh/en/documents/court/judgement-case-001>.

¹⁴ Willful killing, torture, and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian, pursuant to the Geneva Conventions of 1949. *See Duch Trial Judgment*, para. 568.

¹⁵ *See Duch Trial Judgment*, paras. 631-32.

¹⁶ *See Duch Trial Judgment*, para. 633 (this was approximately 11 years at the time the trial judgment was delivered, comprising the eight years of illegal detention by Cambodian authorities, plus three years in the custody of the ECCC. As of the date the appeal judgment was announced, Duch had spent a total of approximately 12.5 years in custody).

¹⁷ *See Summary of Appeal Judgment*, p. 15, “**QUASHES** the Trial Chamber’s decision to sentence KAIN Guek Eav to 35 years of imprisonment; **ENTERS** a sentence of life imprisonment.”

¹⁸ *See Summary of Appeal Judgment*, p. 15, “**QUASHES** the Trial Chamber’s decision to grant a remedy for the violation of KAIN Guek Eav’s rights occasioned by his illegal detention by the Cambodian Military Court between May 1999 and 30 July 2007...”

¹⁹ These include: findings on the nature of “personal jurisdiction” determinations by the Co-Prosecutors and Co-Investigating Judges; the re-characterization of Duch’s offenses; and upholding the Trial Chamber’s rejection of civil party claims for a wide array of reparations. *See Summary of Appeal Judgment*, pp. 15-16.

²⁰ Article 1 of the ECCC *Law*, and Article 1 of the ECCC *Agreement*.

appeared to disagree with the Trial Chamber's view that this argument should have been raised as a preliminary (jurisdictional) objection, saying that "a fair trial demands that the Accused has the right to raise an objection to a patent or latent lack of jurisdiction that could vitiate the trial at whatever time s/he decides safeguards his/her interests."²²

The SCC went on to say that the term "senior leaders... and those most responsible"...

[R]efers to two categories of Khmer Rouge officials which are not dichotomous. One category is senior leaders of the Khmer Rouge who are among the most responsible, because a senior leader is not a suspect on the sole basis of his/her leadership position. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible.²³

During the appeal hearing,²⁴ the SCC asked an important question with potentially far-reaching consequences for the entirety of the ECCC's caseload.²⁵ This concerned the issue of who might properly be subject to investigation and prosecution by the court. The SCC considered whether this question was a "jurisdictional requirement" (which might then be subject to the review of a higher authority), or simply a guide to be used by the co-prosecutors and co-investigating judges in the exercise of their discretion.

The SCC's ultimate response to this question was significant because of its potential to limit the scope for review of decisions by the co-investigating judges. For several years now, the question of who properly falls within the jurisdictional mandate of the ECCC has been a central concern for the court.²⁶ Further, during the course of 2011 both National Co-Prosecutor Chea Leang and National Co-Investigating Judge You Bunleng, as well as Judge You's former international counterpart, Siegfried Blunk, expressed doubts that suspects in Cases 003/004 fell within the court's personal jurisdiction. As the Justice Initiative outlined in its two 2011 reports, this reasoning appeared to be an absurd legal ruse aimed at justifying the shelving of Cases 003/004 to satisfy Cambodian government political will.²⁷ The extent of this ruse was made evident by the fact that

²¹ *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."

²² Summary of Appeal Judgment, para. 7.

²³ Summary of Appeal Judgment, para. 9.

²⁴ The appeal hearing was held from March 28-30, 2011.

²⁵ See Open Society Justice Initiative, June 2011 Update Report, pp. 23-29, especially at pp. 23-24, available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf.

²⁶ For a discussion of this issue, see, for example, OSJI June 2011 Update Report at pp. 23-29; see also, November 2011 Update Report, pp. 14-15, available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114/eccc-developments-20111114.pdf.

²⁷ Press Release, "Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004," August 8, 2011, at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004>.

Judges You and Blunk apparently reached this conclusion without having conducted any real investigations (at least insofar as the Case 003 suspects were concerned).

The Justice Initiative's June 2011 Update Report argued that the question of who might fall under the ECCC's personal jurisdiction should be found to be a "jurisdictional requirement" which is subject to legal review.²⁸ Examining jurisprudence from the Special Court for Sierra Leone (SCSL), we noted that—since the decision is made not only by a prosecutor, but also by (co-investigating) judges—it should be subject to appellate review.²⁹ However, we also stipulated that, even if the determination was found to be a discretionary matter, there must be an avenue of legal recourse for the review of alleged abuses of such discretion, or where it was demonstrated that there had been bad faith.

The SCC unanimously found that the term "most responsible" "requires a large amount of discretion... [it] should be interpreted as a non-justiciable, policy guide for the Co-Investigating Judges and the Co-Prosecutors in the exercise of their discretion as to the scope of investigations and prosecutions."³⁰ The appeal court went on to state that "[i]n the absence of bad faith, or a showing of unsound professional judgment, the Trial Chamber has no power to review the alleged abuse of the Co-Investigating Judges' or the Co-Prosecutors' discretion... Whether an accused is a senior leader or one of those most responsible are exclusively policy decisions for which the Co-Investigating Judges and Co-Prosecutors, and not the Chambers, are accountable."³¹

The SCC's determination of this matter is alarming, not least because it potentially narrows the scope for review of the decision(s) of the co-investigating judges in relation to a highly controversial issue: the selection of individuals for investigation and prosecution. There is, however, ample evidence (as detailed in OSJI's June and November 2011 reports, as well as in the opinions of international judges on the Pre-Trial Chamber) of judicial misconduct and incompetence on the part of Judges You and Blunk in the investigation of Cases 003/004 which could be used as a basis for alleging abuse of discretion.

A further consideration not addressed by the SCC's summary is the relationship between the co-prosecutors' determination of personal jurisdiction and that of the co-investigating judges. For example, if the co-prosecutors (or, indeed, one of them) make a determination

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

²⁸ OSJI June 2011 Update Report, p. 24.

²⁹ *Ibid.*

³⁰ Summary of Appeal Judgment, para. 10. (Emphasis added.)

³¹ *Ibid.*

that an individual falls within the ECCC’s personal jurisdiction, on what basis might the co-investigating judges interfere with that finding? Do they have authority to make a *de novo* determination on personal jurisdiction, or is their power limited to reviewing the exercise of the co-prosecutors’ discretion? Can the co-investigating judges only substitute their own findings on personal jurisdiction where it is established that one or more of the co-prosecutors abused their discretion, or acted in bad faith in determining that a certain individual fell under the court’s personal jurisdictional mandate? Furthermore, unlike in common law jurisdictions, the decision-making of the SCC is not directly binding upon the Pre-Trial Chamber (PTC) (which has a special jurisdiction to review decisions of the co-investigating judges). This could leave scope for the PTC to depart from the SCC’s reasoning (i.e. to find that the issue of personal jurisdiction is in fact justiciable, and not merely a matter of policy, and thereby rule upon it).

B. Crimes against Humanity (cumulative convictions)

As stated above, the Trial Chamber found Duch guilty of persecution on political grounds as a crime against humanity,³² and war crimes.³³ The SCC found that the Trial Chamber had erred in failing to enter cumulative convictions for a number of crimes against humanity committed by Duch. It therefore also convicted him for extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts as crimes against humanity.³⁴ This was in line with the co-prosecutors’ submissions on appeal.

C. Sentence

Having rejected Duch’s appeal in its entirety, the SCC focused on the prosecution’s appeal which sought an increase in sentence.³⁵ The SCC unanimously found that the Trial Chamber had attached undue weight to mitigating factors, and insufficient weight to the gravity of Duch’s crimes and aggravating circumstances.³⁶ The SCC held that Duch’s leadership role and “particular enthusiasm” in the commission of his crimes “should have been given significant weight in the determination of his sentence.”³⁷ It also noted the “retributive and deterrent purposes of punishment,” and found that Duch’s crimes were “undoubtedly among the worst in recorded human history.”³⁸

³² Subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts. *See Duch* Trial Judgment, para. 568, available at: <http://www.eccc.gov.kh/en/documents/court/judgement-case-001>.

³³ Willful killing, torture, and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian, pursuant to the Geneva Conventions of 1949. *See Duch* Trial Judgment, para. 568.

³⁴ Summary of Appeal Judgment, paras. 25-27.

³⁵ Summary of Appeal Judgment, paras. 28-51, at 35: “The Co-Prosecutors argue that the Trial Chamber erred in imposing a sentence that is too lenient.”

³⁶ Summary of Appeal Judgment, para. 35.

³⁷ Summary of Appeal Judgment, para. 40.

³⁸ Summary of Appeal Judgment, para. 41.

They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes invoked in victims, their families and relatives, the Cambodian people, and all human beings.³⁹

Unanimously, the SCC decided to impose a term of life imprisonment on Duch, and went on to hold that it did not have the authority to decide on Duch's eligibility for parole.⁴⁰ The court ordered that Duch's parole was to be overseen by the Cambodian authorities. This aroused the concerns of many about whether fair standards will actually be applied in the determination of Duch's eligibility for parole. According to both the national and international co-prosecutors, under the relevant Cambodian legal provisions, Duch will become eligible for parole after serving twenty years of his sentence (which is, effectively, in about eight years' time). There is an apparent need for some kind of ongoing monitoring mechanism to ensure that—when the time comes—Duch's eligibility for parole is reviewed according to international standards of due process and natural justice: namely, that only relevant matters are taken into account in that decision-making process.

Up to this point in the SCC's findings, the Justice Initiative considers the court's treatment of Duch's sentence to be sound and well-reasoned, as well as in line with the relevant jurisprudence of other *ad hoc* tribunals. This jurisprudence has largely determined that the gravity of the crimes is the single most important factor in the determination of sentence⁴¹ and that—even where mitigating factors are present—a term of life imprisonment may still be the only appropriate sentence.⁴²

From a human rights and fair trial perspective, however, there are significant concerns regarding the court's reasoning, particularly its treatment of the violation of Duch's rights occasioned by his eight-year illegal detention by the Cambodian Military Court. The Trial Chamber had granted Duch a five-year reduction in his sentence because of the gravity of this human rights violation.

The SCC split on this issue—largely along national/ international lines—with one international judge (Judge Moto Noguchi, Japan) voting with the Cambodian judges to

³⁹ Ibid.

⁴⁰ Summary of Appeal Judgment, paras. 44-45.

⁴¹ See, for example, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20, Judgement and Sentence (Trial Chamber), May 20, 2003, para. 555; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Judgement (Appeals Chamber), November 16, 2001, para. 382; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgement (Appeals Chamber), June 1, 2001, para. 413; *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23, Judgement (Appeals Chamber), October 19, 2000, para. 125; *Prosecutor v. Zoran Kupreskic et al.*, Case No. IT-95-16) Judgement (Appeals Chamber), October 23, 2001, para. 442.

⁴² *Prosecutor v. Musema* Judgement (AC), para. 396. See also *Prosecutor v. Niyitegeka*, Judgement (AC), para. 267: “nothing prevents a Trial Chamber from imposing a life sentence in light of the gravity of the crimes committed, even if the evidence in the case reveals the existence of mitigating circumstances.” Note that former Rwandan Prime Minister Jean Kambanda received a sentence of life imprisonment despite certain mitigating factors including his ongoing cooperation with the tribunal and his guilty plea (*Kambanda*, Judgement and Sentence (TC)). The Appeals Chamber found that the sentence fell within the discretionary framework provided by the statute and the rules, and therefore saw no reason to disturb the Trial Chamber's decision (*Kambanda*, Judgement (AC), para. 126).

constitute the requisite supermajority. The majority said that “the Trial Chamber misinterpreted the relevant international jurisprudence to mean that violations of [Duch’s] rights should be redressed by [the ECCC] even in the absence of violations attributable to the ECCC and in the absence of abuse of process.”⁴³ The majority said that the Trial Chamber should have rejected Duch’s request for a remedy.

Two of the SCC’s international judges disagreed. They said that the ECCC should “where it is fair and reasonable... take responsibility for excessive pre-trial detention.” The minority noted that the ECCC is established “within the existing court structure of Cambodia...[and is] highly integrated into the Cambodian judicial system.” These judges noted that Duch had been held by the Cambodian court “for eight years, during which time it performed no substantial investigation.” They noted that the “gravity of the deprivation of liberty was extreme by international standards,” and that the ECCC was “uniquely positioned to grant a remedy.” Ultimately their joint view was that Duch’s life sentence should be commuted to 30 years.⁴⁴

In a highly unusual turn of events, the co-prosecutors—both at trial, and again, on appeal—while seeking a higher sentence than the 30 years ordered by the Trial Chamber, agreed that Duch should be given a five-year reduction as a remedy for the violation of his rights. In the words of International Co-Prosecutor Andrew Cayley, “we got more than we asked for.”⁴⁵ The end result is that the outcome looks unreasonable and unbalanced. It appears to give too much weight to public perception at the expense of recognizing Duch’s fundamental rights. At the conclusion of Duch’s trial, the Justice Initiative praised the Trial Chamber’s compliance with international standards.⁴⁶ However, the outcome in Duch’s appeal casts a shadow on the achievements made in Duch’s trial. The SCC ultimately refused to provide a remedy for Duch’s eight-year illegal detention on the ground that the ECCC was not responsible for the violation, but it did not provide any guidance on how this violation might be addressed. Duch’s counsel—both Cambodian lawyers—were also notably absent from the public discussion about the merits of the SCC’s judgment.

This aspect of the decision is troubling and sends a message to the Cambodian justice system, and Cambodians citizens who are subject to inappropriate and excessive pretrial detention by the national court system, that due process and human rights standards can be ignored. The Cambodian Center for Human Rights (CCHR) and Amnesty International share these concerns.⁴⁷ Rights group LICADHO reported that, as of April

⁴³ Summary of Appeal Judgment, para. 47.

⁴⁴ Summary of Appeal Judgment, para. 49.

⁴⁵ Net Sok Kheng, “Shock for Khmer Rouge Leader Duch as his Sentence is Increased to Life,” February 3, 2012, *The Telegraph*, available at: <http://www.telegraph.co.uk/news/worldnews/asia/cambodia/9058823/Shock-for-Khmer-Rouge-leader-Duch-as-his-sentence-is-increased-to-life.html>.

⁴⁶ See, for example, “Press Release: Duch Verdict Marks Milestone for Khmer Rouge Tribunal (Closure of First Case Brings Millions of Cambodians Closer to Justice),” July 26, 2010, available at <http://www.soros.org/initiatives/justice/news/cambodia-duch-20100726>.

⁴⁷ See CCHR, “Media Comment: Good and Bad at the ECCC as Duch’s Prison Sentence is Extended to Life,” available at: http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=press_detail.php&pid=215&id=5. See

25, 2011, Cambodia's total prison population was 15,001 (or 179% of capacity).⁴⁸ Pretrial detainees accounted for 5,394 of this number (or 36% of the total prison population), most of whom are incarcerated for petty offenses.⁴⁹ LICADHO also reports that some pretrial detainees are incarcerated months or years beyond the statutory limit of six months. Despite a presumption against pretrial detention under both international and Cambodian domestic law, CCHR reports a pretrial detention rate in Cambodia of 80% of all cases, although it notes that the rate is decreasing.⁵⁰ Forty-six percent of these cases involve individuals charged with misdemeanors. Interestingly, CCHR's report—released just prior to the rendering of the *Duch* appeal verdict—relies on the ECCC Trial Chamber's approach to Duch's excessive pretrial detention as a basis for asserting that “the court should use excessive pre-trial detention as a mitigating circumstance to reduce the length of a sentence.”⁵¹ Unfortunately, Cambodian NGOs monitoring fair trial rights in Cambodia will no longer be able to rely on this legacy since it has been quashed by the SCC majority. Though the general trend in pretrial detention seems to be gradually improving, this underscores the very need for the ECCC to act as an exemplary model in its treatment of fundamental human rights violations. Indeed, one of the main purposes of the ECCC's international backing is to ensure that it sets a positive example for the justice system and rule of law in Cambodia.⁵²

The SCC's treatment of the ECCC's reparations scheme was also disappointing. While it admitted a number of additional civil parties whose expectations had been unfairly raised through their participation in the trial and subsequent denial of civil party status, the SCC shared the Trial Chamber's restrictive view on the scope of reparations available to them under the ECCC's regime. It said that it had “no jurisdiction to grant requests for reparation that entail, either explicitly or by necessary implication, an active involvement of the Cambodian authorities in order for the measures to be realised.”⁵³ This will have significant implications for Case 002, in which some 3,850 civil parties are joined to the proceedings in anticipation of reparations in the event of any findings of guilt. The SCC said that requests for measures such as a state apology, organization of health care, institutional or national commemoration days, and naming of public buildings after the

also, Amnesty International, “Cambodia: Khmer Rouge Judgment Welcome , but Raises Human Rights Concerns,” available at <http://www.amnesty.org/en/for-media/press-releases/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02->. See also, Bridget Di Certo, “Duch Verdict Worries,” February 6, 2012, *Phnom Penh Post*, pp. 1 and 4.

⁴⁸ “Beyond Capacity 2011: A Progress Report on Cambodia's Exploding Prison Population,” July 2011, LICADHO (Cambodian League for the Promotion and Defense of Human Rights) (hereinafter, “LICADHO Prison Report 2011”) available at: <http://www.licadho-cambodia.org/reports.php?perm=154>.

⁴⁹ LICADHO Prison Report 2011, p. 2.

⁵⁰ CCHR, “Third Bi-Annual Report: Fair-Trial Rights – One Year Progress,” January 2012, pp. 38, available at: http://cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=70&id=5.

⁵¹ *Ibid*, p. 44.

⁵² In apparent response to the—mainly NGO—criticism of the *Duch* Appeal Judgment, an online publication called the *Cambodia Herald* published a story (with no by-line) claiming that the judgment would foster rule of law development in Cambodia. The article quoted “economists” as saying that the judgment would boost investment in Cambodia. “Khmer Rouge Judgment Seen Bringing Cambodia Closer to Rule of Law,” February 5, 2012, available at:

<http://www.thecambodiaherald.com/cambodia/detail/1?page=14&token=Yzk0MjViMjNhOTVINmQ4ODIyY2Q3ZWE4OTJiY2Fm>.

⁵³ Summary of Appeal Judgment, para. 65.

victims “are predestined for rejection, due to the fact that their realisation would imply an order against the Cambodian State.”⁵⁴

Nonetheless, the response to the *Duch* appeal judgment was overwhelmingly positive by Cambodians and diplomats alike.⁵⁵ A donors’ group, the Friends of the ECCC, issued a statement welcoming the “long-awaited” closure of the first ECCC trial and noting its recognition of the suffering of the Cambodian people. They said that they were “proud” to be associated with “these efforts” and they “reaffirm[ed] the expectations that judges and lawyers as well as national and international staff will uphold the highest standards of law and due process.” They also said they looked forward to the court carrying out its mission in a “more expeditious manner.”⁵⁶

IV. CASE 002: NUON CHEA, IENG SARY, KHIEU SAMPHAN (AND IENG THIRITH)

A. Commencement of Trial

Initially, Case 002 was a joint trial against the four allegedly senior-most surviving leaders of the Khmer Rouge regime: Nuon Chea (also known as Brother Number 2), Khieu Samphan (the regime’s head of state), Ieng Sary (Khmer Rouge foreign minister), and his wife, Ieng Thirith (minister for social affairs).

The initial hearing took place June 27-30, 2011. Although an initial hearing officially marks the start of an ECCC trial,⁵⁷ no evidence is presented at this stage, nor is there an outline of the case to be presented at trial. Rather, the initial hearing consists of legal arguments (on “preliminary objections”⁵⁸), as well as discussion about potential witness lists for the first phase of the trial. The lead co-lawyers also provide indications about the kinds of reparations they might seek on behalf of the civil parties, following any finding of guilt of one or more of the accused. Despite the largely technical nature of the hearings, the Case 002 initial hearing attracted a huge amount of interest both locally and

⁵⁴ Summary of Appeal Judgment, para. 68.

⁵⁵ See, for example, Sopheng Cheang, “Khmer Rouge Chief Jailer Gets Life in Prison,” AP/AFP, February 4, 2012, available at <http://www.chinapost.com.tw/asia/australia/2012/02/04/330558/Khmer-Rouge.htm>. <http://www.diplomatie.gouv.fr/fr/pays-zones-geo/cambodge/la-france-et-le-cambodge/evenements-11566/article/cambodge-condamnation-en-appel-de>. France not only congratulated the court on its achievements in relation to *Duch*, but also took the opportunity to congratulate the ECCC’s judges and personnel on their work. Yet the French announcement did not mention Cases 003/004, nor the extensive allegations of judicial misconduct and political interference that have dogged the court. See also, Abby Seiff and Kuch Naren, “Duch Sentenced to Life in Prison by Khmer Rouge Tribunal,” February 4, 2012, *Cambodia Daily*, pp. 1, 2, 9. “The verdict was roundly greeted with praise from prosecutors, government officials and international donors...[and victims].”

⁵⁶ “Statement of the Co-Chairs of the Friends of the ECCC,” February 3, 2012.

⁵⁷ Internal Rule 80*bis*, “The trial begins with an initial hearing...”

⁵⁸ Internal Rule 89 specifies three categories of objections: (a) to jurisdiction; (b) concerning any issue which would require the termination of prosecution; and (c) the nullity of procedural acts made after the indictment is filed. Some of the issues aired during the course of the Case 002 initial hearing included the impact of Ieng Sary’s amnesty and pardon, and the legal principle of *non bis in idem*. Some examples of other issues raised in written legal filings included the applicability of national (Cambodian) crimes, the legality of the ECCC’s internal rules, and the fairness of the Case 002 investigations.

internationally, signifying the importance of Case 002 for Cambodia, for the ECCC, and for the international community. It cannot be overstated that bringing to trial the senior-most surviving leaders of the Khmer Rouge regime more than 30 years after the alleged commission of their crimes is of huge symbolic and legal significance. The initial hearing also constituted one of very few opportunities for local and international public to see the four accused persons, who were present in the courtroom.

B. Severance

During its ninth plenary session of judges, held February 21-23, 2011, the ECCC adopted Internal Rule 89*ter*, entitled “severance.” This rule empowered the Trial Chamber to take highly significant trial management measures in Case 002, “in the interest of justice.” Rule 89*ter* stipulates that

[...] the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate. (Emphasis added.)

During the second half of 2011, the Case 002 Trial Chamber invoked this rule on two separate occasions: first, in its decision to break Case 002 into smaller trials, and second, in its decision to sever one of the accused—Ieng Thirith—from Case 002, having found her mentally unfit to stand trial. The substance of each of these decisions, and their implications, will be examined below.

In the lead-up to the commencement of the Case 002, a number of crucial issues emerged which are exacerbated by the advanced age of the accused (who range from 80-86 years of age). What has since become clear is that some of these issues relate not only to the accused, but also to witnesses and civil parties to the proceedings, many of whom are of equally advanced age.

Between late June 2011 and the eventual commencement of the Case 002 opening statements and substantive hearing in November 2011, the Trial Chamber also sat to hear expert evidence concerning the physical and mental fitness of accused persons Nuon Chea and Ieng Thirith to stand trial.⁵⁹ The initial assessment of the accused persons’ fitness was made by an expert geriatrician (Dr. John Campbell, who also assessed Ieng Sary). The Trial Chamber found Nuon Chea fit to stand trial,⁶⁰ which was largely supported by the findings of Dr. Campbell that “none of [Nuon Chea’s] clinical

⁵⁹ These hearings were held between August 29-31, 2011.

⁶⁰ “Decision on Nuon Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise,” November 15, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E115_3_EN.pdf. See, Bridget Di Certo, “Nuon Chea Declared Fit for Trial in Case 002,” November 17, 2011, *Phnom Penh Post*, available at: <http://www.phnompenhpost.com/index.php/2011/11/1752811/National-news/nuon-chea-declared-fit-for-trial-in-case-002.html>.

conditions currently affect [his] fitness to stand trial.”⁶¹ It noted, however, that it would continue to monitor his health “in accordance with the provisions of the ECCC legal framework.”⁶²

Severance of Co-accused Ieng Thirith

In relation to Ieng Thirith’s “cognitive impairment,” the Trial Chamber supplemented the geriatrician’s findings through the appointment of four psychiatric experts (two Cambodian, one British, and one Singaporean).⁶³ A further hearing on these supplementary opinions took place October 19-20, 2011. The four experts agreed with Dr. Campbell that Ieng Thirith’s likely diagnosis was Alzheimer’s disease.⁶⁴ While they found that she did possess the capacity to enter a plea, to understand the charges against her, to understand the details of the evidence, and to testify, the crucial pitfall—according to the four experts—was her capacity to understand the course of the proceedings. They said her “ability to understand what was said in court, reason and weigh information, and comment intelligibly on it” would be compromised because of her cognitive impairment.⁶⁵ They also said she would be unable to instruct counsel.⁶⁶

Literally on the eve of the opening of the Case 002 trial, the Trial Chamber unanimously found Ieng Thirith unfit to stand trial.⁶⁷ It held:

Trial and continued detention of an Accused who lacks capacity to understand proceedings against her or to meaningfully participate in her own defence would not serve the interests of justice. Nor would this comply with the international standards that bind this Chamber... Ieng Thirith has been diagnosed as suffering from a progressive, degenerative illness. The Chamber accepts the unanimous opinion of all experts that Ieng Thirith’s condition will likely deteriorate over the course of what is likely to be a complex and lengthy trial.

The Trial Chamber therefore decided that Ieng Thirith’s remaining joined to the Case 002 proceedings would probably jeopardize the rights of the others to an expeditious trial.

⁶¹ “Decision on Nuon Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise,” November 15, 2011, para. 22.

⁶² “Decision on Nuon Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise,” November 15, 2011, para. 33.

⁶³ “Order Appointing Experts,” August 23, 2011.

⁶⁴ “Decision on Ieng Thirith’s Fitness to Stand Trial,” November 17, 2011, (hereinafter “Ieng Thirith Fitness Decision”) paras. 45-46. The Trial Chamber said “[o]n a 7-point scale, they estimated the Accused Ieng Thirith to be at stage 5 (‘early dementia: moderately severe cognitive decline’) and noted that the disease will lead to a gradual decline over time in her memory and function... As to possible effects of reduction of the Accused’s psychotropic medications, the Psychiatric Experts noted that there is no indication that this has improved Ieng Thirith’s memory... Further, Alzheimer’s disease is not a reversible or treatable form of dementia.”

⁶⁵ Ieng Thirith Fitness Decision, para. 50.

⁶⁶ Ieng Thirith Fitness Decision, para. 51.

⁶⁷ Ieng Thirith Fitness Decision, para. 60. “[T]he Trial Chamber... has also found Ieng Thirith to be incapable of exercising her right, enshrined in the ECCC legal framework, to an effective defence.”

Invoking Rule 89*ter*, it severed the charges against her and ordered a stay of proceedings against her.⁶⁸

Despite these highly encouraging signs of the Trial Chamber's reliance upon and adherence to international norms, there was a split along national/international lines as to the impact of the decision. While the international judges—relying upon the medical evidence that Ieng Thirith's condition was unlikely to improve—considered the appropriate outcome to be her immediate, unconditional release,⁶⁹ the Cambodian judges considered that Ieng Thirith should be assessed to determine whether there is a possibility that her condition could be improved in the future.⁷⁰ They said she should be hospitalized, treated, and reassessed in six months.⁷¹

The result of the national/international split in the decision was that the Trial Chamber failed to reach a supermajority, as required by Article 14(1)(a) of the ECCC Law. However, ECCC, international, and national law was silent on how to resolve the inability of the Trial Chamber to attain the required supermajority. Therefore, the judges had recourse to “general provisions of international criminal and human rights law.”⁷² Having recourse to these “general provisions,” they said “the interpretation most favourable to the Accused must be preferred.”⁷³ On this basis, the Trial Chamber unanimously ordered Ieng Thirith's unconditional release.⁷⁴

Despite the Trial Chamber's finding a legal basis upon which to settle its disagreement regarding Ieng Thirith, the co-prosecutors appealed to the Supreme Court Chamber on the basis of the national judges' opinion (i.e. requesting Ieng Thirith's hospitalization, treatment, and review in six months). The Supreme Court Chamber by supermajority (Judge Nihal Jayasinghe dissenting) granted the appeal, overturning the Trial Chamber's decision.⁷⁵ They directed the Trial Chamber to request additional treatment for Ieng Thirith “which may improve her mental health such that she could become fit to stand

⁶⁸ Ieng Thirith Fitness Decision, para. 61.

⁶⁹ Ieng Thirith Fitness Decision, paras. 69-76, noting, at 70, the medical evidence that “the gradual insidious decline” noted by [the psychiatric experts] was “more consistent with Alzheimer's disease than vascular dementia” and that “Alzheimer's disease is not a reversible or treatable form of dementia.”

⁷⁰ Ieng Thirith Fitness Decision, para. 64.

⁷¹ Ieng Thirith Fitness Decision, para. 67.

⁷² Ieng Thirith Fitness Decision, para. 79. (Footnote 166 refers to Article 12(1) of the ECCC *Agreement*, as well as Article 33 new of the ECCC *Law* which states that “if [...] existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] guidance may be sought in procedural rules established at the international level.”)

⁷³ Ieng Thirith Fitness Decision, para. 80: “As pursuant to the presumption of innocence, liberty is considered the norm, detention is an extraordinary measure which must only be imposed in accordance with procedures established by law... Continued detention or forced confinement in circumstances where it is unclear whether a trial will ever be convened violates the Accused's right to a fair trial and to liberty.”

⁷⁴ Ieng Thirith Fitness Decision, para. 81.

⁷⁵ Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, December 13, 2011, available at: <http://www.eccc.gov.kh/en/document/court/corrected-1-decision-immediate-appeal-against-trial-chamber039s-order-release-accused>. Judge Jayasinghe agreed with the finding of the Trial Chamber's international judges that Ieng Thirith is “unable and will likely remain unable to stand trial.” See “Separate Dissenting Opinion of Judge Nihal Jayasinghe,” available at <http://www.eccc.gov.kh/en/document/court/attachment-1-separate-dissenting-opinion-judge-nihal-jayasinghe>.

trial.” She is therefore currently detained and, under the direction of the Trial Chamber, medical experts are soon to provide further recommendations about treatment.⁷⁶

The logic behind the continued detention of Ieng Thirith for the purposes of improving a degenerative condition which—according to expert medical opinion—is permanent, is highly questionable. There is concern as to what steps will be taken should the medical experts continue to leave a possibility—however remote—of marginal and temporary improvement in her cognitive function.

Severance of Charges

By order dated September 22, 2011, the Trial Chamber divided Case 002 into a series of smaller trials which are to be tried and adjudicated separately.⁷⁷ In the order, the Trial Chamber outlined the subject matter for the “first trial,” which concerns:

- a) Factual allegations described in the Indictment as population movement phases 1 and 2; and
- b) Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to the movement of population phases 1 and 2).

The Trial Chamber noted that “[n]o co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and [war crimes] have also been deferred to later phases of the proceedings in Case 002.”

The principal motivations in commencing the trial with these allegations seems to have been to follow the chronological order of the indictment (known as a “Closing Order”), to establish the role and responsibility of the accused for subsequent allegations (or trials), and to involve as many civil parties as possible in the first phase of the trial. According to the Trial Chamber, the advantage of separation of proceedings into segments is that each trial will take an abbreviated time to complete. The chamber also said that a verdict, and appropriate sentence in the event of conviction, would be issued at the conclusion of each “trial.”

The reaction to the Severance Order was mixed. The co-prosecutors sought reconsideration of the order, preferring a more representative selection of allegations to

⁷⁶ See memorandum entitled, “Update Regarding Trial Chamber’s Direction to Medical Experts Requesting New Information Regarding Ieng Thirith,” January 31, 2012, available at

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7_2_EN.PDF.

⁷⁷ Severance Order Pursuant to Internal Rule 89ter, September 22, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF. See also “Press Release:

Severance of Proceedings Ordered in Case 002,” September 22, 2011, at

<http://www.eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf>.

those chosen by the Trial Chamber.⁷⁸ They, however, recognized the need to reduce the size of the case. The co-prosecutors' view was that the first trial would likely be the "first and only" trial and would not be representative of the alleged criminal conduct. The Trial Chamber rejected this request for reconsideration, and also rejected the request for further engagement on the issue.⁷⁹ It however reserved some scope for additional charges or crimes to be added to the first segment of the trial "where circumstances permit."⁸⁰

As the Severance Order affected the interests of many different groups, including some 3,850 civil parties joined to the proceedings, the lack of more inclusive consultation was generally viewed as disappointing. Civil parties and their lawyers were particularly concerned about the impact of the decision on the scope of reparations. Victims' groups and their representatives were concerned, for example, that crimes such as genocide might never be addressed. Nonetheless, the overriding concern dictating the division of Case 002 into smaller portions is the possibility—if not likelihood—that one or more of the remaining three accused might not survive several years of trial and judgment. This is a sound and necessary motivation. At the same time, the concerns about very important aspects of the criminal allegations not being prioritized provides a difficult conundrum which may leave undesired gaps in the historical record being established by the court. This is reinforced by concerns about the ECCC's ultimate docket being too limited, which is also likely to reduce the potential for the court to provide an accurate narrative of the method of commission of Khmer Rouge atrocities, from top-level policy-making to mid-level implementation.

C. Opening of Trial and Substantive Hearing in Case 002

The Case 002 trial opened on November 21, 2011, and over the course of a week Cambodians, and the world, heard opening statements from the prosecution and each of the three accused. Although by this stage Case 002 had been divided into smaller trials, the opening statements encompassed the totality of the allegations. As was already clear from the pretrial phase, each of the accused is strongly contesting all of the allegations against him. One of the most significant criticisms arising from the opening statements was the Trial Chamber's refusal to permit the lead co-lawyers representing some 3,850 civil parties to make an opening statement on behalf of their clients, on the basis that the Internal Rules did not envisage it.

Although the evidence was supposed to begin immediately following the week of opening statements, the Trial Chamber adjourned for one week in order to allow the parties to take into account the implications of Ieng Thirith's having been severed from the case. The evidence phase therefore commenced on December 5, 2011, and continued

⁷⁸ Co-Prosecutors' Request for Reconsideration of 'Severance Order Pursuant to Internal Rule 89^{ter}, October 3, 2011, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_2_EN.PDF.

⁷⁹ Decision on Co-Prosecutor's Request for Reconsideration of the Terms of the Trial Chamber's Severance Order," October 18, 2011, para. 12, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_7_EN.PDF.

⁸⁰ Decision on Co-Prosecutor's Request for Reconsideration of the Terms of the Trial Chamber's Severance Order," October 18, 2011, para. 12, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_7_EN.PDF.

for two weeks before the court recessed again. Evidence resumed on January 10, 2012, and continued through to February 16, 2012. In total, approximately seven weeks of evidence have been presented in Case 002, as well as one week of opening statements, and several days of legal argument concerning the admissibility of documents. Accused persons, witnesses, and civil parties have all testified during the course of this period. Overall, the evidence has proceeded slowly.⁸¹ In some instances the quality of the evidence has been lacking, for example, witnesses' memories fading, or avoiding answering, or even recanting. Some of this may relate to the passage of time, but as previously noted, concerns about the impact of advanced age on the proceedings are not limited to the accused.

Meanwhile, Nuon Chea has been by far the most vocal in offering his version of the period leading up to the Khmer Rouge era. He has discussed (or, at least, attempted to discuss) the roles and responsibilities of Heng Samrin and Chea Sim in the Khmer Rouge.⁸² Heng and Chea are currently politicians in the ruling Cambodian People's Party. While the Trial Chamber must provide some boundaries to the scope of questioning, and therefore, the trial, Trial Chamber President Nil Nonn's approach to this questioning has appeared reactive. Undoubtedly, this is exactly the kind of topic—potential allegations concerning involvement of members of the current government's leadership in Khmer Rouge era atrocities—that the Cambodian government does not want the court to explore. Consistent reports concerning the government's sensitivity about Cases 003/004 mirror these concerns.

V. CASES 003/004: MEAS MUTH AND SOU MET; TA AN, TA TITH, AND IM CHAEM

A. Background

Both the Justice Initiative's June 2011 and November 2011 Update Reports extensively documented the progress (or lack thereof) and status of the Case 003/004 investigations, which have long been vehemently and publicly opposed by the Cambodian government.⁸³ The November 2011 Update Report in particular outlined a litany of complaints against Judge You Bunleng (Cambodia) and (former) Judge Siegfried Blunk (Germany), highlighting judicial misconduct and incompetence, breach of judicial duty, and evidence of political interference by the Cambodian government in those cases. Between June and

⁸¹ See, for example, Michelle Fitzpatrick, "Fading Memories Give K. Rouge Trials a Slow Start," December 10, 2011, Agence France-Presse, available at <http://www.google.com/hostednews/afp/article/ALeqM5gszV7SalmU6RsoopLISo2TUXHNGg?docId=CNG.a6f58af4a651cd5bcfbfda28e4b03ed4.281>.

⁸² See, for example, Kristin Lynch, "KRT Spotlight Returns to Current Leadership," February 10, 2012, *Phnom Penh Post*, p. 2.

⁸³ Open Society Justice Initiative, June 2011 Update Report, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf; and Open Society Justice Initiative, November 2011 Update Report, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114/eccc-developments-20111114.pdf.

November, 2011, the Justice Initiative repeatedly called upon the United Nations to convene a panel of experts to conduct an inquiry into these allegations. No such action was ever taken.

Judge Blunk resigned on October 9, 2011, citing “perceived... attempted interference by [Cambodian] government officials with Cases 003 and 004,” as the reason for his resignation.⁸⁴ Shortly after his resignation, the ECCC’s Pre-Trial Chamber (PTC, which is the review body for the conduct of the judicial investigations) issued a number of non-decisions (because they failed to reach the requisite supermajority) on the Case 003 investigation. Although these non-decisions failed to ensure the progress of the investigation, the international judges issued a series of damning opinions about the conduct of Judges You and Blunk, including the back-dating and alteration of documents on the 003 case file. The international judges of the PTC also highlighted serious concerns about the legitimacy and transparency of the Case 003 investigations, including the co-investigating judges’ failure to provide victims with sufficient information to enable them to meaningfully participate in the judicial investigation.

At the time of Judge Blunk’s resignation, Judge Laurent Kasper-Ansermet (Switzerland) was the reserve international co-investigating judge. The UN’s immediate response to Judge Blunk’s resignation was to seek Judge Laurent Kasper-Ansermet’s appointment.⁸⁵ However, it very quickly became apparent that the Royal Government of Cambodia was stalling on the appointment. Judge Kasper-Ansermet was originally supposed to arrive in Phnom Penh to take office around November 14, 2011, but his arrival was delayed without any explanation.

Judge Kasper-Ansermet maintains a Twitter account (@LKasperAnsermet). Between May 17, 2011 (the date of his first tweet) and late January, 2012, he posted approximately 255 tweets, all of which are accessible to the public. Following Judge Blunk’s resignation, the media began to scrutinize the incoming judicial appointee, including examining his Twitter communications.⁸⁶ Media accounts referred to both the substance (and meaning) of individual tweets, as well as what the totality of his tweets said about the judge’s position on the crisis of credibility facing the court.⁸⁷ The main features of Judge Kasper-Ansermet’s tweets about the ECCC are as follows:

⁸⁴ See Press Release by the International Co-Investigating Judge, October 10, 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

⁸⁵ The UN issued a statement thanking Judge Blunk for his service and stating that it was “working urgently” to ensure that the reserve judge, Laurent Kasper-Ansermet, was available. The statement again made only general references to the need for the ECCC to proceed with its work independent of interference from any source. See Statement by UN Secretary-General Spokesperson, October 10, 2011, available at:

<http://www.cambodiatribunal.org/blog/2011/10/statement-un-secretary-general-spokesperson>. Julia Wallace, “Gov’t Accuses Blunk of Bowing to Pressures,” October 14, 2011, *Cambodia Daily*, p. 24. Alice Foster and Phorn Bopha, “Judge Resigns KR Court Over Gov’t Pressure,” October 11, 2011, *Cambodia Daily*, pp. 1, 3.
⁸⁶ See Michelle Fitzpatrick, “Use of Twitter Stokes Row at Khmer Rouge Court,” Agence France Presse, available at: <http://technology.inquirer.net/8149/use-of-twitter-stokes-row-at-khmer-rouge-court/>.

⁸⁷ See Julia Wallace and Alice Foster, “Fallout from Blunk’s Resignation Continues: Nuon Chea Calls for Investigations; Rights Groups Want UN to Act,” October 12, 2011, *Cambodia Daily*, pp. 1-2: “using the social networking medium Twitter, [Judge Kasper-Ansermet] has frequently shared critical articles about the situation at the court over the past few months, including a Human Rights Watch report issued last week that called for

- Approximately 85 of the 255 tweets related (in varying degrees) to the work of the ECCC.
- More than 90 percent of those tweets consisted of links to documents, with the substance of the tweet being a quote—or headline—from the attached article.
- While the majority of the articles, reports, and opinions posted to Judge Kasper-Ansermet’s account were critical of events unfolding in Cases 003/004 from May 2011 onwards, Judge Kasper-Ansermet also posted links to the views of Judge You and Blunk, as well as the national co-prosecutor.

At the beginning of December 2011, Judge Kasper-Ansermet arrived in Phnom Penh to take office.⁸⁸ In an irregular development, Judge Kasper-Ansermet announced his own arrival: both the ECCC and the UN remained silent. In a public statement, the judge noted the Royal Decree he had been granted on November 30, 2010 by the Supreme Council of the Magistracy (SCM, the Cambodian body responsible for overseeing judicial appointments) “for the duration of the proceedings,” and that he had been sworn in as the reserve judge on February 21, 2011.⁸⁹ He advised that he had been executing his

Judges Blunk and Bunleng to resign. Co-investigating judges ‘have egregiously violated their legal and judicial duties,’ he said in a Twitter message on Oct 4, quoting from the report and providing a link to it. In June, quoting from a French media report, he wrote: ‘The Khmer Rouge tribunal is passing through a crisis without precedent in the history of international justice.’” Bridget Di Certo, “Tweeting Judge’s Cyber Diary,” October 19, 2011, *Phnom Penh Post*, p.2: “Many have asked: ‘WHY isn’t the Khmer Rouge tribunal going after more bad guys?’

It’s a question on the mind of new tribunal Co-Investigating Judge Laurent Kasper-Ansermet – or at least was on August 21 when he retweeted an article asking exactly that... The Swiss judge... frequently retweets civil society statements about the tribunal, including links to Open Society Justice Initiative and Human Rights Watch reports, including a recent HRW report calling for the resignation of co-investigating judges Blunk and Bunleng... Kasper-Ansermet has also tweeted links to court documents from Khieu Samphan’s defence team calling for investigating judges to be removed, and on June 29, retweeted a comment from New Zealand MP on cases 003 and 004, who said it was ‘reasonable to pursue cases 003/004 against Sou Met, Meas Muth, Ta An, Ta Tith and Im Chaem’.” Julia Wallace, “Judge Blunk Officially Gone from KR Tribunal,” November 2, 2011, *Cambodia Daily*, p. 23: “[Kasper-Ansermet] is a prolific user of the social media site Twitter and continues to broadcast his thoughts on a wide range of issues. Until recently he frequently shared critical statements about the Khmer Rouge tribunal and the conduct of his predecessor, Judge Blunk.” See also Julia Wallace, “A Tweeting Judge in a Twisted Case,” December 19, 2011, *Radio Netherlands Worldwide*, available at, <http://www.rnw.nl/international-justice/article/a-tweeting-judge-a-twisted-case>.

⁸⁸ See Statement by the International Reserve Co-Investigating Judge, December 6, 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-international-reserve-co-investigating-judge>; See also Julia Wallace, “Arrival of New Judge Marked by Infighting,” December 7, 2011, *Cambodia Daily*, pp. 1 and 26.

⁸⁹ Judge Kasper-Ansermet referred to Articles 12, 23, 26 and 27 of the ECCC Law as the basis for his authority. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of

Crimes committed during the Period of Democratic Kampuchea, October 27, 2004, available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

Article 12 of the ECCC Law provides that [a]ll judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.” Article 23 new of the ECCC Law provides that “[a]ll investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges...” The provision goes on to lay down the obligations of co-investigating judges, and the procedure for dealing with disagreements between them. Article 26 provides

mandate remotely since November 14, 2011.⁹⁰ He advised that he was ready to work jointly with his national counterpart, Judge You, and that he would endeavor to keep the public informed “about major developments in Case Files 003 and 004.”

Ordinarily, the contents of Judge Kasper-Ansermet’s statement should have been relatively benign (he was simply advising the public that he had arrived and was doing his job), but in the context of the ECCC and its political dynamics, it elicited a strong response from Judge You.⁹¹ In his statement, Judge You said that a replacement for Judge Blunk had yet to be appointed, and that Judge Kasper-Ansermet was obliged to await such official appointment. He further stated that any action taken in the meantime was “not legally valid.”

These opposing views on the legal status of Judge Kasper-Ansermet set the tone for the events that have since unfolded. The positions of each of the national and international co-investigating judges mirror the positions taken by the RGC and the UN, respectively.

The issue of Judge Kasper-Ansermet’s status abated between mid-December, 2011 and early January, 2012, when a second set of sparring statements emerged. On January 9, 2012, Judge Kasper-Ansermet issued a statement advising that although he wished to inform the public about “important decisions” he had taken in Cases 003 and 004, Judge You’s joint authorization was required for him to do so, which Judge You had declined to give.⁹² Judge You responded, reiterating his position that “the Reserve International Co-Investigating Judge does not have legal accreditation to undertake any procedural action or measure with respect to [003/004], including issuing public information.”⁹³ He expressed “deep disappointment” with Judge Kasper-Ansermet’s “working manners” and asserted that he was acting as “an outreach officer rather than a judicial one.”

that “[t]he Cambodian Co-Investigating Judge and the reserve Investigating Judge shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. These Investigating Judges may continue to perform their regular duties in their respective courts. The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations. The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.” Article 27 new provides that “[a]ll Investigating Judges under this law shall enjoy equal status and conditions of service. Each Investigating Judge shall be appointed for the period of the investigation. 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.”

⁹⁰ The judge referred to Internal Rule 14(6) of the ECCC’s Internal Rules which provides that “[i]n the absence of a Co-Investigating Judge, actions that must be performed personally under these [Internal Rules] may be accomplished by remote means.”

⁹¹ See Statement of the National Co-Investigating Judge (unofficial translation), December 6, 2011, available at <http://www.eccc.gov.kh/en/articles/statement-national-co-investigating-judge-unofficial-translation>.

⁹² See Statement by the International Reserve Co-Investigating Judge, January 9, 2012, available at <http://www.eccc.gov.kh/sites/default/files/media/9%20Jan%20IntResOCIJ%20En.pdf>.

⁹³ See Press Statement of the National Co-Investigating Judge (unofficial translation), January 9, 2012, available at <http://www.eccc.gov.kh/sites/default/files/media/5-PRESS%20Statement%20from%20National%20Co-Investigating%20Judge%20English.pdf>.

Following this second set of opposing statements, the Justice Initiative called for the immediate appointment of Judge Kasper-Ansermet, as per the clear, non-discretionary obligation under the *Agreement*.⁹⁴ The Justice Initiative noted that three months had passed since Judge Blunk's resignation. The UN publicly responded, stating that it was "worried" by the delay, and noting Cambodia's "obligation" to appoint Judge Kasper-Ansermet.⁹⁵

On January 12, 2012, the RGC's Council of Ministers reacted, also issuing a public statement. It denied that there had been any deliberate delay or obstruction to Judge Kasper-Ansermet's appointment. It said that there had been various communications between the UN and the RGC between October and December, 2011 concerning the matter. The RGC stated that "the matter is now in the hands of the Supreme Council of the Magistracy, which is now independently carrying [out] its normal procedures and legal considerations before a decision would be made."⁹⁶ An unofficial version of the statement which was supposedly accidentally circulated listed a series of communications between the UN and the RGC. In this list of communications, a letter from Prime Minister Hun Sen to UN Secretary-General Ban Ki-moon was noted, the contents of which "suggest[ed] prudent consideration in the light of 'certain activities [of Judge] Kasper-Ansermet that have been brought to public attention'"—an apparent reference to the tweeting of Judge Kasper-Ansermet. A report of the SCM on its meeting concerning the appointment of the judge—dated January 13, but made public on January 30—confirms this fact.⁹⁷

Judge You (in his capacity as president of the Court of Appeal), National Co-Prosecutor Chea Leang (in her capacity as general-prosecutor of the Supreme Court), and two of her deputy prosecutors, as well as the minister for justice, are all sitting members of the SCM. Despite the fact that Judge You and Chea Leang have publicly expressed opposition to proceeding with Cases 003/004, neither of them recused themselves from the SCM when it sat to "consider" Judge Kasper-Ansermet's appointment.

Between Friday, January 13, and Sunday, January 15, information began to leak about a secretly-convened meeting of the SCM during which Judge Kasper-Ansermet's appointment had been considered and rejected.⁹⁸ This meeting was convened some three months after Judge Blunk announced his resignation, and just a few days after the Justice Initiative, Amnesty International, and the UN called for the immediate endorsement of

⁹⁴ See Open Society Justice Initiative press release, "Cambodian Government Must Confirm New Judge Now," January 10, 2012, available at <http://www.soros.org/initiatives/justice/news/cambodia-lka-20120109>.

⁹⁵ Mary Kozlovski and Vong Sokheng, "Delay in appointing judge worries UN," January 12, 2012, *Phnom Penh Post*, available at <http://www.phnompenhpost.com/index.php/2012011253911/National-news/delay-in-appointing-judge-worries-un.html>.

⁹⁶ See, Press Statement, January 12, 2012, available at <http://pvmemorial.blogspot.com/2012/01/council-of-ministers-wishes-to-provide.html>.

⁹⁷ Summary Report of the Meeting of the Supreme Council of the Magistracy on the Proposed Appointment of Mr. Laurent Kasper-Ansermet as International Co-Investigating Judge in the ECCC," January 13, 2012, available at <http://www.thinking21.org/?p=708>.

⁹⁸ See, for example, Douglas Gillison, "Cambodia Rejects UN Judge," January 15, 2012, available at http://www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge.

Judge Kasper-Ansermet's appointment by the RGC. Following the leak of this information, the SCM's Press and Quick Reaction Unit convened a snap press briefing wherein the spokesperson, Keo Remy, stated that the SCM was under no obligation to appoint Judge Kasper-Ansermet.⁹⁹ Keo Remy criticized the Justice Initiative and the Cambodian non-governmental organization Cambodian Center for Human Rights (CCHR), and two local newspapers—the *Cambodia Daily* and the *Phnom Penh Post*—for “incorrectly reporting that the SCM must appoint Kasper-Ansermet.” This position ignored the express, unequivocal wording of the *Agreement*.¹⁰⁰

Although the Cambodian government, its spokespeople, and various departments continued to cloud the issue of whether a decision had in fact been taken by the SCM, the first official public notification that Judge Kasper-Ansermet's appointment had been “rejected” by the SCM was a UN press statement issued on Friday, January 20, 2012.¹⁰¹ The UN—in by far its strongest statement to date on controversy in the court—said that the Cambodian government was in “breach” of the *Agreement*, voiced its continued support for Judge Kasper-Ansermet, and asked the RGC to take immediate steps to ensure his appointment. The statement also noted that the newly-appointed Special Expert on the United Nations Assistance to the Khmer Rouge Trials, Mr. David Scheffer, would travel to Phnom Penh to meet with members of the RGC and ECCC officials.

In response to this “breach” of the *Agreement*, Cambodian human rights activist and Khmer Rouge survivor Theary Seng called upon the UN to invoke Article 28 of the *Agreement* and withdraw cooperation.¹⁰² President of CCHR, Ou Virak, however, urged the UN not to withdraw from the *Agreement* but rather to consider the continued *bona fides* of the RGC as a party thereto.¹⁰³ At the end of his visit, David Scheffer held a press conference, wherein he stated that Judge Kasper-Ansermet has clear authority to fulfill his role as a co-investigating judge, regardless of the refusal by Cambodia's Supreme Council of Magistracy to appoint him. He said that the SCM's stamp of approval was preferable (in that it represents cooperation), but not necessary. He maintained that the discretion to appoint Judge Kasper-Ansermet rested solely with the UN Secretary-General. He insisted that the expectation was that the Secretary-General's selection

⁹⁹ Bridget Di Certo, “Judge OK Not a Must,” January 17, 2012, *Phnom Penh Post*, pp. 1-2. See also, Kuch Narren and Julia Wallace, “Gov't Claims No Obligation to Appoint Judge,” January 17, 2012, *Cambodia Daily*, pp. 1 and 24.

¹⁰⁰ That “[i]n case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post **must be** the reserve international co-investigating judge.” (Emphasis added.) See Article 5.6 of the *Agreement*.

¹⁰¹ Statement Attributable to the Spokesperson for the Secretary-General on Cambodia, January 20, 2012, available at <http://www.un.org/sg/statements/?nid=5815>.

¹⁰² Article 28 of the *Agreement* provides, “Withdrawal of Cooperation: Should the [RGC] change the structure of the organization of the [ECCC] or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.” See Theary Seng, “Letter to the Editor: Time is Ripe for UN to Disengage from the Khmer Rouge Tribunal,” January 27, 2012, *Phnom Penh Post*, available at: <http://www.phnompenhpost.com/index.php/2012012754179/National-news/time-is-ripe-for-un-to-disengage-from-the-khmer-rouge-tribunal.html>.

¹⁰³ Ou Virak, “An Open Letter to UN Special Expert on the ECCC, David Scheffer,” January 25, 2012, *Phnom Penh Post*, p. 16.

would be respected, and that Judge Kasper-Ansermet would be able to fulfill his duties.¹⁰⁴ The Justice Initiative welcomes these statements and strongly supports the UN's position in this matter.

The Justice Initiative considers that Judge Kasper-Ansermet's use of Twitter may have been imprudent, particularly in light of the sensitivity of Cases 003/004 and the continued opposition to those cases by the Cambodian government. In all senses, it would have been preferable if the judge had not tweeted (or retweeted) links to articles, opinions, and commentary on the unfolding crisis in the ECCC. This is particularly so because of the possibility that he would ultimately assume office at the ECCC.

Without question, Judge Kasper-Ansermet's use of the social medium presented an opportunity for the RGC to continue to stall the judicial investigations in Cases 003/004, and indeed it has been used to that end. But that in no way alters the legality of his appointment or the validity of his acts as co-investigating judge. As noted by UN Special Adviser David Scheffer, the power to appoint the international co-investigating judge rests with the United Nations. A reading of the relevant provisions of the ECCC *Law and Agreement* demonstrates an incontrovertible truth: Neither the Cambodian government nor its judicial appointing authority, the SCM, had any legal power to reject Judge Kasper-Ansermet's appointment. The RGC was and remains in violation of the *Agreement* in refusing to appoint him as co-investigating judge.

More worrisome, however, are the very real questions about the independence of the SCM, as well as certain national judges in the ECCC. In fact, the Cambodian government's calling into question the judicial integrity and independence of Judge Kasper-Ansermet on the basis of his use of social media, and indeed without entitling him to a fair hearing as mandated by the UN Basic Principles on the Independence of the Judiciary, is worth noting.¹⁰⁵ Principle 17 provides that:

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. (Emphasis added.)

Concerns over the independence of the body which apparently "rejected" Judge Kasper-Ansermet are consistently well-documented. In a 2010 report on the Cambodian judiciary, the UN's Special Rapporteur on human rights in Cambodia, Surya Subedi, said

¹⁰⁴ David Boyle, "UN Holds Firm on Judge," January 26, 2012, *Phnom Penh Post*, pp. 1 and 2. *See also*, Zsombor Peter, "UN Says KRT Judge Will Keep Working," January 26, 2012, *Cambodia Daily*, pp. 1 and 2.

¹⁰⁵ United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, at <http://www2.ohchr.org/english/law/indjudiciary.htm>. *See also* Bangalore Principles of Judicial Conduct, 2002, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11058&LangID=E>.

that the SCM was in need of reform and was not yet truly independent.¹⁰⁶ As outlined above, Judge You—who apparently opposes the genuine pursuit of investigations in Cases 003/004 on the tenuous ground of lack of personal jurisdiction over the suspects—and National Co-Prosecutor Chea Leang, whose view is apparently the same, joined in rejecting Judge Kasper-Ansermet’s appointment.

Concerns over judicial independence inside the ECCC are even more pronounced. The Justice Initiative has made consistent allegations about judicial misconduct, incompetence, and political decision-making against Judge You (and Judge Blunk), which remain unaddressed. The substance of these allegations has been repeated by international judges on the Pre-Trial Chamber. Their seriousness cannot be overemphasized. National judges on the Pre-Trial Chamber consistently vote in line with the Cambodian government’s publicly-expressed will in relation to the fate of the Case 003/004 investigations. Most recently, PTC President Prak Kimsan attempted to thwart the supermajority safeguards in the ECCC’s founding documents by refusing—apparently on behalf of the entire Pre-Trial Chamber—to register a disagreement.¹⁰⁷ The national co-prosecutor’s approach also aligns with these positions.

B. Implications of Judge Kasper-Ansermet’s Non-appointment for Investigations in Cases 003/004

What are the consequences of this impasse between the UN and the RGC over Judge Kasper-Ansermet’s status? Can the investigation still proceed?

The Justice Initiative considers that the conflicting views between the UN and the RGC over the question of Judge Kasper-Ansermet’s status have no bearing on his legal authority to proceed with the Case 003/004 investigations on his own. However, there may be extensive practical implications in the withholding of the RGC’s cooperation.

This is evidenced by recently unfolding events. In dueling public statements issued by Judges Kasper-Ansermet and You between February 9 and 10, 2012,¹⁰⁸ it became public knowledge that Judge Kasper-Ansermet had issued an order to reopen the Case 003 investigation immediately after taking office.¹⁰⁹

¹⁰⁶ Surya P. Subedi, “Report of the Special Rapporteur on the situation of human rights in Cambodia,” paras. 23-29, available at http://cambodia.ohchr.org/WebDOCs/DocReports/3-SG-RA-Reports/A_HRC_CMB16092010E.pdf.

¹⁰⁷ See “Public Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges pursuant to Internal Rule 72,” February 10, 2012, available at <http://www.eccc.gov.kh/node/16710>.

¹⁰⁸ Press Release by the International Reserve Co-Investigating Judge, February 9, 2012, available at http://www.eccc.gov.kh/sites/default/files/media/ECCC%20INT-OCIJ%20PR%209%20Feb%202012%20Eng_0.pdf.

¹⁰⁹ Case File No.: 003/07-09-2009-ECCC-OCIJ, Order on Resuming the Judicial Investigation, dated December 2, 2011, (made public on February 9, 2012), available at: <http://www.eccc.gov.kh/en/document/court/order-resuming-judicial-investigation>.

On February 9, 2012, Judge Kasper-Ansermet issued a damning statement, which outlined his thwarted attempts to file a disagreement with the ECCC's Pre-Trial Chamber, pursuant to Rule 72 of the Internal Rules. In order to circumvent the requirement for Judge Kasper-Ansermet to issue public information on the progress of the judicial investigations *jointly* with Judge You,¹¹⁰ Judge Kasper-Ansermet invoked the authority of Rule 21(c) of the Rules, which states:

Rule 21, Fundamental Principles

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings...

[...]

c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings.

Judge Kasper-Ansermet noted that, since arriving at the ECCC in early December, 2011, he had taken steps to ensure the functioning of his office, including through twice-submitted requests to the UN for additional staff to ensure effective investigations in Cases 003/004.

The first question is to what extent can Judge Kasper-Ansermet (proceeding on the basis that he actually is already properly in office) act alone in pursuing the investigations into Cases 003/004? The correct legal position under the Rules is that one co-investigating judge can exercise investigative powers alone, unless otherwise specified.¹¹¹

On the basis of Rule 1, Judge Kasper-Ansermet has full authority to do the following on his own:

- investigate the facts (R. 55.2);
- charge any suspect named in the introductory submission(s), or “any other person” [provided the facts outlined in the introductory submission inculpate that/those individual/s] (R. 55.4);
- take any investigative action conducive to ascertaining the truth (R. 55.5), including summoning and questioning suspects and charged persons, interviewing victims and witnesses and recording statements, seizing exhibits, seeking expert opinions, conducting on-site investigations, ordering protective measures for

¹¹⁰ Rule 56 of the Internal Rules, entitled “Public Information by the Co-Investigating Judges,” states that (2) [...] the Co-Investigating Judge, may

a) jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information.”

¹¹¹ See Internal Rule 1.2, “...*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...” Note that the same provision applies to the co-prosecutors acting jointly or alone.

- potential witnesses, seeking international and NGO cooperation, issue any other orders necessary for the conduct of an investigation, including summonses, arrest warrants, detention orders, and arrest and detention orders (R. 55.5(a)-(d));
- make on-site visits to conduct any investigation he considers useful (R.55.8);
 - issue Rogatory Letters requesting the judicial police or ECCC investigators to undertake such action as necessary for the conduct of his investigations (R.55.9).

The second question is—legally speaking—what are the implications of Judge Kasper-Ansermet taking action alone?

Internal Rule 72 provides a means for settling disagreements between the co-investigating judges. The procedure is that the “disagreeing judge” must bring the disagreement before the Pre-Trial Chamber within 30 days (R. 72.2) unless it concerns the provisional detention of a charged person, in which case the disagreement must be filed within five days; the Office of Administration then convenes the Pre-Trial Chamber. During this period, the co-investigating judges are meant to continue to seek consensus, however, during this time the action or decision which is the subject of the disagreement shall be executed (IR 72.3), unless it is:

- (a) any decision that would be open to appeal by the Charged person or a Civil Party under the Internal Rules;
- (b) notification of charges; or
- (c) an Arrest and detention order.

In the aforementioned three cases, no action shall be taken with respect to the subject of the disagreement until a consensus is achieved, the 30-day time period has ended, or the Pre-Trial Chamber has been seized and the dispute settlement procedure completed.

A Pre-Trial Chamber decision on a Rule 72 disagreement requires the *affirmative vote of at least 4 judges*.¹¹² If the required majority is not achieved before the chamber, the default decision is that the order or investigative act done by the co-investigating judge (acting alone) stands, or that the order or act proposed to be done shall be executed. The only exception is in relation to provisional detention.

Therefore, from a legal point of view, Judge Kasper-Ansermet can exercise, or seek to exercise, any of the investigative powers outlined in the Rules on his own. Pursuant to the applicable disagreement provisions, if Judge You files a disagreement, almost all of those acts will proceed, even while a Pre-Trial Chamber decision on the disagreement is still pending. This means that, for example, Judge Kasper-Ansermet can issue rogatory letters, question witnesses, and conduct field investigations on his own, even while a disagreement is pending. The limitations to the exercise of his powers while a disagreement is pending are: (a) to notify a suspect of the charges against him; (b) to

¹¹² Rule 72.4(d). (Emphasis added.)

arrest and detain a suspect; and (c) move forward on a decision which is subject to appeal to the Pre-Trial Chamber by a charged person or a civil party.¹¹³

The only legal limitation to his power would be if the Pre-Trial Chamber attained the requisite supermajority to block the action. This of course does not account for practical obstacles to the exercise of Judge Kasper-Ansermet's authority, which will ultimately require at least some level of cooperation by the national authorities.

VI. BUDGET

A. Current Budget Situation

The ECCC is funded through voluntary contributions from member states of the United Nations.

According to “preliminary figures” issued by the court’s Public Affairs Section at the time of the *Duch* appeal verdict pronouncement, total ECCC expenditures between 2006 and 2011 were approximately \$140.1 million USD.¹¹⁴ The document notes Japan as the greatest contributor (at 47%), followed by Australia (10%), Germany (6%), and the United States and France (5% each).¹¹⁵ Some donor states fund both international and national sides, while others earmark funding for either the national or international side. Additionally, some states prefer to mark funding for particular sections of the court’s operations. For example, while Japan, Australia, France, and the United Kingdom have funded both sides of the court, the US, Norway, and Canada have funded the international side of the court only. As discussed further below, Germany’s recent practice has been to fund the Victims Support Section only.

There is no official public information currently available on the court’s proposed budget beyond the end of 2011. While the budget process for 2012-13 might otherwise have been concluded, the resignation of former Co-Investigating Judge, Siegfried Blunk and subsequent appointment of Judge Laurent Kasper-Ansermet required significant revision to the proposed budget.¹¹⁶ This is because—while Judge Blunk was in office—it was not envisaged that significant funding would be required for judicial investigations in Cases 003/004.

¹¹³ These include: (pursuant to R. 74.3 and 74.4)

Charged Persons/ Accused

- (a) confirming the jurisdiction of the ECCC;
- (b) refusing requests for investigative action allowed under these IRs;
- (c) refusing requests for the restitution of seized items;
- (d) refusing requests for expert reports;
- (e) refusing requests for additional expert investigation;

¹¹⁴ Document entitled “ECCC Financial Outlook, January 2012,” not available on the ECCC’s web page.

¹¹⁵ Document entitled “ECCC Financial Outlook, January 2012,” not available on the ECCC’s web page.

¹¹⁶ Interviews with sources in Phnom Penh (both within the ECCC, and outside the ECCC).

As the Justice Initiative has consistently noted in its Update Reports, despite continued generous support from some donors, budgetary issues continue to plague the ECCC's ongoing operations. The court's funding crisis appears only to have worsened as concerns about its credibility have escalated. Most recent public reports concerning the court's funding have focused on the fact that up to 300 Cambodian staff members (including judges, and legal and administrative staff) have not been paid since October, 2011.¹¹⁷ As this issue was unfolding, the court blamed the donors, whereas the donors blamed the court.¹¹⁸ It is anticipated that this problem may not be rectified for some months, at the very least. Yet, this problem has raised an interesting quandary: under the *Agreement* establishing the ECCC, the RGC is charged with providing the court's premises, as well as other utilities, facilities, and other services for the court's operation, as "mutually agreed upon."¹¹⁹ But the *Agreement* also places the obligation for the payment of Cambodian judges and personnel squarely within the RGC's domain.¹²⁰

On February 8, 2012, Germany pledged €1.2 million to the ECCC's Victims Support Section (VSS). This is Germany's fourth donation since the VSS was established in 2008.

¹¹⁷ Bridget Di Certo, "Cash Crunch at KR Tribunal," January 19, 2012, *Phnom Penh Post*, p. 3. "Three weeks into the new financial year, no donor countries have yet committed any new funds to the tribunal [...] tribunal spokesman Neth Pheaktra said."

¹¹⁸ Julia Wallace, "Paychecks for Cambodian Judges Late," November 4, 2011, *Cambodia Daily*, p. 26. "Tribunal press officer Neth Pheaktra said on Wednesday the delay was due to 'technical issues' and that the judges would be paid as soon as the court receives money from the EC. He said a donation of approximately 2 million euros, about \$2.8 million, had recently expired, but a separate 1.3 million euro donation would soon make up the shortfall.

'This is a transitional period and we need to wait,' Mr Pheaktra said. 'When the money comes, we will pay all to them... We are poor, but soon we will be rich.'

Rafael Dochao Moreno, the EC's charge d'affaires in Cambodia, said the delay was due to a lag period between contracts. 'What I know is that we are in between two contracts, a 1.7 million euro contract that is about to finish and we are going to sign a new contract very soon,' he said. But Mr Moreno said the EC was not responsible for the delay... 'It is the responsibility for the tribunal... We are just the providers. We are not responsible for paying the salaries.'

¹¹⁹ ECCC *Agreement*, Article 14, says that the RGC "shall provide at its expense the premises...It shall also provide such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between [the UN and the RGC]."

¹²⁰ Whereas Article 16 of the ECCC *Agreement* specifies that salaries and other associated benefits of international judges and staff "shall be" met by the UN, Article 15 specifies that the corresponding costs of the national side of the court "shall be" met by the RGC. Furthermore, Article 44 new of the ECCC *Law* which deals with the expenses and salaries of the ECCC provides that:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget; (emphasis added)
2. The expenses of the foreign administrative officials and staff, the foreign judges, co-investigating judge and co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;...
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organisations, and other persons wishing to assist the proceedings."

This funding is earmarked for 2012-13 VSS program implementation which focuses on “legal representation; effective victims’ participation; and information dissemination.”¹²¹

B. Staffing and Administration

Article 8 of the ECCC *Agreement* provides for the establishment of an Office of Administration (OA) within the ECCC, comprising a Cambodian director and an international deputy director. They are to “cooperate in order ensure an effective and efficient functioning of the administration.”¹²² The OA must support the Chambers, the Office of the Co-Prosecutors, and the Office of Co-Investigating Judges in the performance of their functions.¹²³ Three of the main offices which fall under the administration’s authority are the Defence Support Section, the Victims Support Section, and the Public Affairs Unit. Below, we highlight some of the operational issues which have emerged or are emerging within those branches.

According to Internal Rule 11, the Defence Support Section (established by the Office of Administration) must be directed by a “Head of Defence Support Section,” with one national and one international deputy, and such other staff as necessary. These requirements are mandatory.¹²⁴ Although the Justice Initiative has repeatedly called for the appointment of a head of the Defence Support Section, as mandated by the Rules, the position remains vacant. The Justice Initiative is of the view that a robust Defence Support Section is absolutely required in order to ensure effective representation of all suspects and accused persons before the ECCC. As is patently clear from the opinions of two international PTC judges, as well as Judge Laurent Kasper-Ansermet, the rights of suspects have clearly been compromised due to the non-appointment of counsel to represent their interests.

Nisha Valabhji, the deputy head of the Defence Support Section—who has also been Officer-in-Charge of the section since her appointment following the resignation of Richard Rogers in late 2010—wrote a scathing opinion about the impact of political interference and judicial misconduct on the ECCC’s ability to guarantee fair trials.¹²⁵ While Valabhji agreed that an independent inquiry into misconduct and political interference was required, she said that the UN should “start exploring other solutions for the court without delay,” such as amending the *Agreement* or withdrawing from the court.

¹²¹ ECCC Press Release: “Germany Provides 1.2 million Euro to the Victims Support Section of the ECCC,” February 8, 2012, available at: <http://www.eccc.gov.kh/en/articles/germany-provides-€12-million-victims-support-section-extraordinary-chambers-courts-cambodia>.

¹²² Article 8.4, ECCC *Agreement*.

¹²³ Internal Rule 9.

¹²⁴ Internal Rule 11.1 states: “The Defence Support Section shall be directed by the Head of the [DSS], with a national and international Deputy, and such other staff as necessary.” (Emphasis added.)

¹²⁵ Nisha Valabhji, “Political Interference and Judicial Misconduct Impede Justice in Cambodia,” December 6, 2011, available at: <http://jurist.org/hotline/2011/12/nisha-valabhji-cambodian-interference.php>.

The OA is the ECCC’s official channel for both internal and external communication, and is also responsible for the Public Affairs Section (PAS).¹²⁶ The PAS is responsible for the dissemination of information to the public regarding the ECCC.

The Justice Initiative receives consistent reports from individuals inside the court, and indeed across all of its branches, about limits to the effective operation of all three of these branches. Specific concerns about the Defence Support Section relate to its activities being hampered by lack of authoritative leadership, and inadequate staffing. As outlined in the recent order reopening the Case 003 investigation, the rights of suspects may have been prejudiced in part because of this status quo.

Meanwhile, the Victims Support Section has been all but entirely nationalized. However, its current mandate—including in the identification, design, and implementation of “non-judicial measures”—absolutely requires international input and expertise. If international input and expertise is not available, more rigorous oversight of its activities and spending is absolutely necessary. Since the scope of judicial reparations has been unfortunately limited now by both the Trial and Supreme Court Chambers, victims, civil parties, and non-governmental organizations are looking to the VSS for strategic leadership and planning in relation to the court’s non-judicial measures mandate. However, reports from those representing civil parties, including those in the NGO community, reveal that these initiatives are stagnating. Greater effort on outreach is also required—both in relation to soliciting applications for civil party status in Cases 003/004, and in keeping the Cambodian public informed about ongoing developments in Case. But in order to give effect to the VSS’s mandate, greater direction from the chambers is also required.

During the course of 2011, the Justice Initiative received reports from various sources in the ECCC about the need for greater transparency and access to information about the court’s work. Current concerns with the dissemination of information by the Public Affairs Section include the need for greater transparency about budgetary issues. Another pertinent example was the confusion engendered by the ECCC’s failure to publicly announce the arrival of Judge Kasper-Ansermet so that he was required to do this on his own.

All three of the aforementioned branches rely upon efficient management and leadership from the highest levels of the court’s administration, in conjunction with proper direction from the chambers. The UN, the court’s donors, and the RGC must ensure greater transparency, efficiency, and accountability from the court’s administration through this crucial phase of the court’s life.

¹²⁶ Internal Rule 9.4.

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