

Salvaging Judicial Independence:
**The Need for a Principled
Completion Plan**

**for the Extraordinary Chambers
in the Courts of Cambodia**

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This report, issued by the Open Society Justice Initiative, is part of an ongoing series 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/projects/cambodia.

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Introduction

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is beginning the process of planning for the completion of its operations. Winding up the work of internationalized courts such as the ECCC involves a number of complex issues that are best addressed early in the life of an ad hoc tribunal. Unlike most other completion processes, this one takes place under repeated and public threats by Cambodia's most senior officials to abort proceedings for political reasons.

This report outlines considerations for those involved in planning to conclude the ECCC's work while ensuring that it fulfills its core mandate of bringing to justice the senior leaders and those most responsible for crimes of the Khmer Rouge. The report addresses the cases pending before the ECCC, the goals of a completion plan, and the principal options under consideration for completing the court's work.

The Justice Initiative recommends that, in assembling a completion plan for the ECCC, the court's staff, the UN, and the government of Cambodia should conduct a transparent planning process that is open to input from victims' groups, court monitors, and NGOs, among others. Under the current circumstances, as described in this report, the most reasonable completion plan for the court should include:

1. completion by the ECCC—in its current hybrid configuration—of all four cases currently before the court; and
2. immediate preparations to conduct the trials of Case 002 and Cases 003/004 simultaneously.

In view of the consistently voiced threats of political interference discussed in this report, there is currently no reason to believe that, absent a requirement capable of ensuring meaningful international engagement, a fully domestic successor court would be capable of conducting fair trials or of acting independently and impartially. For this reason, it is the position of the Justice Initiative that no cases should be transferred to a Cambodian-controlled court. However, as some stakeholders have raised the prospect of including in the court's completion plan an option for transferring cases to a Cambodian-controlled successor jurisdiction, this report provides an overview of established standards for transferring cases from an internationalized tribunal to a domestic tribunal. If this option is included in the completion plan, there must be clear rules and standards for such transfers. These rules should ensure that the successor court is free of political interference and can meet international fair trial standards. The rules should also provide for the return of the cases to the ECCC if these standards are not met.

Cases Pending before the ECCC

There are only four cases—involving a total of ten accused persons—pending before the ECCC. The prosecutors have stated that they do not intend to pursue additional accused beyond these ten, and the court's donors have clearly indicated a desire to conclude the court's work without bringing additional cases. For planning purposes, it is therefore reasonable to assume the entire caseload of the court will be:

Case 001

The trial of the case against Kaing Guek Eav, alias “Duch” was completed in November 2009 and a Trial Chamber judgment was issued on July 26, 2010, finding him guilty on charges of crimes against humanity and war crimes in connection with his role as head of the Tuol Sleng Prison. The defense, prosecution, and several civil party applicants have appealed the judgment. The Supreme Court Chamber’s ruling on those appeals is expected in early 2011.

Case 002

This case includes charges of genocide, war crimes, crimes against humanity, and domestic law charges against Ieng Sery, Ieng Thirith, Nuon Chea, and Khieu Samphan. The trial is expected to begin by the middle of 2011. Although the investigation began in July 2007, it was not completed until September 2010 when a closing order and indictment were issued by the investigating judges. The indictment is currently under appeal to the court’s Pre-Trial Chamber on jurisdictional issues.

Upon conclusion of the appeal, the case will be transferred to the Trial Chamber and a trial date set. The trial will likely be lengthy and complicated, as it involves complex charges including genocide and liability based on a joint criminal enterprise, against four persons alleged to be the most senior living leaders of the Khmer Rouge. These persons are all elderly, ranging in age from 78 to 84, and in relatively poor health. They will almost certainly be unable to sit through a full day of court and the Trial Chamber may be limited to conducting proceedings for only a portion of each trial day to accommodate the needs of these elderly accused. Further, proceedings will undoubtedly be stayed for varying periods of time throughout the lengthy trial as the Chamber considers motions pending before the court or as other complications arise, such as witness availability and translation issues. The accused are, to date, denying criminal liability and refusing to provide testimony to the court. Forceful and experienced Cambodian and international defense counsel represent each accused. Under such circumstances, the trial can reasonably be expected to last at least two years, possibly three.

If, optimistically, the trial in Case 002 concludes in late 2013, it is reasonable to expect that the Trial Chamber will require at least the first six months of 2014 to complete the judgment. The appeal process following a judgment will likely last another six months to a year. Under this projected timetable, it will be late 2014 or early 2015 when the court completes the Case 002 process. (This projection is less optimistic than that included in the court’s Approved Budget for 2010-2011, which projects the completion of any Case 002 appeals by November 2013.)

Cases 003/004

These cases include allegations against five suspects whose identities remain confidential. After a lengthy process to resolve a disagreement between the international and Cambodian prosecutors about whether to submit Cases 003/004 to the investigating judges, the cases were finally submitted for formal judicial investigation in September

2009.¹ However, to date it appears that little substantive investigation has been conducted, and what has been accomplished has been done without the assistance of Cambodian staff. There are widespread concerns that the Cambodian side of the court is unwilling and unable to cooperate in the investigation and prosecution of these cases. These concerns were confirmed in late October when Cambodian Prime Minister Hun Sen told UN Secretary-General Ban Ki-moon that “Case 003 will not be allowed...The court will try the four senior leaders successfully and then finish with Case 002.”² Hun Sen’s comments were the latest and most overt of a series of statements from high-level government officials indicating they do not wish Cases 003/004 to go forward.³ Such blatant political interference in the court’s work is of course contrary to basic fair trial standards.⁴ An ECCC official who bows to this political interference violates the *Law* of the Extraordinary Chambers, which requires that judges and prosecutors “shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”⁵

Although the names of the accused in Cases 003/004 remain confidential, as do the crimes and crime sites covered by the prosecutor’s submission, there are indications that the accused are considered to be persons “most responsible” for Khmer Rouge crimes (e.g., not the “senior leaders” who constitute the Case 002 defendants). As such, the asserted crime base and evidence linking the accused to the crime base will likely be more direct—and less complex to prove—than in the 002 Case.

For these reasons, the investigation in Cases 003/004 can likely be concluded in much less time than that required for Case 002, and any trial could be significantly shorter than that anticipated for the 002 Case. While it is conceivable that the investigating judges could find that there is no case to be pursued against the suspects named in Cases 003/004, such a judicial determination falls outside the scope of the completion plan, which should assume that the cases will go forward to trial. If investigated efficiently—

¹ The names of the accused, the crime base alleged and other details of these cases remains confidential under internal rules of the court that provide that the judicial investigation process is generally secret absent discretionary decisions by the investigating judges to release information to the public.

² “[Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC](http://www.phnompenhpost.com/index.php/2010102744318/National-news/hun-sen-sees-pending-krt-as-threat-to-stability.html),” *The Phnom Penh Post*, Oct. 27, 2010, available at: <http://www.phnompenhpost.com/index.php/2010102744318/National-news/hun-sen-sees-pending-krt-as-threat-to-stability.html>.

³ For information on public comments made by senior government officials and evidence of a lack of Cambodian cooperation in the investigation of the cases, refer to the Justice Initiative report, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2010,” regarding apparent political interference in Cases 003/004 at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324 (“Justice Initiative Political Interference Report”).

⁴ International Covenant on Civil and Political Rights, 999 UNTS 171 of Dec. 16, 1966, *entered into force* Mar. 23, 1976, Article 14(1) “All persons . . . are entitled to a fair and public hearing by a competent, independent and impartial tribunal”. Similar provisions are in the regional human rights treaties. *See also* European Convention, Article 6(1); American Convention, Articles 8(1) and 27(2); and African Charter, Articles 7(1) and 26.

⁵ 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, Articles 10 and 19, at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (the *Law*).

and with full cooperation between Cambodian and international investigators—the cases may well be ready for trial before Case 002 concludes. Although the court’s most recent budget request anticipates that any trial for Cases 003/004 will not begin until after the conclusion of the Case 002 trial, the court should seriously consider the possibility that, if active investigation begins immediately, Cases 003/004 could be tried simultaneously with Case 002 and completed on a much shorter timeframe than originally anticipated. Possible strategies to accomplish this are examined below.

Goals of the Completion Plan

The major goal of completion planning is to ensure the court concludes its work as efficiently as possible. Where appropriate, a completion plan can also contribute to the development of domestic capacity to try cases involving war crimes and crimes against humanity.⁶ These considerations, however, must be incorporated into a principled completion plan that ensures that: a) the court substantially meets its mandate; and b) cases before the court are completed in a manner consistent with international standards. The plan should strive to ensure that the court leaves Cambodia with a positive model of independent and impartial justice and an effective challenge to impunity.

The mandate of the ECCC requires that the court prosecute “senior leaders of Democratic Kampuchea and those who were most responsible” for the crimes within the jurisdiction of the court committed between April 17, 1975 and January 6, 1979.⁷ The prosecution of only ten persons in connection with the deaths of 1.5 to 2 million Cambodians during the Khmer Rouge period is unfortunate, yet understandable given the practical, political, and financial difficulties the court faces. In contrast, prosecution of only the five persons the government of Cambodia has said it will allow to be prosecuted⁸ would not provide a full sense of justice to Cambodians, tell an accurate story of the nature and scope of Khmer Rouge crimes, or demonstrate a credible and independent judicial process for Cambodia.⁹

⁶ See discussion in Bekou, Olympia, *Rule 11 bis: An examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 *Fordham Int'l L.J.* 723, February 2010; Fausto Poca, “Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY,” *Journal of International Criminal Justice*, 1 September 2008, ICJ 6 4 (655); and Diane F. Orentlicher, “That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia,” *Open Society Justice Initiative*, July 2010, page 123 et seq.

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, at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf, (the *Agreement*), Article 1.

⁸ “Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC,” *The Phnom Penh Post*, Oct. 27, 2010, available at: <http://www.phnompenhpost.com/index.php/2010102744318/National-news/hun-sen-sees-pending-krt-as-threat-to-stability.html>. See also, Chean Sokha and Robbie Corey-Boulet, “ECCC Ruling Risks Unrest: PM,” *The Phnom Penh Post*, September 8, 2009; Sopheng Cheang, “Cambodia PM Accuses Other Countries of Stirring Unrest,” *Associated Press*, September 10, 2009; and Vong Sokheng, “Inquiries could sink ECCC: PM,” *The Phnom Penh Post*, September 10, 2009; Hun Sen speech recorded and broadcast by Voice of America, March 18, 2009; Neth Pheaktra and Georgia Wilkins, “Judges should Focus on Current KR Suspects: Gov’t,” *The Phnom Penh Post*, March 12, 2008; Maggie Tait, “Interference 'Deplored' by Judge,” *NZPA*, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

⁹ See “A Thousand Voices,” *Documentation Center of Cambodia*, March 5, 2009, at

Most importantly, in view of the repeated, public statements of the Prime Minister expressing vehement opposition to cases 003/004, any decision not to pursue these cases risks fatally undermining the court's independence, which is so crucial to public trust.

In addition to the four surviving senior leaders in Case 002, prosecution of Duch as the only person in the category of "those who were most responsible" is insufficient to satisfy the mandate of the court to provide justice for Cambodians. Duch was found guilty for the torture and deaths of over 12,000 detainees in Tuol Sleng Prison, which constitutes approximately one percent of those who lost their lives to the Khmer Rouge. Given that Duch is widely recognized as amongst those who are "most responsible" for Khmer Rouge-era crimes, if those suspected in Cases 003/004 similarly share responsibility for the deaths of tens of thousands, and the prosecutor believes there is sufficient evidence and reason to pursue them, they should be tried as well.

The need to ensure that the ECCC leaves a positive legacy as a credible judicial institution for Cambodians requires that the four cases over which the court currently has control are conducted in a manner consistent with international fair trial standards. If any of these cases are dismissed, transferred, or otherwise handled in a manner that does not evince independent decision making consistent with international standards, the court will be left with a legacy of impunity rather than justice in spite of its accomplishments in other cases.¹⁰

Completion Plan Options

There are several options available to the ECCC in winding up its work. Two options under discussion by donors, tribunal officials, the UN, and the government of Cambodia are examined below.

1. ECCC Completion of All Pending Proceedings

The most straightforward option is to allow the ECCC to complete the four cases now before it through the completion of any final appeal process. This plan has the best chance of ensuring that the court's mandate is fulfilled with integrity and in accordance with international standards. It is also the most expensive option for the court if, as contemplated in the current budget, any trial in Cases 003/004 begins only *after* the conclusion of the trial in Case 002. However, alternative trial schedules, including simultaneous trials for Cases 002 and 003/004, could, while more costly in the short run, ultimately reduce costs and the time required to complete all cases within the current ECCC structure.

It is common in other international and hybrid courts for more than one case to be

http://www.dccam.org/Tribunal/Analysis/pdf/A_Thousand_Voices.pdf; and Amnesty International Press Release, "Cambodia: Follow Khmer Rouge Convictions with More Prosecutions," July 26, 2010, available at <http://www.amnestyusa.org/document.php?id=ENGPREF012542010&lang=e>.

¹⁰ Any finding by the investigating judges or chambers that the cases cannot be pursued should be set forth in a well-reasoned decision, and subject to review and public scrutiny. The rules of the court do not explicitly provide that an order dismissing cases submitted by the prosecutor be issued publically, but shrouding any such decision in secrecy would, after the numerous government statements that have been made about the cases, further diminish confidence in the independence of the process.

investigated and tried at a time. For instance, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) regularly schedule a single trial chamber to preside over more than one active trial at a time. The chamber either sits for part of the day on each case, or staggers trial days for each case within a week or month, depending on circumstances. These courts also advance their completion strategies by providing for the appointment of *ad litem* judges to sit on a particular case in order to facilitate the trial of more than one case concurrently. Both options should be carefully considered for the ECCC.

Scheduling trials for Cases 002 and 003/004 at the same time is practical. As stated above, it is unlikely that the Trial Chamber will be able to sit for full days for the 002 trial because of the advanced age and poor health of the accused. Accordingly, the court should consider running two trials at once, with the 002 Case tried, for instance, in the morning and the 003/004 Cases tried in the afternoon. Managing two cases simultaneously would place an increased burden on the Trial Chamber and the prosecutors' office, necessitating additional resources. However, the additional expense would be justified as a measure to shorten the overall life of the court. Because of delays in beginning the investigations, the 003/004 Cases will likely not be ready to begin trial until the 002 Case has been underway for at least six months. Under these circumstances, scheduling two trials before a single trial chamber or establishing a second trial chamber with *ad litem* judges may be the most effective and efficient way to complete the work of the court. Furthermore, there is little appetite for spending tens of millions of dollars per year for a court to run a single trial for only a few hours each day. Holding two trials at the same time is more efficient, and far better for Cambodians following the trials and survivors trekking long distances to observe the court.

2. Transfer Case 003/004 to a Fully Domestic Trial Chamber or Court

A second option under consideration by court stakeholders is to eliminate substantial international involvement following the completion of Case 002 and to turn over, upon conclusion of the investigation, any trial and appeal in Cases 003/004 to either a Cambodian domestic court or a fully domestic chamber of the ECCC. The goal of this strategy would be to reduce costs by ending most international participation in the court before the 003/004 trial takes place. The justifying premise for this approach is that, after five or six years of working with international legal professionals, Cambodian legal professionals at the court will have gained the capacity and demonstrated the independence to conduct the trial without substantial international assistance. But the Cambodian government's continuing (and apparently successful) efforts to politically influence the ECCC make it impossible to believe that an entirely Cambodian institution could operate independently.

Currently, there is no indication that, on its own, the Cambodian side of the court can or will carry out effective and fair trials for atrocity cases. To the contrary, statements of high level government officials, including the prime minister, that the Cases 003/004 should not go forward—combined with the lack of progress in investigating them—demonstrate that Cambodian officials and staff in the ECCC are unwilling to undertake substantive investigations or trials of these cases. The Cambodian government has stated

it opposes pursuing prosecutions of Khmer Rouge atrocities beyond the first five brought before the ECCC (Cases 001 and 002) because it may cause civil unrest.¹¹ Under these circumstances, it is perverse to assume that a Cambodian controlled court could or would legitimately try Cases 003/004. The UN would fail in its responsibility to uphold international fair trial standards for ECCC proceedings if it were to support turning Cases 003/004 over to a Cambodian court that clearly lacks independence. Similarly, donor governments supporting such a step would be in conflict with their own responsibility to ensure that all cases are completed in accordance with international standards.

Even if the problem of political interference were to be fully remedied by the government of Cambodia and the UN, transfer of the 003/004 Cases to a domestic chamber for trial would only be feasible with adequate procedures and protections in place to ensure the trials meet full fair trial standards. There are clearly established minimum standards that international or hybrid tribunals must adhere to in turning cases over for trial to domestic jurisdictions.¹² These standards require that any successor court has both the political will and the practical capacity to try the cases in accord with established standards for fair and independent trials. Until such conditions are satisfied, the cases cannot be turned over to another judicial body. Further, transfers can only be made if appropriate procedures are followed and appropriate protections are in place. In this regard, the experience of the ICTY and the ICTR in referring cases to national jurisdictions as part of their completion strategies is relevant. Both courts passed similar rules to outline the procedures, standards, and protections necessary for such a referral to a domestic court.¹³ Under the ICTY and ICTR rules:

- Referrals are made upon the court's own motion or that of the prosecutor.
- Referrals are a judicial function and can be made only by a special referral bench of judges that would not otherwise sit on the case.
- The referral bench must be satisfied that the accused will receive a fair trial in the domestic court.
- The accused has an opportunity to be heard on the referral issue.
- The prosecutor has the authority (and the duty) to monitor the referred case.
- A referral can be revoked if fair trial standards are not being met by the domestic court.
- The accused and the prosecution have the right to appeal decisions of the referral bench.

¹¹ Supra, notes 2 and 3.

¹² See International Criminal Court for the Former Yugoslavia (ICTY) Rules of Evidence and Procedure, Rule 11 *bis*, Rev. 44, December 2009, at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf; and International Criminal Tribunal for Rwanda (ICTR) Rules of Evidence and Procedure, Rule 11 *bis*, Revised February 19, 2010, at <http://www.unicttr.org/Portals/0/English/Legal/ROP/100209.pdf>; and the review of ICTY 11 *bis* cases in Bekou, Olympia, Rule 11 *bis*: *An examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 Fordham Int'l L.J. 723, February 2010.

¹³ ICTY Rules of Evidence and Procedure, Rule 11 *bis*, Rev. 44, December 2009, at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf and ICTR Rules of Evidence and Procedure, Rule 11 *bis*, revised February 19, 2010, at <http://www.unicttr.org/Portals/0/English/Legal/ROP/100209.pdf>.

The ICTY has successfully transferred eight cases involving 13 accused of intermediate or lower rank to local and hybrid courts in the former Yugoslavia, after the chambers were satisfied that the domestic courts were capable of conducting fair trials.¹⁴ However, the ICTR's efforts to transfer cases to domestic Rwandan courts have not been successful to date. All five cases referred by the prosecutor and considered by the trial chambers of the ICTR have been rejected due to concerns about domestic courts' independence and capacity to meet fair trial standards.¹⁵

The International Criminal Court (ICC) incorporates somewhat similar safeguards when determining if it is appropriate for the court to refrain from exercising jurisdiction because a domestic institution is willing and able to investigate and prosecute. According to the ICC, handing a case to a domestic institution is not appropriate where "[T]he proceedings [in the domestic court] were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."¹⁶ In considering how to apply these standards, the Office of the Prosecutor of the ICC has recently said:

Impartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned. Independence in the proceedings at hand may be assessed in light of indicators as, *inter alia*, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation, prosecution and trial; and corruption of investigators, prosecutors and judges.¹⁷

¹⁴ See Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council, Resolution 1534 (2004), UN S/2010/270, June 1, 2010 at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_01june2010_en.pdf.

¹⁵ The ICTR has prevented the transfer of several indicted ICTR defendants to Rwandan domestic courts because basic fair trial standards could not be met. See *Prosecutor v. Munyakazi*, ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, May 28, 2008; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11bis, Decision on Prosecutors Request for Referral to the Republic of Rwanda, June 6, 2008; *Prosecutor v. Hategekimana*, ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, June 19, 2008; *Prosecutor v. Kayishema*, ICTR-01-67-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Dec. 16, 2008.

¹⁶ Rome Statute of the International Criminal Court, Article 17 (2) c at http://untreaty.un.org/cod/icc/statute/rome_fra.htm.

¹⁷ Office of the Prosecutor, International Criminal Court, Draft Policy Paper on Preliminary Examinations, October 4, 2010, The Hague, Netherlands, Paragraphs 64 and 65.

Any principled completion strategy devised by the ECCC that involves the potential to transfer Cases 003/004 to a fully domestic trial chamber or court would have to include necessary changes to the *Agreement*, the *Law* and internal rules that govern the court to include standards, protections, and procedures similar to those set forth in Rule 11 *bis* of the ICTY and ICTR, and described by the ICC prosecutor. The ECCC must not violate international standards by turning over cases currently within its control to a judicial system that has not proven itself up to the task and has indeed shown itself susceptible to political interference. For the ECCC to hand over cases to the Cambodian judicial system would risk undermining the credibility the court gained with its trial of Duch—a trial that by all appearances met international standards. Furthermore, such a hand-over would undermine the standards established by the ICTY, ICTR, and ICC and thereby damage the cause of international justice and principles of complementarity.

There is no evidence that the problems with independence and capacity in the Cambodian judicial system that originally necessitated extensive international participation in the ECCC have improved enough to justify international withdrawal from a mass atrocity trial. The most recent report of the UN Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, acknowledges some improvement in the human rights and rule of law situation in Cambodia in the last year, but also notes the presence of widespread corruption, inadequate judicial capacity, and Cambodians' lack of confidence in the court system.¹⁸ It is likely that Cambodian officials who have worked at the court have gained considerable capacity, but it is not clear they would be involved in any domestic chamber or court to which cases were referred or that they could operate the court absent the current international assistance and protections. But most critically, the overriding problem of political interference means that referred trials would not meet international standards. Thus, the Justice Initiative does not regard transferring of ECCC cases to a fully domestic chamber for trial or other proceedings to be an option for a credible completion plan for the court.

Conclusion

While there is a practical imperative to plan to wrap up the work of the ECCC, it is vital that any completion plan take into account the core mandate of the court and ensure that international fair trial standards are met for all cases pending before the court. Ideally, the court's completion will also leave a positive legacy for Cambodia and the progress of international criminal justice. We urge the UN, the government of Cambodia, the donors of the ECCC, and the ECCC officials to engage in a more transparent discussion of the available options for concluding the work of the court. These stakeholders each have a considerable investment in the success of the ECCC and must use care not to damage its value and credibility by endorsing a completion plan that overvalues the economic need to wind up the court above the demands of international standards and the credibility of the process.

¹⁸ Surya P. Subedi, "Report of the Special Rapporteur on the Situation of Human Rights in Cambodia," UN Human Rights Council, UN General Assembly, A/HRC/15/46, September 16, 2010.

Critically, if the court ignores the outstanding problems of political interference and transfers cases to domestic courts for trial, it diminishes not only the credibility of the referred cases but also the confidence in the application of international standards with respect to the other cases before the court. It risks the appearance that it is “dumping” the cases because it is unwilling or unable to deal with the political interference that has come to haunt the ECCC.

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