Political Interference

at the Extraordinary Chambers in the Courts of Cambodia

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I. Introduction

Since before it was established, the threat of political interference has hung over the Extraordinary Chambers in the Courts of Cambodia (ECCC). From the earliest negotiations between the United Nations and government of Cambodia over the formation of the court, through its founding, and throughout its operations to date, the prospect and reality of political interference have shaped the ECCC. Now, as the court completes its first case, prepares to try its second, and contemplates additional cases, it is essential to understand the extent to which the ECCC has succeeded in maintaining its independence. The goal of this report is to examine the effectiveness in practice of the protections embedded in the court's structure and whether they have enabled the ECCC to operate fairly and free of improper governmental interference. The answers will determine not only if the court is seen to have succeeded, but will likely inform the scope and structure of future international tribunals.

The ECCC is charged with prosecuting senior leaders and those most responsible for crimes committed by the Khmer Rouge regime between April 17, 1975 and January 6, 1979. The court, set up thirty years after the crimes were committed, marks the first serious effort to bring some measure of justice for the atrocities that resulted in massive suffering and the deaths of well over a million and a half people. Its unique structure as a court formally embedded in the Cambodian domestic system—but with international participation at all levels, a majority of Cambodian judges, and a commitment to complying with international standards of justice—is an experiment in the development of mechanisms to secure legal accountability for mass atrocities.

The ECCC is the result of long and difficult negotiations between the United Nations and the Cambodian government. Those negotiations finally concluded with the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, signed in June 2003 and amended October 2004, referred to as the *Agreement*.[1] The government of Cambodia insisted that a majority of the judges in each chamber of the court be Cambodian, a structure that is both unusual and troublesome. From the outset, UN negotiators were concerned that widespread corruption in the domestic Cambodia judicial system, as well as lack of capacity and a history of politicized justice, would prevent the court from meeting international standards. The compromise worked out in the *Agreement* is a court with a majority of Cambodian judges, a largely dual administrative system, and international and Cambodian co-prosecutors and co-investigating judges. A requirement that the court's Pre-Trial, Trial, and the Supreme Court Chambers make decisions by "supermajority" vote (that is, four out of five votes on the Pre-Trial and Trial Chambers, and five out of seven votes on the Supreme Court Chamber), is designed to guard the independence and integrity of the court, because at least one international judge must vote with the Cambodian judges for a decision to be made.

The court, which began operations in 2006, has completed one trial in "Case 001" against one accused person, Kang Guek Eav, also know as "Duch." A joint trial in a second case is currently expected to begin in early 2011. The second case, referred to as "Case 002," will likely include charges against the four persons—Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith—

[1] Found at www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf.

alleged to be the most senior living leaders of the Khmer Rouge. In addition, the international prosecutor has forwarded the names of five more suspects to the court's Office of Co-Investigating Judges for judicial investigation. The cases against these five additional suspects are referred to as "Cases 003/004," because the prosecutor's submission divided them into two cases.

Since the court's launch, Cambodian court officials have come under considerable pressure to comply with indirect or direct government mandates—including hampering additional investigations and preventing the interviewing of certain witnesses. Cambodian officials within the ECCC have made efforts to resist political interference within the limited range of actions they believed were available to them. There are clearly members of the Cambodian legal profession working in the court who are deeply committed to seeing the ECCC act independently but who also see their options to effectuate that within the current system as extremely restricted. Nonetheless, the exercise of political influence by government actors at all levels in Phnom Penh has tainted the court's operation and infringed upon its judicial independence. In the end, the ability of individual Cambodian actors to resist interference by senior political figures and still maintain a position within the Cambodian legal system is limited.

This report begins with a brief exploration of the history of judicial independence in Cambodia, up to and including the design of the Agreement. It then examines the Agreement's commitment to international fair trial standards, and the protections built into the Agreement to prevent political interference—and how those protections have been tested in practice. Finally, the report draws recommendations both to better safeguard independence at the ECCC and to inform the structure and performance of future international courts.

II. Judicial Independence and the Establishment of the *Agreement*

No period of Cambodia's medieval or modern history can claim the existence of a strong judicial system. Hierarchical and authoritarian regimes, some more benign than others, governed Cambodia during the reign of the Angkor rulers from the ninth to the 15th centuries. The periods of French colonial rule (1863 -1953) and subsequent independence (1953 to the early 1970s) saw little development of a modern independent judiciary.[2] From 1975 to 1979, Cambodia's judiciary, like other state institutions in the country, was decimated by the Khmer Rouge. Although a system of courts was provided for in Khmer Rouge documents, the regime made no efforts to establish it. Cambodians working as lawyers or judges when the Khmer Rouge came to power in 1975 were generally killed, like other elites or educated groups, if they were unable to flee or conceal their background.

In the years following the downfall of the Khmer Rouge, progress in building a strong and independent judicial system has been slow and beset with interruptions and inaction.[3] From 1979

[2]See David Chandler, "Historical Context: Cambodia's Historical Legacy," in "Safeguarding Peace: Cambodia's Constitutional Challenge," edited by Dylan Hendrickson in *Accord,* No. 5, November 1998 at http://www.c-r.org/our-work/accord/cambodia/contents.php; David Chandler, "Cambodian History," published in *Searching For the Truth*, by the Documentation Center of Cambodia, July, 2009, and at http://www.cambodiatribunal.org/history/cambodian-history.html#Colonial.
[3]See generally, Evan Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building*,

until 1993, neither law nor practice embraced an independent judiciary. The political system was modeled on Vietnamese communism, with the judiciary operating as a tool of the ruling government. In addition, Cambodia was experiencing various levels of civil war during this period and state institutions were barely operating. In 1993, following the 1991 Paris Peace Accords and the deployment of the United Nations Technical Assistance to Cambodia (UNTAC), a new constitution was adopted based on liberal democratic principles. The Constitution of Cambodia provides that "[t]he judicial power shall be an independent power" and "shall guarantee to uphold impartiality and protect the rights and freedoms of citizens."[4]

Since 1993, some steps have been taken to give reality to the mandate of an independent judiciary,[5] but much of this progress has been superficial. Recent evaluations by local NGOs, the UN, and the US State Department conclude that the Cambodian judicial system is marked by lack of political independence, limited capacity, and corruption.[6] As summarized by the report of the Office of the High Commissioner for Human Rights in Cambodia in 2005: "The challenge which has faced the Cambodian authorities in the period since 1993 has been how to transform a weak, untrained, and impoverished judiciary, with a history of operating under political direction, into an independent judiciary as envisaged in the 1993 Constitution and as required by international law."[7]

The problems facing the judicial system in Cambodia are multifaceted and much has been written describing them.[8] Two general categories of failures emerge. First, there are problems related to a lack of resources, training, and development—evidenced by low salaries for judges, inadequate funding of judicial operations, and a permissive culture of bribery by parties wishing

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Silkworm Books, Thailand, 2003; Special Representative for the Secretary General [of the UN] for Human Rights in Cambodia, "Continuing Patterns of Impunity in Cambodia," October 2005, Page 8 et seq. at http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf, ("HCHR 2005 Impunity Report").

[4] Constitution of the Kingdom of Cambodia, Article 128, New, adopted September 21, 1993, amended March 6, 1999, at http://www.cambodia.gov.kh/unisql2/egov/english/organ.constitution.html#chapter11.

[5] Cambodia passed a new Code of Criminal Procedure in June, 2007 and a new Penal Code in November, 2009. There are now numerous law schools in Cambodia training a new generation of lawyers and judges. The government established the Royal School for Judges and Prosecutors in 2002. Salaries and allowances for judges were increased in 2002 to between $400 and $600 a month. The number of practicing lawyers in Cambodia has risen from approximately 200 in 2003 to 547 in 2010. Considerable development assistance has gone into improving the general rule of law system in Cambodia.

[6] United States Department of State, Bureau of Democracy, Human Rights and Labor, *2008 Human Rights Report: Cambodia*, February 25, 2009 at http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.htm; United Nations Special Representative of the Secretary-General for Human Rights in Cambodia, "Continuing Patterns of Impunity in Cambodia," October 2005 (HCHR 2005 Impunity Report) at http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf; and Brad Adams, "Cambodia's Judiciary: Up to the Task?," in *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts,* edited by Jaya Ramja and Beth Van Schaack, The Edwin Mellen Press, 2005.

[7] HCHR 2005 Impunity Report, page 25.

[8] See for instances, Cambodian League for the Promotion and Defense of Human Rights, (LICADO), "Human Rights in Cambodia: The Charade of Justice Report 2007," December 2007 at http://www.licadho-cambodia.org/reports/files/114LICADHOPaperCBAThreatIndependentLegalRep07.pdf. United States Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Cambodia*, March 11, 2011 at http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135988.htm; Carolyn Dubai, "Evaluating the Khmer Rouge Tribunal," *International Judicial Monitor*, Summer 2009 at http://www.judicialmonitor.org/archive_summer2009/sectorassessment.html.

to influence judicial outcomes. While this experience influences the attitudes of Cambodian judges on the court, its impact has been somewhat attenuated by the exceptional funding that the court receives (compared to a domestic court) and the training and exchange of ideas that occurs between the national and international judges.

The second and more difficult problem is the lack of a meaningful separation of powers in Cambodia between the judiciary and the executive branch. Judges are hired and promoted at the discretion of the executive. The Cambodian judiciary is part of a hierarchical political system that prioritizes ongoing obedience and loyalty to the ruling elite as essential to economic and professional success. Judges in Cambodia who displease the government are punished or transferred and do not progress professionally. This ongoing system of patronage and political interference was of greatest concern to the UN as it evaluated whether Cambodian judges would be able to operate independently in any court established to try the Khmer Rouge. While Cambodian judges are under a technical legal obligation to act with independence, this principle gives way easily when political interests conflict.

Against this background, in June 1997 Prime Ministers Norodom Ranariddh and Hun Sen wrote to the UN Secretary-General Kofi Annan, referencing the UN's assistance in establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and requesting UN assistance in bringing to justice those responsible for crimes committed during the Khmer Rouge regime.[9] In response, Secretary-General Annan noted that "[i]t is … my view that Khmer Rouge leaders responsible for the most serious of crimes should be brought to justice and tried before a tribunal which meets the international standards of justice, fairness and due process of law. Impunity is unacceptable in the face of genocide and other crimes against humanity."[10] He appointed three international experts (the "Group of Experts") to evaluate the feasibility of a tribunal to try the worst perpetrators of atrocities during the Khmer Rouge period. In their report, issued in February 1999, the experts recognized the importance of such a justice mechanism for Cambodians but pointed to the weakness of the Cambodian judicial system as a barrier to domestic trials: "It is the opinion of the Group that the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process."[11] The UN Group of Experts recommended that any tribunal established with the assistance of the UN should be staffed with international judges and an international prosecutor.

The government of Cambodia reacted strongly against this recommendation, insisting that the UN provide international assistance in a domestic court. Further discussions between the government of Cambodia and the UN thus focused on establishing a justice mechanism that met the demand of the UN that trials comply with international standards, and the desire of the government that trials be part of the domestic judicial system to the greatest extent possible. The negotiations were protracted and difficult. In 2000 the parties agreed to pursue the concept of a

[9] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, with introductory note by Secretary-General Kofi Annan, February 18, 1999, para. 4 at http://www.unakrt-online.org/Docs/Other/1999-02-18%20Experts%20Report.pdf, (the "Experts Report").
[10] Introductory Note of Secretary-General Kofi Annan to Experts Report.
[11] Experts Report, Para. 126.

"mixed" tribunal with Cambodian and international judges, but significant differences remained regarding the appointment process for judges and whether a majority would be international or Cambodian. The Secretary-General stated on February 8, 2000 that given concerns about the independence of the Cambodian judiciary, he would agree to a "mixed" tribunal only if it had four components: 1) a majority of international judges; 2) an independent, international prosecutor; 3) guarantees for the arrest by the Cambodian authorities of all indictees on Cambodian soil; and 4) previously-issued pardons would not be a bar to prosecutions.[12]

Discouraged by the government of Cambodia's apparent lack of commitment to an independent court and the lack of progress toward an agreement that would guarantee fair trials, the Secretary-General cut off negotiations in February 2002. However, UN member states, led by Japan, Australia, France, and the United States, initiated a General Assembly resolution requesting that the Secretary-General reengage in negotiations for a tribunal along the lines suggested by the government of Cambodia, but which met international standards. With some reluctance, the Secretary-General resumed negotiations with the government of Cambodia and the parties ultimately agreed to establish a tribunal with a majority of Cambodian judges, balanced by a complex supermajority voting requirement and other provisions designed to protect against political interference by the Cambodian government.[13]

In a report to the General Assembly in March 2003, Secretary-General Annan remarked on the initialed draft agreement: "There still remains doubt in some quarters regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia. It is, however, the hope of the Secretary-General that the Government [of Cambodia], in the implementation of the agreement, would carry out fully the obligations that it would assume. It is worthwhile noting that, under the terms of the draft agreement, any deviation by the Government from the obligations undertaken could lead to the United Nations withdrawing its cooperation and assistance from the process."[14]

The UN and the government of Cambodia formally concluded the agreement for the establishment of the ECCC in June 2003. Contrary to the Secretary-General's February 2000 recommendation that safeguarding the ECCC's judicial independence required a court composed of a majority of international judges and a single international prosecutor and investigating judge, the *Agreement* provides that a majority of judges in the Pre-Trial, Trial, and Supreme Court Chambers will be Cambodian and that the functions of prosecutor and investigating judge will be carried out by pairs of "Co-Prosecutors" and "Co-Investigating Judges," with one

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[12] See detailed descriptions of the negotiation process by authors who had significant involvement in the process; Ambassador Thomas Hammarberg, "How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN," 2001 at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm. ("Hammarberg Notes"); and David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, ed., International Criminal Law, Third Edition, Volume III, Martinus Nijhoff Publishers, The Netherlands, 2008, p 219-255, ("Scheffer Negotiations Descriptions"). Their factual descriptions are the major source of information about the details of the negotiations relied on in this report. See also Report of UN Secretary-General on Khmer Rouge Tribunals, A/57/769, March 31, 2003 at http://www.unakrt-online.org/Docs/SG%20Reports/A-57-769.pdf (the "2003 Secretary-General Report"); and Craig Etcheson, "The Political Origins of the Tribunal," in *Justice Initiatives: The Extraordinary Chambers,* published by the Opens Society Justice Initiative, Spring 2006.

[13] 2003 Secretary-General Report, para 7.

[14] 2003 Secretary-General Report, Introduction.

Cambodian and one international in each role. Elaborate provisions for resolving disagreements between the co-prosecutors and co-investigating judges are included in the *Agreement*, as are provisions for a supermajority voting requirement to ensure that the Cambodian judges cannot completely dominate decision making. The Cambodian Law on the Establishment of the Extraordinary Chambers (the "*Law*") was subsequently adopted and amended to embed the court in Cambodia's domestic judicial system.[15]

The *Agreement* is complex and has been the subject of much criticism, mostly focused on whether it sufficiently guarantees the independence of judicial and prosecutorial decision making, particularly in light of Cambodia's long history of political manipulation of the judiciary.[16] The threat of political interference was seen to be heightened by the fact that some key government officials, including Prime Minister Hun Sen himself, held positions of some power within the Khmer Rouge. Only the experience of the court in practice would tell whether the protections built into the *Agreement* were adequate, and whether the stated commitment of the parties, particularly the government of Cambodia, to comply with international standards would be carried out.

III. Commitments to International Standards in the *Agreement*

A. International Standards as Incorporated into the *Agreement*

That the ECCC comply with "international standards" for fair trials is a central concern of the *Agreement*. Thus, the *Agreement* states at Article 12 (2) that "[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party." Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR)[17] address the rights of accused persons before and during trial, including the right to: 1) a fair and public hearing by a competent, independent, and impartial tribunal established by law; 2) be presumed innocent until proven guilty; 3) be tried without undue delay; 4) assistance of counsel; 5) examine witnesses against him/her; 6) not be compelled to testify against him/herself; 7) and the right not to be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.

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[15] The Law on the Establishment of the Extraordinary Chambers, as amended October 27, 2004, at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf, (the "*Law*"), was passed by the Cambodian National Assembly to provide the legal framework for the court under domestic law. Although there are differences between provisions of the *Law* and the *Agreement*, in most respects relevant to the issues addressed here, they track each other in outlining the parameters of the court.

[16] See Amnesty International, "Kingdom of Cambodia: Amnesty International's position and concerns regarding the proposed 'Khmer Rouge' tribunal," April 24, 2003 http://www.amnesty.org/en/library/asset/ASA23/005/2003/en/d8df2bf1-d6fc-11dd-b0cc-1f0860013475/asa230052003en.html, and the statements from domestic NGOs attached; and Human Rights Watch, "Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement," April 2003, at http://www.hrw.org/backgrounder/asia/cambodia040303-bck.htm.

[17] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, at http://www2.ohchr.org/english/law/ccpr.htm, (the "ICCPR").

The sources of international standards for fair trials include, in addition to the ICCPR, the Universal Declaration of Human Rights, regional human rights instruments such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), U.N. General Assembly resolutions, and the statutes and jurisprudence of international criminal tribunals.[18] The *Agreement* provides at Article 12 (1) that, although "procedure shall be in accordance with Cambodian law…..where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level." Although the ECCC is designed to be a special chamber of the domestic courts, it is clear that the intent of the *Agreement* is that international fair trial standards must take precedence over any domestic practices.

Further, the *Agreement* mandates that judges appointed to the ECCC "be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."[19] Likewise the *Agreement* provides that the prosecutors must be "independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."[20]

B. International Standards as Incorporated into Rules of Procedure and Judicial Decisions

Once judges and prosecutors of the ECCC were sworn into office on July 3, 2006, they began working on internal rules to guide their procedures.[21] The rules, which track Cambodian domestic procedures when they are consistent with international standards, detail many procedures necessary to protect the fair trial rights of accused persons. For instance, the rules contain extensive provisions to ensure a charged person[22] has adequate notice of the charges against him, access to counsel, and the opportunity to challenge provisional detention.[23]

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[18] See David Scheffer, Memorandum on Application of International Standards of Due Process by the Extraordinary Chambers of the Courts in Cambodia, published by Open Society Justice Initiative, April 2006 at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20060401. David Scheffer, former United States Ambassador-at-Large for War Crimes Issues was directly involved in negotiating the final terms of the *Agreement.*

[19] *Agreement,* Articles 3(3) and 5(3).

[20] Ibid. Article 6(3).

[21] Procedures for the selection and appointment of judges are closely related to judicial independence and were the subject of extensive criticism and controversy when the initial appointment of Cambodian judges was made. See Open Society Justice Initiative, "Progress and Challenges at the Extraordinary Chambers for the Courts in Cambodia," June 2007, page 8, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20070627/cambodia_20070627.pdf. The basic criticism lodged against the process for nominating and selecting Cambodian judges was that it was politically controlled and resulted in the appointment of judges on the ECCC who had demonstrated their political loyalty. It is beyond the scope of this report to further evaluate the judicial selection process or its impact on the independence of the court, but its flaws reinforce the concerns about political interference described in this paper.

[22] The Internal Rules define a "charged person" as one formally under investigation by the investigating judges. The term "accused person" refers to one who has been formally indicted by the investigating judges. A "suspect" refers to a person the prosecutors or investigating judges consider may have committed a crime, but who has not been formally charged.

[23] Internal Rules, Rev. 5, February 9, 2010, Rules 57, 58 and 63 respectively, at

Nonetheless, the process of developing the internal rules was protracted and evidenced deep disputes between the international and Cambodian judges about implementing basic fair trial rights in accordance with international standards. For instance, extensive debate about the right of accused persons to seek the full assistance of competent international defense counsel threatened at one point to derail the court before it began.[24]

The internal rules, passed June 12, 2007 and amended during periodic plenary sessions of the judges, detail at Rule 21 certain "Fundamental Principles" including the requirement that the 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." The judges have invoked this provision on several occasions as a reference point to evaluate whether a rule or action of the court is consistent with the fundamental international fair trial rights of accused persons.

Notably, the judges have on occasion condemned actions taken by officials of the ECCC or Cambodian judicial officials on the ground that international fair trial standards were violated.[25] The most dramatic example occurred when the Trial Chamber ruled that the pretrial detention of the accused Kaing Guek Eav, alias "Duch," by the Cambodian Military Court for nearly eight years before he was transferred to the ECCC constituted a violation of his fundamental right to a speedy trial, protected by international standards which include the ICCPR, which confirms a right to a trial within a reasonable period of time and to detention in accordance to the law.[26] The chamber emphasized the obligation of the court to proceed in accordance with international standards: "The ECCC *Law* not only authorizes the ECCC to apply domestic criminal procedure, but also obligates it to interpret these rules and determine their conformity with international standards prescribed by human rights conventions and followed by international criminal courts." Moreover the ECCC must consider Article 31 of the Constitution of the Kingdom of Cambodia which states that "the Kingdom of Cambodia shall recognize and respect human rights

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http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf. (All references to the internal rules are to this version and referred to as "Rule___").

[24] See Open Society Justice Initiative, "Progress and Challenges at the Extraordinary Chambers for the Courts in Cambodia," June 2007, page 8, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20070627/cambodia_20070627.pdf. International judges argued that international defense counsel must be able to represent accused, with rights of appearance in court, in order for trials, with international prosecutors and judges participating, to meet international fair trial standards. The Cambodian judges, with the backing of the Bar Association of Cambodia, argued that international defense counsel could only assist Cambodian lawyers behind the scenes and could not appear in court. In the end, the judges agreed that international lawyers could fully participate as defense counsel so long as they acted alongside a Cambodian lawyer and went through an approval process with the Bar Association. See Rule 22.

[25] See for instance, Pre-Trial Chamber Decision on Admissibility of Appeal Lodged by Ieng Sary on Visitation Rights, March 21, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/52/PTC_decision_on_Ieng_Sary_Visit_right_A104_II_4_EN.pdf, and Pre-Trial Chamber Public Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, September 26, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/139/C33_I_7_EN.pdf.

[26] Trial Chamber Decision on Request for Release (related to Kaing Guek Eav, alias "Duch"), June 15, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/353/E39_5_EN.pdf.

as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, and covenants and conventions related to human rights."[27]

Although defense counsel have unsuccessfully challenged other court actions as being outside of international standards, the judicial officials have made visible and credible efforts to ensure that international standards are considered in evaluating actions of court officials. As in other judicial institutions, there is room for disagreement about the outcome of some of these decisions, but the judicial chambers have been careful to include analysis of international fair trial standards in many of their rulings.

While these efforts to ensure that international fair trial standards are respected are important, they do not address a central concern: that the court operate independently and free of attempts at political interference. Disturbing evidence of political interference regarding who the court will prosecute and who can be called as a witness during investigations has emerged. To date, the specter of political interference has not been addressed adequately, despite the ECCC's general commitment to respect international standards.

IV. Protections in the *Agreement* to Prevent or Remedy Political Interference

There has never been serious doubt that justice for victims of the Khmer Rouge is an important and worthy goal. Concern about the success or failure of the ECCC has, rather, always focused on whether the court, given its unusual hybrid structure, would in fact operate independently, impartially, and free of political interference. Political interference violates the fundamental guarantee of a fair trial. As the difficult negotiations leading to the court's founding illustrate, there were and are deep concerns at the highest level of the UN, as well as within the international human rights community, about whether senior Cambodian government officials would allow the court to proceed with its mandate, free of attempts to control who was prosecuted or called as a witness, and what evidence was used.[28]

This concern, still pronounced even four years into the life of the court, continues to be based on two major factors. First, the court has a majority of Cambodia judges in each of its chambers, a Cambodian co-investigating judge, and a Cambodian co-prosecutor chosen from a domestic judicial system that is uniformly viewed as subject to political control. Second, many former Khmer Rouge cadre hold senior positions of power in the government and military. Prime Minister Hun Sen, who has controlled the Cambodian political and military system since1993, was a Khmer Rouge officer who fled to Vietnam in 1978. Hun Sen's desire to control the court so that it both supports his own political goals and does not embarrass either him or others in current positions of power is displayed in numerous speeches and the manner in which he has dealt with the court from the initiation of negotiations until the present. While stating general support for the court, the prime minister seems intent on ensuring that its operations are extremely limited in scope and that it neither brings charges nor develops evidence that portrays him or others in his government in an unfavorable light.[29]

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[27] Ibid, para.15.
[28] See 2003 Secretary-General Report.
[29] See Note 13, Supra.

Concern about the potential for political interference motivated the UN to include some extraordinary protections in the *Agreement* when it gave up on its former insistence on the court's being staffed by an independent international prosecutor and a majority of international judges. In addition to basic language mandating independence and compliance with international standards, the *Agreement* includes three unusual features to guard against, remedy, or respond to political interference. These include: 1) the requirement that judicial decisions be made by a supermajority vote; 2) a weighted dispute resolution procedure to resolve disagreements between the international and Cambodian co-prosecutors and co-investigating judges; and 3) an express provision allowing the UN to withdraw assistance to the court if the government of Cambodia does not comply fully with the *Agreement*.

The effectiveness of each of these procedures to date will be evaluated in turn.

A. Supermajority Voting Requirement in the Trial Chamber and Supreme Court Chamber

The majority of judges in each of the three chambers of the court is Cambodian. The Trial Chamber and Pre-Trial Chamber consist of five judges each: three Cambodian and two international. The Supreme Court Chamber consists of seven judges: four Cambodian and three international. In exchange for the concession by the UN negotiators that a majority of the judges be Cambodian, the *Agreement* provides that decisions of the chambers will require a "supermajority vote." Articles 4 and 7 of the *Agreement* mandate that a decision by the Trial Chamber and the Pre-Trial Chamber shall require the affirmative vote of at least four judges, and that five out of seven votes shall be required for a decision by the Supreme Court Chamber. It is designed as a bulwark against political interference in judicial decision making. If the Cambodian judges vote as a block under political pressure, their decision cannot carry the court without the vote of at least one of the international judges. As a tool to prevent government interference in the decisions of Cambodian judges, it is promising in theory—but of only limited use in practice.

The difficulties in applying the supermajority voting system are immediately obvious. They include: 1) potential for delay and judicial deadlock; and 2) ineffectiveness in critical circumstances.

Directions on how the supermajority voting system will work are scarce in the *Agreement* and the court's rules. At the Trial Chamber level, the *Agreement* provides merely that the judges "shall attempt to achieve unanimity in their decisions," but if not "[a] decision by the Trial Chamber shall require the affirmative vote of at least four judges." If there is no unanimity, "the decision of the Chamber shall contain the views of the majority and the minority."[30] These provisions are supplemented by the internal rules, which provide that "a conviction shall require the affirmative vote of at least 4 (four) judges. If the required majority is not attained, the default decision shall be that the Accused is acquitted."[31]

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[30] *Agreement*, Article 4, which states, "A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges."
[31] Rule 98(4).

The rules are not explicit about whether the supermajority voting requirement is intended to apply equally to minor decisions, such as a request for a public hearing, as to ultimate decisions on guilt or innocence, but the judges seem so far to operate on the assumption that the requirement applies to all judicial decisions. Thus, if the judges of the Trial Chamber are split three against two on any issue requiring a decision, there is a deadlock and, with the notable exception quoted above regarding an acquittal in the face of a deadlock, the *Agreement* and the rules provide no guidance as to how the court should proceed.

This situation puts pressure on the judges to reach decisions that are not split along Cambodian/international lines and, in the best of circumstances, may encourage thorough deliberation. However, to the extent divisions between the judges are split along Cambodian/international lines because of political pressure on Cambodian judges, the system leads to deadlock—and hence to significant control of the trial process by the Cambodian judges. This can be illustrated by an example. Assume that the prosecutors or defense counsel suggest that witness X, an influential government official, be called to testify at trial. If government leaders instruct the Cambodian judges that witness X should not be called, they will probably vote to deny the request, because their careers likely depend on following orders. If the international judges believe the testimony of witness X is relevant and they have concerns that the Cambodian judges are being forced by political pressure to reject the witness, they can vote in favor of calling witness X. This three-two vote leaves the court with no supermajority and, thus, no "decision" on the request. The rules provide no guidance as to how to proceed but potentially the witness would not be called because there is no affirmative decision in favor of it.

Another potentially relevant example would be a request of the prosecutors, over the objection of the defense, that Joint Criminal Enterprise (JCE) be applied as a theory of liability against an accused.[32] If the Cambodian judges vote "no" and the international judges vote "yes," no supermajority decision is achieved. The court would be at a deadlock with no guidance as to how to proceed. Assuming the result is that the motion to proceed with JCE does not prevail because it did not receive a supermajority vote, the minority vote of the Cambodian judges prevails—even if it was the result of political instruction and despite the lack of support from even one international judge. A contrasting example also leads to a deadlock: If the Cambodian judges vote as a block in favor of JCE and the international judges vote against it, the deadlock results in no decision and no JCE. Even if the judges split three to two along lines other than Cambodian/international, a deadlock results and no affirmative decision is possible. The outcome of such questions may depend more on the form in which the question is presented to the court than on a reason related to substance.[33]

On the most critical decisions of the Trial Chamber, the supermajority voting requirement is only partially effective in its goal of countering political interference. For instance, if the concern is

[32] In fact, counsel for Ieng Sary, Ieng Thirith, Nuon Chea, and Khieu Samphan have challenged the applicability of Joint Criminal Enterprise against their clients in the course of the investigation before the investigating judges. See, for instance, Ieng Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, January 22, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/538/D97_14_5_EN.pdf.

[33] The ambiguous nature of the supermajority voting requirement might produce a different substantive result depending on whether the motion regarding JCE requests the court to *preclude* the application of JCE or *include* its application.

that the Cambodian judges are improperly influenced to acquit an accused in spite of adequate evidence of guilt, they can easily accomplish this goal regardless of any actions taken by the international judges to counteract the interference. Under the presumption quoted above, without four votes for a conviction, an accused is acquitted. If the Cambodian judges decide to vote together to acquit an accused, the votes of the international judges are effectively meaningless. However, notwithstanding their formal powerlessness, the international judges can, through the power of written dissenting opinions, make clear their concerns about the acquittal. The potential public disclosure of such dissents may be a deterrent against political control in some circumstances.

In the contrasting situation, where there is concern that the government is influencing Cambodian judges to convict an accused in the absence of adequate evidence, the international judges, by voting together for an acquittal, can control the outcome and prevent this result by voting for an acquittal.

The court adopted the internal rule that an accused must be acquitted in the absence of a supermajority vote in favor of conviction as a protection of the fundamental right of the accused to be presumed innocent and to place of the burden of proof on the prosecution. That is an appropriate position for a court committed to international standards. The above examples point out not that the rule is wrong, but that the supermajority voting mechanism is not a fully effective measure to prevent political interference in judicial decision making at the Trial Chamber level.

The supermajority voting requirement may, under certain circumstances, prevent a decision that is controlled by political interference from prevailing. But it can also lead to a deadlock in situations where no political interference is present, and it does not prevent politically controlled decisions from prevailing in other circumstances. As a practical matter, the need to amass a supermajority vote on the range of issues that the Trial Camber must decide in the course of a lengthy trial delays the proceedings. This affects the efficiency of the court even if there is no political interference

The ineffectiveness of the supermajority voting requirement for the Trial Chamber is mirrored in the Supreme Court Chamber—with the exception that the requirement applies to seven judges rather than five, with four Cambodians and three internationals.

The Trial Chamber has completed the trial of Duch and the written judgment is expected to be delivered in July. While it is too early to tell if or how the supermajority voting requirement will affect the judgment, it did not appear to prove an obstacle in the trial itself. To the extent the judges were unable to reach unanimous decision on public issues, the disagreements did not fall along Cambodian/ international lines or result in deadlocks.[34] This is positive evidence that political interference was not an important factor in the conduct of the Duch trial, in which the accused apparently did not dispute his guilt throughout most of the proceedings.

[34] See Trial Chamber Decision on Civil Party Co-lawyers' joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character, October 9, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72_3_EN.pdf.

B. Dispute Resolution Procedure and Supermajority Voting in the Pre-Trial Chamber

Analysis of the impact of the supermajority voting requirement as it applies to the Pre-Trial Chamber is more complex because the chamber is charged, among other things, with resolving disputes between the co-prosecutors and co-investigating judges. During the negotiations leading to the *Agreement*, the parties expressed different views about whether the prosecutor and the investigating judge would be a Cambodian or an international appointment. The UN negotiators initially insisted that both positions should be international posts in order to protect the independence of the court. The government of Cambodia insisted that the tribunal should be as close to a domestic court as possible, with a Cambodian prosecutor and investigating judge. The compromise incorporated into the *Agreement* was a system of co-prosecutors and co-investigating judges, with one Cambodian and one international in each post. This arrangement, however, created the possibility of a deadlock if the two officials could not agree on a decision and did not fully resolve concerns about political interference in decisions about whom to prosecute and charge with crimes.

To deal with these problems, the *Agreement* provided for a specialized Pre-Trial Chamber charged with resolving disagreements between either the co-prosecutors or the co-investigating judges.[35] The original jurisdiction of the Pre-Trial Chamber was limited to resolving such disputes. While the judges, in the internal rules adopted in July 2007, expanded the jurisdiction of the Pre-Trial Chamber to include resolving pretrial appeals on a variety of issues, resolution of disagreements between prosecutors and investigating judges remains its basic function.

The *Agreement* and rules provide that if, respectively, the two co-prosecutors or the two co-investigating judges cannot agree between themselves on a decision, either one can file a notice of disagreement to be resolved by the Pre-Trial Chamber under the supermajority voting requirement. The *Agreement* further establishes a presumption that, absent a supermajority vote of the Pre-Trial Chamber to the contrary, recommended prosecutions and investigations will go forward. This provision is designed to meet the concern of the UN negotiators that the government of Cambodia would seek to protect certain individuals from prosecution or investigation. The process incorporated into the *Agreement* thus attempts to defeat possible political interference in the decision making of prosecutors or judges by mandating that any prosecution and investigation recommended by one of the prosecutors or investigating judges progress unless four (which would necessarily include at least one international judge) out of five judges agree that it should be curtailed.

The *Agreement* does not make clear, and the judges did not clarify the matter in the internal rules, whether or how the disagreement process should work for issues other than whether or not a prosecution or investigation should proceed. In such situations, where no clear presumption exists, the opportunity for deadlock when no supermajority decision is reached is present. In addition, neither the *Agreement* nor the rules provide any guidance for the standards to be applied by the Pre-Trial Chamber in resolving disagreements.

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[35] In the internal rules of the court, the judges expanded the jurisdiction of the Pre-Trial Chamber to include resolution of pre-trial appeals by the parties from decisions of the investigating judges.

C. UN Withdrawal of Support for the ECCC

The UN gave itself an exit strategy in Article 28 of the *Agreement*, which provides that "[s]hould the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers 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*." Thus, if the government does not allow the court to operate independently, the UN is entitled to withdraw from the process. Because the court is embedded in the domestic judicial system, proceedings could continue but, with the condemnation that a UN withdrawal would represent, further proceedings would likely have no international or domestic credibility. It is also unlikely that international financial support could be secured for the court under such circumstances. UN withdrawal would likely represent the end of the ECCC as a functioning or credible institution.

This provision gives considerable theoretical leverage to the UN in guaranteeing the court's independence. Holding ultimate authority over the continued life of the court should provide the UN with the ability to demand an end to any government actions that undermine the independence or other international standards of the court.

However, as experience has shown, the UN is unlikely to use this leverage even in the face of compelling evidence of political interference. The longer the court is in existence, the more extensive is the UN's investment (of time, money and political capital), and the less likely the UN appears to be to discuss, let alone exercise, this authority. As explored in more detail below, in the eighteen months since it became publicly known that the government was likely interfering to prevent the prosecution of additional suspects, the UN has not exercised its power of withdrawal. In their interactions with the government of Cambodia, UN officials have underscored the need for the court to be independent. And yet, no UN actions have been taken to remedy the specific concerns about the government interference in respect of Cases 003/004, or the summonsing of senior government officials as witnesses in Case 002. While the UN must be sensitive to the need to refrain from interfering itself in the judicial proceedings, it is troubling that the UN has not been more active in finding solutions to these problems.

The longer the court operates, the more funds are expended, and the longer accused persons are kept in pretrial detention, the more difficult any decision to withdraw from the ECCC becomes. Additionally, when the court has demonstrated some considerable successes and raised the expectations of Cambodians that they will see some justice for senior leaders of the Khmer Rouge, withdrawal becomes a less desirable option. The ECCC has been operating for over four years and cost nearly $100 million as of the end 2009.[36] It has concluded, successfully by nearly all accounts, the trial of Duch. Many Cambodians were highly engaged with the Duch trial and there is every reason to believe the interest in additional trials will be high. Indeed, it has been reported that a staggering 31,000 people attended the trial and nearly two million Cambodians have watched video footage of the trial.[37]

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[36] *See* Extraordinary Chambers in the Courts of Cambodia, "Revised Budget Estimates from 2005 to 2009," July 2008, at http://www.eccc.gov.kh/english/annual_reports.aspx.

[37] See, Opening speech by H.E. President Kong Srim at ECCC Plenary Session, February 2, 2010 at http://www.eccc.gov.kh/english/cabinet/press/145/02Feb2010Plenary-president-speech(Eng)_.pdf; and Brendan

These remarkable efforts and groundbreaking achievements would be seriously diminished if the court were to fail because political interference resulted in withdrawal of the UN from the *Agreement*. These factors counsel caution by the UN in using the withdrawal option, but they also significantly diminish the power of the withdrawal provision as a deterrent to political interference. Nonetheless, if overt political interference or corruption is not remedied immediately and results in an unfair trial, or if the supermajority provision is tested and fails to protect the integrity of the proceedings, the UN would have no choice but to withdraw from the court.

V. Testing Procedures to Protect against Political Interference

To date, there have been two instances in which the protective procedures of the *Agreement* have been tested by evidence of political interference. Neither instance has produced satisfactory results.

A. Prosecutors' Disagreement over Additional Suspects

The dispute resolution process of the *Agreement* was invoked on December 1, 2008 by International Prosecutor Robert Petit in an effort to secure the cooperation of his Cambodian colleague, Chea Leang, to submit the names of five additional suspects for charging and judicial investigation in Case 003/004. Chea Leang refused to participate in this submission, citing budget constraints and claiming that additional investigations are inconsistent with the *Agreement* and would undercut the continuing need for reconciliation in Cambodia. She did not dispute the sufficiency of the evidence to support proceeding against the named persons.[38] The manner in which this disagreement developed illustrates the complexity of the process designed to protect against interference and the potential for delay and manipulation that this built into it.

1. Cambodian Government Response to the Disagreement Process

In the months following the filing of the disagreement by the international prosecutor, high-level government officials issued a series of public statements making clear their intention to prevent any additional investigations from going forward. On March 18, 2009, Prime Minister Hun Sen, in a speech at the Ministry of Education, Youth and Sports, expressed concern that charging additional suspects would undermine peace in Cambodia.[39] In the same context he expressed disappointment that the Japanese government had in March, 2009 pledged $200,000 to the Cambodian side of the court because he hoped the ECCC would run out of money so that

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Brady, "A new TV Show is Rapidly Extending the Reach of the Khmer Rouge War Crimes Court to Cambodian Households," S*pecial to Global Post*, November 20, 2009 at http://www.globalpost.com/dispatch/asia/091116/cambodia-genocide-tribunal-television?page=0,0.

[38] Statement of the Co-Prosecutors, January 5, 2008 at http://www.eccc.gov.kh/english/cabinet/pres/84/Statement_OCP_05-01-09_EM.pdf.

[39] Following public announcement of this decision, the prime minister bluntly stated his objection to charges against any additional accused, implying that it will result in social unrest that may kill 200,000 to 300,000 people. Hun Sen's speech was recorded and broadcast by Voice of America, March 18, 2009. The prime minister had made similar statements before the chamber issued its divided ruling. See for instance, Neth Pheaktra and Georgia Wilkins, "Judges should Focus on Current KR Suspects: Gov't," *The Phnom Penh Post*, March 12, 2008; and Seth Mydans, "Corruption Allegations Sow Discord at ECCC**,"** *New York Times,* April 17, 2009; and

Cambodia could finish the trial by itself.[40] Government spokesman and Minister of Information Khieu Kanharith stated that foreign judges were "dragging their feet" over issues like charging more suspects and that "they should just go ahead with the first few [trials] to show that [the court] is working…Because [foreign judges] have a lot of money, they can afford to drag their feet…The longer they drag their feet the more money they get."[41] Such statements add confirmation to suspicions that the Cambodian prosecutor was objecting to the proposed additional prosecutions to appease political powers.

2. Pre-Trial Chamber Decision on Disagreement over Additional Suspects

Over eight months after the disagreement process was initiated, in a ruling dated August 18, 2009 and made public on September 7, 2009, the Pre-Trial Chamber ended the deadlock between the international and Cambodian prosecutors.[42] Not surprisingly, the judges were not able to reach either a unanimous or a supermajority decision. The judges voted along international/Cambodian lines, with the Cambodian judges supporting the position of the Cambodian prosecutor and the international judges agreeing with the international prosecutor and finding no basis to prevent the cases from moving forward. As a result, there were not the four votes required to stop the submission.[43] The chamber issued a complicated ruling that contained a joint description and discussion on preliminary issues, and separate opinions by the international and Cambodian judges on the substantive issues.

The Cambodian judges of the chamber offered two reasons why the cases against the five additional names should not go forward. First, they accepted a last minute argument of the Cambodian prosecutor that she did not know about or participate in the preliminary investigation of any of the additional suspects.[44] They concluded that a "unilateral" preliminary investigation was a violation of the *Agreement* and the internal rules and, therefore, invalid. The international judges dismissed this argument, not on its substance, but on the ground that it was submitted by

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Michael Heath, "Cambodia Pushes to Curb Khmer Rouge Court, Group Says," Bloomberg.com, July 22, 2009 at http://www.bloomberg.com/apps/news?pid=20601080&sid=a9471cEULOM8.

[40] Ibid.

[41] Neth Pheaktra and Georgia Wilkins, "Judges should Focus on Current KR Suspects: Gov't," *The Phnom Penh Post*, March 12, 2008.

[42] Statement Regarding Prosecutorial Disagreement, September 2, 2009 at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=308; and Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 72, 18 August 2009, http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version, and _Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71 (English). pdf , and Corrigendum. August 31, 2009, http://www.eccc.gov.kh/english/cabinet/courtDoc/426/Corrigendum_to_the_Considerations_of_the_PTC_Regarding_the_Disagreement_Between_the_Co-Prosecutors_Pursuant_to_Internal_Rule_71.pdf.

[43] Analysis of this Pre Trial Chamber is complicated by the secrecy surrounding the process. The rules provide that resolution of disagreements between the prosecutors or investigating judges be conducted *in camera,* Rule 71. Thus, the pleadings and arguments of the prosecutors were not made public.

[44] This was an obviously absurd argument as there were numerous reports about the prosecutor's considerations of additional prosecutions in the press in the months preceding the announcement of the investigation. See Erika Kinetz, "ECCC To Name More Defendants: Prosecutor," *The Cambodian Daily,* June 13, 2008; Mean Veasna, "Tribunal to Investigate More Former Leaders," *VOA Khmer,* June 13, 2008; and Douglas Gillison, "KRT Budget Shortened, Lowered to $142.6M," *The Cambodia Daily,* June 22, 2008. In addition, if the Cambodian prosecutor can defeat the international prosecutor's request to proceed with additional suspects by merely refusing to cooperate with the preliminary investigation, the protective presumption for resolving disagreements has little meaning.

the Cambodian prosecutor over six months into the process and, therefore, could not be considered as part of the disagreement originally outlined by the parties in November of 2009.

As a second basis for rejecting the additional submissions, the Cambodian judges found that the proposed submissions related to facts already before the investigating judges in Case 002. According to the Cambodian judges, the prosecutors' initial submission in Case 002, which named as suspects Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith and covered facts that "occurred in Cambodia territory during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979, which resulted in the death of between 1.7 and 2.2 million people," was so inclusive that it essentially covered all crimes within the jurisdiction of the court and thus prevented the prosecutors from making any further submissions relating to additional crimes or suspects.

In rejecting this argument, the international judges pointed out that both prosecutors limited the original submission in Case 002 to specific crime sites and made formal supplementary submissions when they wanted the investigating judges to investigate additional sites or crimes. The judges concluded that a submission interpreted as expansively as proposed by the Cambodian judges would be too broad to meet the specificity requirement of the internal rules. Further, they pointed out that if the prosecutors had tried to add the names of additional subjects to the existing investigation in Case 002, as suggested by the reasoning of the Cambodian judges, the rights of both the current accused in that case, as well as any new accused, would likely be prejudiced, as the Case 002 investigation had been proceeding for over two years and further delay to accommodate additional accused would likely be detrimental to them.

Strangely, neither the international nor the Cambodian judges addressed any of the original three reasons—budget constraints, possibly of civil unrest, and inconsistency with the *Agreement*—raised by the Cambodian prosecutor to justify her refusal to participate in additional submissions. After concluding that Cambodian prosecutor Chea Leang's claim that she did not know about the preliminary investigation and that the submissions were already subsumed in the Case 002 investigation were grounds for refusing the additional submissions, the Cambodian judges stated that no purpose would be served by considering the original grounds asserted. The international judges responded that it would serve no purpose for them to address issues not addressed by the Cambodian judges.

Concerns that the Cambodian prosecutor's refusal to agree to the additional submissions was a result of improper political consideration or instructions were bolstered by the repeated statements made by high government officials while the disagreement procedure was pending that additional accused would not be permitted or would create problems for the country.[45] These concerns were neither addressed nor lessened by the decisions of the Pre-Trial Chamber. The international prosecutor apparently did not raise concerns about political interference in the non-public pleadings he filed regarding the disagreement. As a result, although the chamber's 42-page ruling allowed the additional submissions to go forward, and the cases against the five additional accused to proceed to investigation (by virtue of the default provisions of the *Agreement* regarding the absence of a supermajority vote), it did not address any issues of real public concern regarding prosecutorial independence underlying the disagreement.

[45] See Note 40, Supra.

Assuming that political interference did influence the decision of the Cambodian prosecutor not to cooperate with the submissions, the presumptions and supermajority protections of the *Agreement* prevented her view from prevailing at the stage of the submission of the names of additional accused for investigation. They did not, however, ensure her cooperation in the ongoing investigation process.[46] Nor did they prevent similar political interference from occurring with regard to the investigation against the five suspects at the level of the investigating judges.[47] Importantly, because the decision was predictably split along Cambodian/international lines and did not directly address issues of political interference, it did nothing to enhance the court's reputation for independence.

3. Cooperation in Investigation of Additional Suspects
It remains to be seen if the government of Cambodia will accept the result of the Pre-Trial Chamber and cooperate fully with the investigation and processing of the additional submissions. The evidence to date in this regard is not encouraging.[48]

After the August 2009 divided ruling of the Pre-Trial Chamber, the international prosecutor submitted the names of five suspects to the investigating judges for formal investigation. The submissions were separated into two cases—referred to by the court as Cases 003 and 004 (or "003/004"). The names of the suspects and the factual basis for the submissions remain confidential. Following the public announcement of the Pre-Trial Chamber decision, the prime minister bluntly repeated his objection to charges against any additional accused stating, "If the court wants to charge more former senior Khmer Rouge cadres, the court must show the reasons to Prime Minister Hun Sen,....Hun Sen only protects the peace of the nation. I do not affect to the court issue." "Now, if you try the former Khmer Rouge leaders without thinking of peace and national reconciliation, war will happen again, killing 200,000 to 300,000 more, and who will be responsible for this?".[49] Further, he suggested that the international judges who issued the ruling

[46]The acting international prosecutor acted without the assistance or apparent cooperation of the Cambodian prosecutor in filing the additional submissions with the investigating judges following the rulings of the Pre-Trial Chamber, press release, "Acting International Co-Prosecutor Requests Investigation of Additional Suspects," September 8, 2009, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310.

[47]If the Cambodian investigating judge refuses to cooperate in the investigation process by directing investigative actions, signing charging and arrest orders or otherwise actively pursing the case against the additional accused, the burden will fall on the international investigating judge to file disagreement proceeding with the Pre-Trial Chambers. Given the delay that resulted form the prosecutorial disagreement (over nine months to reach a decision), a second round of disagreements would seriously affect the ability of the court to conclude its business in a reasonable time.

[48] To date there has been no public information indicating that the judicial investigation is yet proceeding in any way that would demonstrate the active cooperation of the Cambodian investigating judges or staff. See quote of ECCC press official: " …investigators have started studying the case files for Case 003 and Case 004," said Lars Olsen, a spokesman for the tribunal. "Concrete investigative steps are expected to start in some weeks' time." in Sok Khemara, "Tribunal Expected To Probe Further Suspects," March 12, 2010, *VOA Khmer,* at http://www.voanews.com/khmer/2010-03-12-voa5.cfm.

[49] Chun Sakada, "Hun Sen, Researcher in Row over Indictments," *Voice of America* report, September 7, 2009 at http://www.voanews.com/Khmer/archive/2009-09/2009-09-07-voa10.cfm?CFID=396327763&CFTOKEN=51413172&jsessionid=6630df5b7a509bfd7aa446173735309f4148. 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,

were receiving instructions from their governments, which wanted to destroy the peace in Cambodia.[50] Under the circumstances, this could not be regarded as a serious accusation grounded in fact, but rather an angry warning that, notwithstanding the judicial order that the cases move forward, the government would not cooperate.

The active engagement of both investigating judges and their staffs in processing Cases 003/004 is necessary to the proper functioning of the court, and will be a test of whether the government accepts, in spite of its prior objection, the court's determination that these investigations should proceed. It appears likely—and concerns have been raised confidentially by sources inside the ECCC—that Cambodian members of the staff will refuse to participate in the investigation and prosecution of the additional suspects in Cases 003/004.[51] Because the investigations are confidential, it is extremely difficult to monitor whether Cambodian staff are cooperating. Nonetheless, the publicly stated opposition to any additional investigation by the most powerful Cambodian government official, and indications that such instructions tend to be followed by Cambodian staff, raise significant concerns that the Pre-Trial Chamber's ruling that Cases 003/004 proceed is being ignored by the Cambodian investigating judge and not actively pursued by the international investigation judge. This state of affairs demonstrates the ineffectiveness of the processes in the *Agreement* designed to protect judicial independence.

Part of the difficulty in assessing the relative significance of political interference as a factor in preventing Cases 003/004 from going forward is that the international and national investigating judges, Marcel Lemonde and You Bunleng have indicated they are too busy to address the cases because of the Case 002 workload.[52] If the investigation of the case against the five additionally named suspects in Cases 003/004 were proceeding at a normal pace, it would soon become obvious whether the Cambodian officials are willing or able to cooperate in the investigation, or whether political instruction is playing a role to prevent them from participating. While it is always conceivable that the investigating judges could agree at the outset that the submissions lack sufficient factual basis to go forward and should, rather, be dismissed, it would be highly unusual to take such a step before undertaking active investigation on the case. The investigation process followed in the first two cases by the investigating judges involved a short initial investigation, followed by the arrest and charging of the suspects and then a full fledged investigation involving formal rogatory letters, investigative field missions, taking formal sworn statements, and, in the Duch case, arranging meetings between the accused and witnesses.

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[50] See Sopheng Cheng, "Cambodia PM Accused Other Countries of Stirring Unrest," Associated Press, September 10, 2009.

[51] At a September 26, 2009 victims outreach meeting, Chea Leang, when expressly questioned about the possibility of additional arrests and the desire of victims to see more than five accused before the court, refused to acknowledge the possibility of proceedings against suspects other than the original five charged persons. A Cambodian representative of the investigating judges' office made similar misleading remarks at the same meeting.

[52] See, Sok Khemara, "Tribunal Expected To Probe Further Suspects," March 12, 2010, *VOA, Khmer,* at http://www.voanews.com/khmer/2010-03-12-voa5.cfm, which alludes to the fact that the workload of the 002 Case is preventing active investigation in Cases 003/004. Now that the investigation in Case 002 is officially complete, absent rulings for additional investigation pursuant to appeals to the Pre-Trial Chamber, no information has been released to indicate the Case 003/004 investigation is being actively pursued.

These steps require active cooperation between the international and Cambodian judges. The signature of both co-investigating judges is generally needed to issue an arrest warrant or file charges against a suspect. If the two judges cannot agree on whether to issue an arrest warrant, one can act alone after he has filed a formal notice of disagreement with the court. If the other judge presses this disagreement for resolution by the Pre-Trial Chamber, the court will have to go through the same process followed to allow the international prosecutor to make the submission in the first place. The confidentiality of the investigative process prevents transparency about cooperation in the investigation and more definitive evaluation of the existence of political interference. The public will not know whether there is cooperation unless the judges exercise their discretion to release information about the process or the information is otherwise leaked or disclosed.

To date, the investigating judges have disclosed little public information regarding cooperation in Cases 003/004, and indeed there is every indication that, even nine months after the submission of the cases, there has been no substantial investigation to test whether there will be cooperation. In this way, the ECCC's process for resolving internal discord allows political interference to remain partially hidden. Nonetheless, the information that has emerged is troubling.

Recently, the court revealed a disagreement between the two investigating judges about proceeding with the investigation into Cases 003/004. International investigating judge Lemonde requested the signature of Cambodian investigating judge You Bunleng on an order allowing interviewing into "crime-base" evidence related to Cases 003/004. Judge You Bunleng initially signed the authorization for such investigation, but withdrew his agreement shortly after the order became public and a spokesperson from the Interior Ministry publically reiterated that "only the five top leaders [are] to be tried."[53] Judge You Bunleng cited the "current state of Cambodian society" as the reason for refusing to agree to any investigation of the cases.[54] He also indicated that any investigation in the cases could be considered again only after an indictment in the 002 Case was issued. This is an inherently political rationale. When added to the history of governmental objections to allowing Cases 003/004 to more forward independently, it supports the conclusion that political interference is improperly infecting decisions about the cases.

The internal rules allow the international investigating judge to file a formal "notice of disagreement" and proceed with some investigation without the cooperation of his Cambodian colleague. However, he cannot charge suspects or make arrests without such cooperation. In addition, operating without the cooperation of the Cambodian investigating judge may diminish the extent to which the investigation is seen to be authorized by the court as a whole.

Thus, the court limps along under what, by all available evidence, is the corrosive impact of political interference. Delay in addressing the interference gives the government cover to say that the additional cases cannot be pursued because it would extend the life of the court at a time

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[53] Douglas Gillison, "KRT Begins Investigations of Five new Regime Suspects," *The Cambodia Daily,* June 8, 2008.
[54] See official ECCC Press Release, "Statement from the Co-Investigating Judges," June 9, 2010.

when donors are slow in pledging funds. Some committed international staff are unlikely to want to stay at the court after the conclusion of Case 002 only to be involved in a case marked by conflict because of political efforts to control it.

One solution currently being proposed by some international officials to end the impasse over Cases 003/004 is that a "completion plan" be developed to wind up the work of the court. It is suggested that this plan involve allowing the ECCC to complete the investigation of Cases 003/004, with or without the cooperation of the Cambodian staff, and then turn any trial in the cases over to a court fully controlled by Cambodians (perhaps with some international technical assistance). In principle the strategy of transferring cases from a hybrid or international court to a domestic jurisdiction, once local capacity has increased to an acceptable threshold, is attractive. It has been applied as part of the completion strategy at the ICTY and ICTR with mixed success. However, for the strategy to be successful, the domestic jurisdiction must be demonstrably capable of functioning at an acceptable level, and there must be sufficient political will for trials to proceed independently.

Currently, there is little indication that Cambodia can provide fair trials without international assistance. To the contrary, there is strong indication that Phnom Penh is unwilling to proceed with trials in Case 003/004. With sufficient additional technical assistance from donors, members of the Cambodian judicial system who have improved their skill through involvement with the ECCC might well meet the necessary capacity requirements. But all the evidence indicates that the requirement of judicial independence could not be met. Accordingly, it is fanciful, if not disingenuous, to suggest that the ECCC can investigate the final case, and local courts can prosecute and try it.

B. Interference in Calling Witnesses in the Investigation of Case 002

The *Agreement*'s inadequacy in protecting against political interference was evidenced in a second example involving Case 002. International Investigating Judge Marcel Lemonde authorized for public posting on October 7, 2009 information about summonses sent to six high-ranking government officials and issued over his single signature.[55] The summonses sought the cooperation of these six officials in giving testimony to the investigating judges about facts at issue in Case 002. Compliance with court summonses is mandatory,[56] yet none of the served individuals agreed to appear as requested. If a person fails to comply, the investigating judge is authorized to "issue an order requesting the judicial police to compel the witness to appear."[57]

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[55] See official ECCC press release, "Number of Case Documents in Case 002 Published," October 7, 2009, http://www.eccc.gov.kh/english/cabinet/press/134/ECCC_Press_Release_7_Oct_2009_ENG-FRE.pdf. The persons summoned include Chea Sim, president of the Senate; Heng Samrin, president of the National Assembly; Hor Namhong, minister of foreign affairs; Keat Chhon, minister of finance; and two senators. The international investigating judge is authorized to takes steps such as issuing a summons on his sole signature once he has submitted a notice describing the action and noting that his counterpart refuses to agree or cooperate with the greffier of the Office of the Co-Investigating Judges, Rule 71(3).

[56] Rule 60(3).

[57] Ibid. If such an order is requested and the judicial police of Cambodia mandated to carry it out do not comply, further evidence of interference will exist. The rules do not obligate the investigating judge to take this step, but his failure to attempt it, even knowing it is not likely to succeed, would call into question his compliance with the obligation not to tolerate political interference in the work of the court.

The government of Cambodia has an express obligation under the *Agreement* to assist the investigating judges in actions, including the "service of documents" such as orders to bring a witness to provide testimony.[58]

Nonetheless, the response of government officials to the summonses was swift and explicit. A government spokesperson stated, "except for individuals who volunteer to go, the government's position is 'no' to this, even if they are called as witnesses," and that foreign officials involved in the tribunal "can pack up their clothes and return home" if they are not satisfied.[59] This direct endorsement of the refusal of witnesses to cooperate with court orders is a direct violation of Cambodian government commitments under the *Agreement*.

This example reveals yet another flaw in the operation of the provisions in the *Agreement* to protect against political interference. If when faced with evidence of interference, international officials of the court delay or are unwilling to invoke the protective provisions, they become complicit. Here, in spite of clear evidence of political interference with the appearance of witnesses, the international investigating judge chose not to take further action to seek enforcement of the summonses.

VI. Response of the United Nations and International Court Officials to Evidence of Judicial Interference

In negotiating and entering into the *Agreement* to establish the ECCC, the UN insisted in both the formal agreement and its public rhetoric that it would only participate in a court that met international fair trial standards, including internationals standards for judicial independence. Yet the UN remained largely silent when the prime minister made public statements demanding that the court not proceed against five of the suspects put forward for judicial investigation pursuant to the decision of the international prosecutor and the ruling by the Pre-Trial Chamber. The Public Affairs unit of the court suggested that the court acted independently and did not listen to the admonitions of the prime minister.[60] But these reassurances rang hollow given the political realities in Cambodia and the confirmations from both international and Cambodian staff inside the court that Cambodian officials would not cooperate with the investigation of any additional cases beyond the senior leaders in Case 002.

There is no indication that senior UN officials engaged with the prime minister, or with Deputy Prime Minister Sok An, responsible within the government for ECCC matters, to insist on full cooperation with the processing of Cases 003/004 and the summonsing of witnesses in Case 002. Over the past two years, since the Cambodian government's intransigence with respect to these matters became publicly apparent, representatives of the UN Office of Legal Affairs (OLA) traveled to Phnom Penh on numerous occasions to meet with government officials. No evidence

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[58] *Agreement*, Article 25 states: "The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges,

[59] See Note 39, Supra.

[60] See for example, quote of Knut Rosandhaug, deputy director of the ECCC, in Douglas Gillison, "Ieng Sary's Attorneys Seek Public Hearing on Int'l Judges," *The Cambodia Daily,* October 22, 2009; and Robbie Corey-Boulet and May Titthara, "Filing to Urge Genocide Charge," *The Phnom Penh Post*, October 22, 2009.

has emerged to suggest that the UN officials ever directly addressed the specific evidence of political interference and demanded it cease.

The failure of the highest UN officials to deal proactively with the evidence of interference is compounded by the general leadership problems at the court. Unlike other war crimes tribunals, the ECCC has no registrar, and no single judge with the status of president of the chambers, and it has dual prosecutors and investigating judges. There is thus no one in a position to exert the kind of leadership within the institution that is necessary to deal with political interference. While all international officials of the court have an obligation to bring to the attention of the UN any evidence of political interference, they are not in position to liaise directly with senior officials of the government of Cambodia to solve the problem. Had the court been staffed with a high level international registrar with the stature to deal with the government, it would have been better served.

To date, few of the international officers and staff of the ECCC have publicly expressed explicit concern about evidence of political interference. The lone exception has been Trial Chamber Judge Silvia Cartwright, who stated, weeks after the prime minister had expressed his opposition to a third or fourth case, that "[c]ountries where the rule of law is respected and where their citizens can be sure of a fair trial are those in which the independence of the courts and judges is guaranteed. Comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence are therefore to be deplored."[61]

Defense counsel for several accused have filed motions requesting investigation of evidence of political interference into the decision-making of judicial officers. Most recently, the defense team for Nuon Chea filed a motion requesting the removal of Cambodian investigating judge You Bunleng on the ground that his "un-signing" of the request for investigative action in Cases 003/004 demonstrated that his judicial decisions were improperly influence by political considerations.[62] This filing was reported in the press, but has not been make public by the court—reinforcing concerns that court officials are masking claims of political interference behind overly broad assertions of judicial confidentiality.

With limited exceptions, both the UN and the international officers of the court have met indications of political interference with public silence. A stated rationale for this position is that no actions should be taken that might cause Cambodian officials to cease cooperation with the 002 Case, viewed by many as the most important case because it involves the most senior living leaders of the Khmer Rouge. Several international officials have privately expressed concern that they must take care not to press on Cases 003/004 because then Cambodian officials would cease cooperation on Case 002.

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[61] Maggie Tait, "Interference 'Deplored' by Judge," NZPA, April 5, 2009, at http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge. See also statements made by Robert Petit after he left his post as international prosecutor, in Jared Ferrie, "This Country has a Long Way to Go," *The Globe and Mail,* September 7, 2009 at http://www.theglobeandmail.com/news/world/this-country-has-a-long-way-to-go/article1276808/, quoting Mr. Petit, "It's obvious that some people in the government, from the prime minister downward, think they have a right to tell the courts what to do here," he said in an interview, addressing the issue of political interference in Cambodian courts. "It's not their job to take that on. It's mine. It's the court's."

[62] Douglas Gillison, "Nuon Chea Team Accuses You Bunleng of Political Bias**,"** *The Cambodia Daily,* June 28, 2010.

Such calculations seem ill-advised. It is a theoretical possibility that by insisting that the court operate free of political interference, the UN may force the Cambodian government to abandon the ECCC rather than accept proceedings against persons it wishes to protect. But the UN has never tested whether this result is inevitable. Prior experience indicates that the government of Cambodia is interested in demonstrating that the ECCC is seen to be credible and, when pressed, will make necessary changes to ensure that the court does not fail.[63] Regardless, it is certainly contrary to the court's goal to end impunity if one case is allowed to succeed at the expense of addressing political interference in another.

Moreover, the stated reasoning assumes that the basic fairness and integrity of the ECCC can be evaluated by looking at each case in isolation rather than at the institution as a whole. Thus, the reasoning goes, the fact that Cases 003/004 are deeply marred by political interference does not affect the evaluation of the fairness of the trials in the 002 Case or in the Duch case. Those in favor of this argument cite the Duch trial, which, notwithstanding the surrounding controversy about corruption and political interference, seems to have been a compelling and rewarding event for many Cambodians. Thus, it is said, the Cambodian public's evaluation of the value of the Duch trial does not seem to be undercut by concern about political control over who else is brought before the court. The same situation may well be the case if the Case 002 trial goes forward in a basically fair manner, free from interference by political players (assuming interference with the summonsing of witnesses is addressed).

But this argument overlooks surveys which indicate that a majority of Cambodians would like to see more persons tried by the ECCC than the first five charged.[64] Furthermore, it ignores the principal role that judicial independence plays in determining whether international fair trial standards are met. If judges or other key court officers, including prosecutors and investigating judges, are allowed to operate independently when it suits the interest of the government but are prohibited from doing so when it does not, the general proceedings of the court do not meet basic standards for independence. If the government gets to pick and choose which cases go forward, the court is not operating independently. Not only does the situation create unfairness in the choice of who is prosecuted, but it demonstrates that judicial and other court officials are responsive to political direction and therefore raises questions about the impartiality of the officials in other cases that were seemingly free of outside influence.[65] In addition, such an approach seriously undermines any hope that the ECCC could serve as a model of justice for the domestic courts in Cambodia..

The reluctance of international officials to take action in the light of evident interference may also stem from their understandable desire not to embarrass their Cambodian colleagues, or a fear of damaging the reputation of the court by airing improper actions. Others reason that if they

[63] When allegations were made public that Cambodian staff were required to pay substantial kickbacks from their salary to ECCC officials in order to secure and maintain their jobs, a number of donors and ECCC officials claimed that pursuing an end to the practice was fruitless and might destroy the ECCC. However, when the issue was vigorously pursued, the government of Cambodia took significant steps to address the corruption problem.
[64] See Phuong Pham, Patrick Vinck, Mychelle Balthazar, Sokhom Hean, Eric Stover, "So We Will Never Forget," Human Rights Center, University of California, Berkeley, January 2009, at http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf.
[65] See Group of Experts Report, Paras.133 and 134.

delay dealing with the problem, it may go away. These are short sighted rationales for tolerating political interference and ignore the corrosive and accumulating impacts on the institution. Indeed, several Cambodian officials and staff of the court have stated confidentially that they wish the international officers would be stronger and more vocal in standing up for the integrity of the institution, because that stance would give the Cambodians more ammunition with which to resist attempts to improperly influence their work.

Likewise, the existence of tools to deal with political interference—including the dispute resolution system for disagreements between Cambodian and international prosecutors and investigating judges and the supermajority voting requirement for judges—does not mitigate the obligation of officials of the court to take other affirmative actions, such as making public statements or filing complaints with the UN or the government of Cambodia, in response to concerns about political interference. To view these flawed tools as the sole means of dealing with evidence of political interference would amount to an excuse for tolerating political interference. Court official have an overriding obligation to address effectively all evidence of political interference regardless of whether the protective tools are evoked or effective. This is necessary to protect the absolute right of the accused to trial by an independent tribunal.

The ECCC also faces the additional problem of insisting that the government of Cambodia cease political interference at a time when it is trying to raise funds for a growing court budget.[66] It is obviously difficult to raise funds from either new or existing donors while actively challenging the Cambodian government to cease its political interference. Donors will wonder if their funds are being appropriately used. Nonetheless, the fundraising needs of the court do not justify silence. The threat of political interference is not a secret. Addressing it is essential to ensure the integrity of the court and to convince donors to contribute sufficient funds. The Justice Initiative has been criticized by some for publicly raising concerns about the ECCC, and ostensibly harming fundraising. Our view, however, is that candid oversight and monitoring of the court's achievements and problems, coupled with effective efforts to correct problems, are essential if the ECCC is to command adequate resources to complete its mission. The repeated reluctance of international officials to acknowledge and deal with the problem of political interference only further entrenches the problem.

Donors, including many who insisted that the court be established under the terms of the *Agreement*, would serve the court better by affirming their commitment to adequately fund the court so long as it demonstrates compliance with international standards. Donor failure to commit to adequate funding if the court operates according to the *Agreement* creates a false incentive for others to whitewash, rather than confront, the significant problems of the court.

The Cambodian government's resistance to true judicial independence is unlikely to change without more consistent and public pressure from the UN and the donor community. The

[66] The approved budget for 2010-2011 is $87.1 million and the court is projected to last into 2015. Key donors are indicating unwillingness or inability to continue current funding levels. In April 2010, the court indicated that Cambodian staff, paid through the Cambodian portion of the budget, would only receive one half of their salary because there were insufficient funds to pay full salaries. In May 2010 there will be no salary available for Cambodian staff. Funding is slated to run out on the international side in June without additional pledges and payments of funds.

measure of success is clear: active cooperation by Cambodian court officials in the investigation of Cases 003/004, and by the government in facilitating the attendance of the summonsed government witnesses in Case 002.

VII. Transparency and Protecting against Political Interference

Transparency is an essential tool to defeat political interference.[67] Transparent proceedings are important to both deter political interference and to monitor if it is occurring. Attempts to interfere with judicial independence are easily hidden. It is only by ensuring transparency throughout the entire judicial system—from the appointment of judges to the reasoning of judicial decisions—that the public has a chance to determine if the process is free from impropriety.. A non-transparent system does not mean that political interference is occurring, but it makes it much more difficult to observe and stop. In a country with Cambodia's history of an ineffective judiciary, it also breeds cynicism about the process.

Confidentiality is necessary to protect the rights of witnesses who may be subject to pressure or retribution, and of the investigative process to proceed without interference that may undermine the effectiveness of the process. And yet, in many instances it is possible for court officials to act more transparently without jeopardizing the security of victims or witnesses. Absent demonstration of a compelling need for confidentiality in a concrete matter, rules favoring transparency should govern, in order to allow the public to observe the work of the court. At the ECCC, the balance struck between confidentiality and transparency at the pretrial phase of the proceedings has been inappropriate. The internal rules of the court provide "[i]n order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality."[68] The investigating judges have interpreted this provision aggressively, on several occasions issuing warnings to defense counsel who have released information about their legal positions to the pubic without express permission from the investigating judges.[69]

An example of the effective use of transparency is the decision of the international Investigating Judge Marcel Lemonde to publish on the ECCC website the names of the five witnesses that he summoned for testimony, but who refused to appear.[70] That action helped shed light on an example of political manipulation, but unfortunately was a rare event. In contrast, a ruling of the Pre-Trial Chamber that its opinions resolving disagreements between prosecutors or investigating judges would be made public only at the unguided discretion of the chief administrative official of the court was a step backwards in developing a more transparent

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[67] See Keith Henderson, Violaine Autheman, Sandra Elena, Luis Ramirez-Daza and Carlos Hinojosa, "Judicial Transparency Checklist, Key Transparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms," IFES, Summer 2003 at http://www.ifes.org/files/rule-of-law/Tool-kit/Transparency_Checklist_EN.pdf.
[68] Rule 56.
[69] See Co-Investigating Judges issue Order on Breach of confidentiality of the judicial investigation, March 3, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/248/D138_EN.pdf; and Order Issuing Warning Under Rule 38, February 25, 2020 at http://www.eccc.gov.kh/english/cabinet/courtDoc/556/D367_EN.pdf.
[70] See for example, September 25, 2009 letter from Judge Marcel Lemonde to summonsed witness Hor Namhong posted on ECCC web site at http://www.eccc.gov.kh/english/cabinet/courtDoc/451/A299_EN.pdf.

process.[71] It allows the judicial decisions most likely to deal with political interference to be buried from public scrutiny.

Recently, there have been news reports that significant Pre-Trial Chamber filings or decisions relating to claims of political interference have been ruled by the court as "confidential."[72] It is impossible to judge the appropriateness of keeping specific documents secret because we do not have access to them. However, making confidential the filings of parties and rulings of judges in order to protect the court from embarrassment is a misuse of the secrecy rights of the court and can easily contribute to a cover up rather than a solution to the perception of political interference.

Under such circumstances it is difficult for outside observers to determine whether the court is complying with international fair trial standards and avoiding political interference during the pretrial stage. As a consequence, the court and the public must rely on the willingness of the judicial and prosecutorial officers, particularly international staff, to actively address evidence of political interference. To the extent that it is necessary to keep proceedings secret, the burden on court officials to respond swiftly to evidence of interference increases.

The trial stage of the proceedings has much greater protections against political interference because it is conducted largely in public. The evidence, arguments of counsel, and responses of the judges are generally open to public observation. The Trial Chamber in the Duch case took pains to ensure that essentially all of the trial took place in the presence of the public. No doubt, the focus on transparency of the proceedings added to the credibility with which the Cambodian public received the trial process.

VII. Conclusions and Recommendations

Concerns about judicial independence and political interference at the ECCC led to the inclusion in the *Agreement* of complicated and unusual provisions to address them. In the court's first four years, these protective provisions have shown their inadequacy. Hun Sen and key players in the Cambodian government seem content to allow the court to operate without interference on cases such as that against Duch—a Khmer Rouge prison warden without current political connections—but are unwilling to let the court operate independently if its operations potentially affect current government officials or those it wishes to protect.[73]

The *Agreement* has not succeeded in guaranteeing the independence of the court. It allows the government of Cambodia, if it wishes, to control whether the court operates independently, and to date there has been little push back from court officials, the UN, or donors. Thus, as predicted

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[71] Fortunately, the director of administration determined to release publicly a redacted version of the ruling on the prosecutors' disagreement about additional suspects.

[72] See Douglas Gillison, "Nuon Chea Team Accuses You Bunleng of Political Bias**,"** *The Cambodia Daily,* June 28, 2010, and Douglas Gillison, "KRT Prosecutor Says Journalists Face Prosecution," *The Cambodia Daily,* June 10, 2010. The chamber indicated that it is preparing redacted versions of some of these filings for publication in the *Court Report*, June 2010, http://www.eccc.gov.kh/english/cabinet/fileUpload/153/The_Court_Report_%5BJune_2010%5D_REVISED_VERSION2.pdf.

[73] See Experts Report, paras. 96, 97, and 98, for an expression of their concerns in this regard.

by UN Secretary-General Kofi Annan,[74] the success of the ECCC ultimately rests with the political will of the Cambodian government.

While the challenges to the independence of the court have been and remain serious, it is not too late to address them. The UN, donors, and the international officials of the ECCC must take effective action when confronted with evidence of political interference and threats to judicial or prosecutorial independence. They must also practice and insist on greater transparency to better ensure that any attempted interference is known and addressed.

The ECCC is one of a number of courts established in recent years to end impunity for massive atrocity crimes. It is unique in its attempt to provide justice that both meets international standards and is deeply embedded in a national judicial system where the government's political commitment to justice remains so seriously in question.[75] The presence of the ECCC proceedings in Cambodia and the opportunity for Cambodians to both participate in and observe the proceedings have seemingly made the ECCC more relevant to the affected communities than international tribunals which operate far afield of the affected country.

Nonetheless, the court's life has been fraught with challenges and controversy that to date have prevented it from establishing itself as a legitimate institution that generally meets international fair trial standards. Evidence of political interference in decisions about who is prosecuted and who is called as a witness is damaging the overall legitimacy of the ECCC. Unless it changes course, the ECCC is in danger of failing.

Recommendation for Immediate Action:

1. The UN, Donors, and International Officials of the ECCC Should Demand a Public Demonstration that Political Interference Has Ceased

Although the first trial conducted by the ECCC appeared to be a fair proceeding unmarred by political interference, it is too early to extend that conclusion to the court as a whole. Troubling evidence exists that the Cambodian government is improperly attempting to limit what the court can and cannot do. To protect the overall credibility of the ECCC, the specter of political interference must be immediately removed. Cambodian and international officials must show they are fully cooperating to ensure witnesses are not allowed to ignore summonses from the court, and the investigation into the additional cases submitted by the international prosecutor is being pursued vigorously and in good faith. This cooperation must be evidenced publicly so as to demonstrate independence to the audience that matters most: the Cambodian people.

2. The Court Should Implement Greater Transparency Requirements and Practices at all Levels of the ECCC

It is often extremely difficult to detect political interference. It typically happens behind closed doors, is subtle and is often cloaked in credible but disingenuous language. Political interference

[74] See Secretary General Report, para. 30.

[75] Other war crimes chambers have been situated within domestic courts, such as in Timor Leste, Bosnia, and Kosovo, but these did not or do not have as many challenges (including capacity, corruption, and independence) as the domestic courts in Cambodia. In addition, the other war crimes courts have been somewhat differently designed.

is made easier in courts when the process is confidential and conducted behind closed doors. This situation is magnified in the civil law system such as that used at the ECCC where the entire judicial investigation is fully confidential, subject only to discretionary decisions by the investigating judges to release information.

No government wants to be seen as manipulating what it is touting as an independent judicial process. The more transparency that exists in how cases proceed and how key decisions are made, the more difficult it is to hide political manipulation. Courts should maximize their transparency in order to minimize opportunities for political interference.

Mistrust of judicial institutions is likely to be high in post conflict states where hybrid tribunals are appropriate. Secrecy reinforces this mistrust and is fatal to the credibility of a public institution such as a court. Hybrid tribunals should be established and operated so as to maximize transparency.

The ECCC should develop much more finely tuned policies to promote transparency except where absolutely necessary to protect a legitimate and specific interest such as the safety of a witness or the integrity of the investigation. The presumption of the court should shift dramatically toward openness, even at the pretrial stage. This step would increase public confidence in the process and provide both greater deterrence and clearer evidence of attempts at political interference.

3. The UN Should Clearly Define the Role of International Officials
From the negotiations that led to the ECCC, it is clear that international officials are expected to play two roles: building the capacity of domestic officials, and guaranteeing the court meets international fair trial standards. The UN insisted on the various provisions, including supermajority voting requirements and international co-prosecutors and co-investigating judges, not to build the capacity of the Cambodian officials, but to ensure that political manipulation did not mar the process.

Yet many international officials at the ECCC see their role as limited to that of advisors providing technical assistance as opposed to guardians of international standards. The obligation of international officers of the court to proactively address political interference should be made more explicit. While international officials need not be overseers of their national colleagues, they must be active guardians of the integrity of the court and cannot ignore or acquiesce to situations where political interference is apparent. This responsibility is heightened to the extent processes are held in secret. The UN should make public the mandate that international officials of the court have an obligation to take necessary steps to guard the integrity of the court when presented with evidence of political interference or other wrongdoing.

4. The UN and the ECCC Should Foster Effective and Experienced Leadership
The lack of effective leadership at the ECCC has created institutional problems for the court since its inception. Unlike other international or hybrid tribunals, the ECCC has no registrar or president—no official who has overall management authority and responsibility for the court. Whether by design or circumstances, no one has authority or responsibility to ensure all the offices of the court—the chambers, prosecution, investigating judge, victims support section and

court administration—all work together to support the goals of the institution in a manner that meets international standards. This situation is compounded at the ECCC because of the presence of joint Cambodian and international officials in each significant position of the court.

Ideally, a person in the central leadership role of a hybrid court would have the comparative experience and international stature to make and enforce administrative decisions impacting all aspects of the court. While the judges would maintain full authority over all judicial matters, a registrar should be able to work closely with judicial officers to ensure that the court operates effectively.

The ECCC shows that the leadership role must extend to dealing with high level political officials in the country where the court is located. The lack of such adequate leadership is not repaired by the periodic presence of high level UN officials. While helpful, the practice of UN officials visiting Phnom Penh and the court when the most difficult problems arise has proven insufficient. The recently announced appointment of a senior UN advisor to focus on ECCC issues, including politically sensitive issues such as political interference, is an important and long overdue step. The court would have been better served by empowered and sustained high level leadership from the beginning of its operations, and the new appointee must act with dispatch to deal with the pressing problem presented by evidence of political interference.

5. ECCC Donors Should Commit to a Sustained Source of Funding

The ECCC is funded by voluntary contributions from donor states. It must seek renewed and additional funds from donors each year. This process is made difficult by the fact that the ECCC, like all other internationalized courts, has lasted longer and costs more than expected when it was formed. Donors lose interest in ongoing funding after a few years, establish different funding priorities or undergo dramatic political changes in their own country. This need to raise funds annually from a variety of states exacerbates the willingness to deal openly and effectively with problems such as political interference.

The UN, donors, and international officials are seemingly reluctant to directly address problems of political interference partly because doing so may hinder fundraising for the court. As fundraising difficulties get to a critical state, as experience has shown is inevitable with voluntary funding schemes, there is huge reluctance to acknowledge any significant problems with the institution in the hope that donors will not get unduly discouraged and cease or reduce contributions. Pretending problems do not exist is not the best way forward for any institution.

Secure, sustained funding of a court such as the ECCC allows the UN and court officials far greater leeway to insist on necessary changes without feeling like they are running the risk of undermining the court. This must be accomplished by insisting on a system that ensures adequate funding is available so long as the court if functioning according to its mandate. Voluntary funding schemes, such as that used at the ECCC, do not meet this requirement and can encourage a passive approach to addressing fundamental problems at a court.

Donors to the ECCC and any other such courts would assist in addressing the challenges of political interference by committing adequate long term funding that is conditioned on a

demonstration of compliance with international standards. While ad hoc courts cannot be allowed to exist in perpetuity, they must be funded adequately to fulfill their core mandates.

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