

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

MARCH 2013

THE DEATH OF IENG SARY, ONE OF THE THREE ACCUSED IN Case 002 at the Extraordinary Chambers in the Courts of Cambodia, cast into sharp relief the many delays and difficulties that threaten to deny justice to the victims of the Khmer Rouge. The court continues to struggle with Case 002, while the specter of political interference haunts Cases 003 and 004, and a funding crisis hangs over the entire institution. This report examines recent events at the court and offers recommendations for action by the UN, the Royal Government of Cambodia, and the court's donors.

This report is part of a series issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at <http://www.opensocietyfoundations.org/topics/international-justice>.

I. EXECUTIVE SUMMARY AND RECOMMENDATIONS

There have been several dramatic developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since the Justice Initiative's last report was published in October 2012.¹ This report will focus on recent developments in Cases 002 (including the death of Ieng Sary), 003, and 004, as well as the funding issues which continue to plague the court.

Case 002, which has been underway for 16 months, focuses on charges of crimes against humanity, war crimes, and genocide for atrocities committed throughout Cambodia by the Khmer Rouge. The trial suffered a major setback with the death on March 14, 2013 of accused Ieng Sary, former minister of foreign affairs and member of the Khmer Rouge's standing committee. Charges against Ieng Sary's wife, Ieng Thirith, were severed from the trial in 2011 when she was found unfit to stand trial because of increasing symptoms of Alzheimer's disease. Case 002 will now continue against Nuon Chea, 86, former deputy secretary of the Khmer Rouge known as "Brother Number 2" to Khmer Rouge leader Pol Pot, and Khieu Samphan, 81, former Khmer Rouge head of state. Given the important role that Ieng Sary played in the overall leadership of the Khmer Rouge, his death will significantly diminish the scope of any judgment in Case 002 with respect to accountability for Khmer Rouge crimes. With the charges against him terminated by his death, he remains entitled to a legal presumption of innocence, and his role in the movement and its crimes—like those of Pol Pot and Ta Mok, who also died before facing any accountability proceedings—will now be left to history to judge.

Additionally, trial progress in Case 002 has been stalled by a February 8, 2013 Supreme Court Chamber ruling that the Trial Chamber's 2011 division of the trial into a series of smaller trials was improper. The Trial Chamber is now deliberating over how to rejoin the severed portions of the original indictment under the guidelines provided by the Supreme Court Chamber. A decision is not expected until late March 2013 at the earliest, and it remains unclear how reconsideration of the severance of the case will affect the scope or length of the trial.

In a third significant development, trial proceedings to hear expert witnesses were postponed indefinitely on March 4, 2013 when the Cambodian members of the interpretation and translation unit announced a work stoppage because they had not been paid in over three months. Funds provided by the European Union to pay December salaries temporarily halted the strike, but it remains uncertain when funds will be available for 2013 salaries and if staff will strike again if the matter is not resolved soon.

¹ Open Society Justice Initiative, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia: October 2012*, (hereinafter "October 2012 Report") available at: http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf.

The diminishing number of defendants in Case 002 only underscores the importance of resolving the fate of Cases 003 and 004 through an impartial, judicial process. In this regard, there are modestly encouraging signs of progress, despite evidence that the Cambodia government continues to seek to derail the cases. Cases 003 and 004 involve a total of five suspects who operated at a level of authority one rung lower than the senior leaders on trial in Case 002. International Co-Investigating Judge Mark Harmon (USA), arrived at the ECCC in October 2012, five months after his predecessor, Laurent Kasper-Ansermet (Switzerland), resigned. Judge Harmon—who became the fourth international co-investigating judge since the court’s founding—has announced that the international side of the Office of Co-Investigating Judges is actively investigating both cases. The court’s recently released budget indicates that it is planning adequate staffing for full investigation of the cases.

This report offers recommendations for improving the court’s performance; looks at recent developments in Cases 002, 003, and 004; and then examines the serious funding issues facing the court and their consequences, including the walk-out of Cambodian staff in the translation and interpretation unit.

RECOMMENDATIONS

TO THE UNITED NATIONS

To United Nations Special Expert to the Secretary-General on the UNAKRT, Amb. David Scheffer; to United Nations Under-Secretary General for Legal Affairs and Legal Counsel, Ms. Patricia O’Brien:

Urge the Royal Government of Cambodia (RGC)—both publicly and privately, as appropriate—to desist from engaging in any and all forms of political interference in the judicial process.

Closely monitor the independence and progress of the trial in Case 002 and the judicial investigations in Cases 003 and 004, while observing the confidential nature of the investigative process.

Seek immediate resolution to the funding impasse that is preventing the timely payment of salaries to Cambodian staff and the hiring of any additional staff needed for the ongoing investigations and trials.

TO THE ECCC

To the Administration:

Take all necessary steps to ensure that adequate budgetary and staffing provisions are made in a timely manner for all cases before the court.

Seek immediate resolution to the funding impasse that is preventing the timely payment of salaries to Cambodian staff and the hiring of any additional staff needed for the ongoing investigations and trials.

To the Victims' Support Section:

Develop a plan and press for a budget for active outreach to inform Cambodians who may qualify as civil parties in Cases 003 and 004 of their rights to participate.

To the Co-Investigating Judges:

Give clear instructions to the court's Victims' Support Section and Public Affairs Section to ensure that outreach to potential victim-complainants and civil parties in Cases 03 and 004 is conducted as soon as possible.

To the extent possible, and observing the confidential nature of ongoing judicial investigations, ensure that there is transparency in decision-making and public information about Cases 003 and 004.

Take all appropriate steps to ensure that the investigation and decision-making in Cases 003 and 004 are undertaken expeditiously and free of political influence.

Consider including gender-based violence committed during the Khmer Rouge period in the investigation and any proposed indictment in Cases 003 and 004.

TO THE ROYAL GOVERNMENT OF CAMBODIA

Publicly commit to ensuring the independence of the investigative and judicial processes in Cases 003 and 004 in particular, and in all cases before the court.

Contribute adequately to the financial support of the court to ensure that it can complete its work on existing cases. Take steps—including making financial contributions—to effect immediate resolution to the funding impasse that is preventing the timely payment of salaries to Cambodian staff.

TO THE COURT'S DONORS

Ensure the provision of adequate financial resources to the ECCC until the court has completed its work on all cases currently before it. Ensure that all branches of the court are provided with adequate funding to complete all cases currently under investigation, including 003 and 004.

Remain engaged in the totality of the court's caseload, insisting—both privately and publicly, as appropriate—that decisions made within the court are based on facts and law, and not extraneous considerations. Insist that the ECCC is as transparent as possible in all administrative, judicial, and prosecutorial decision-making.

II. THE SENIOR LEADER TRIAL: CASE 002

Case 002 has been heralded as the ECCC's landmark case for ending impunity for Khmer Rouge atrocities. The case represents the first time senior leaders of the Khmer Rouge regime have been brought to justice through an internationally endorsed process.²

The trial in Case 002 began on November 21, 2011 against three accused: Ieng Sary, Nuon Chea, and Khieu Samphan. Ieng Sary died on March 14, 2013 and all proceedings against him have been terminated.³ There is no clear indication of when the trial against the remaining accused will be completed, as it has been beset by delays due to the need to reevaluate the severance of the case into smaller trials, health problems of the remaining accused, and, most recently, the walk-out of Cambodian staff from the translation and interpretation unit because they have not been paid for months.

A. Death of Ieng Sary

While a blow to the work of the ECCC, the death of Ieng Sary was not completely unexpected. He had been growing increasingly frail as the trial progressed and was hospitalized several times over recent months. His condition resulted in trial delays and arguments from his counsel that he, like his wife, was not physically and mentally able to follow the trial and meaningfully participate in his own

² Between August 15-19, 1979, Khmer Rouge leader Pol Pot (now deceased), and Foreign Minister Ieng Sary (now on trial before the ECCC), were tried *in absentia* by a Vietnamese-backed court through a process widely described as a show trial. See Judgment of the People's Revolutionary Court, Doc. U.N. A/34/491, 19 August 1979. See also <http://www.reuters.com/article/2008/07/03/uk-cambodia-rouge-idUKBKK25945020080703>.

³ Termination of the Proceedings against the Accused Ieng Sary, Trial Chamber Order, March 14, 2013, available at <http://203.176.141.125/en/document/court/termination-proceedings-against-accused-ieng-sary>.

defense.⁴ Additional hearings on his fitness to stand trial had been scheduled for late March 2013. All of these proceedings are now terminated.

Case 002, and particularly the death of Ieng Sary, demonstrates the grave difficulties associated with trying individuals as elderly as Ieng Sary (who was 87 when he died) Nuon Chea (86), Khieu Samphan (81), and (formerly) Ieng Thirith (81). As discussed in the February 2012 *Update Report*, the Trial Chamber found Ieng Thirith (Khmer Rouge minister of social action and wife of Ieng Sary) mentally unfit to be tried and severed her from the proceedings.⁵ She was released from ECCC custody in September 2012. The chamber found that, because there was little likelihood that Ieng Thirith's condition would improve, conditions on her release were inappropriate. The Supreme Court Chamber overruled this finding in December 2012 and held that minimal supervision and regular checks on her health were appropriate.⁶ The treatment of Ieng Thirith by the court is important in that it publicly demonstrated respect for the fair trial principle that a trial cannot proceed against an accused who is mentally unable to follow the proceedings and assist her counsel. At the same time, it demonstrates the cost of political obstacles which prevented the launch of the ECCC until more than a quarter century after the Khmer Rouge regime was forced from power.

Meanwhile, the age and health of the remaining two defendants remain concerns. Nuon Chea has spent a significant amount of the trial proceedings in a detention cell rather than in the actual courtroom. He routinely seeks permission to go to the detention cell for the afternoon trial sessions, waiving his right to be present in the courtroom. In January 2013, he was hospitalized on several occasions with what was reported as acute bronchitis.⁷

Khieu Samphan's health has been relatively stable. He routinely attends the full day of trial proceedings. However, he was also hospitalized briefly in January 2013 with a respiratory ailment.

⁴ Ieng Sary's Appeal Against the Trial Chamber's Decision that He is Fit to Stand Trial and its Refusal to Appoint an Additional Expert to Assess Fitness, January 3, 2013, available at http://203.176.141.125/sites/default/files/documents/courtdoc/2013-01-29%2016:19/E238_9_2_1_Redacted_EN.PDF; and Ieng Sary's Appeal Against the Trial Chamber's 16 January 2013 Decision to Deny Request to be Audio and/or Video Recorded in the Holding Cell, February 5, 2013, available at http://203.176.141.125/sites/default/files/documents/courtdoc/2013-02-18%2015:23/E254_3_1_1_EN-1.PDF.

⁵ Ieng Thirith was found to be suffering from a dementing condition, most likely Alzheimer's disease. See, February 2012 *Update Report*, pp. 16-18, see also "Decision on Ieng Thirith's Fitness to Stand Trial," November 17, 2011, available at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_EN.PDF.

⁶ Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, December 14, 2012, available at http://203.176.141.125/sites/default/files/documents/courtdoc/2013-01-04%2010:44/E138_1_10_1_5_7_EN.PDF.

⁷ Stuart White, "Future of Case 002 Precarious Due to Defendant's Illness," *The Phnom Penh Post*, January 17, 2013, pages 1-6.

Up until its recent recess on March 4, 2013, the Trial Chamber was regularly juggling the scheduling of witnesses and proceedings based on a complex matrix of which accused was healthy enough to attend the proceedings (in Ieng Sary's case, via video link from the holding cell), and which accused had waived the right to be present for specific witnesses or proceedings. This makes for extremely slow progress. The trial of the remaining two accused might progress at a slightly better pace now that they are the only accused. Nonetheless, given their ages, the court will continue to confront the challenge of balancing the fair trial right of an accused to be present for proceedings against the need to proceed expeditiously.

The death of Ieng Sary prior to the conclusion of the Case 002 trial is certainly a blow to the court's promise of delivering accountability for Khmer Rouge atrocities, and is emblematic of the saying that justice delayed is justice denied. His death is likely to leave Cambodians with a sense of frustration about the ECCC's ability to provide accountability for Khmer Rouge crimes. Since well before the court began its administrative work in 2006, it has been clear from extensive public documents that Ieng Sary would be a target for prosecution.⁸ The fact that the court was unable to complete the preliminary investigation, judicial investigation, and trial before he died is severe disappointment to the many victims of Khmer Rouge crimes.

Now, the Trial Chamber must make every effort to proceed with the trial of the remaining two accused as expeditiously as possible while also protecting their fair trial rights. This is essential given the strong possibility that the current Case 002 trial may be the final trial the ECCC holds. (See the discussion below regarding problems with the Case 003 and 004 investigations and the fact that those cases are unlikely to proceed to trial given the government's interference.) In order to complete Case 002, the court's donors, including the Government of Cambodia, must immediately ensure that adequate resources are supplied. The current impasse between donors and the Government of Cambodia about financing the court—also described below—cannot be allowed to hinder the court's best chance to deliver some accountability for Khmer Rouge crimes.

B. Severance of the Case 002 Trial

The Case 002 indictment charges Nuon Chea, Khieu Samphan, and Ieng Sary with genocide, crimes against humanity, and war crimes for a wide array of criminal conduct, beginning with the forced movement of the Cambodian population from Phnom Penh and ending with the fall of the Khmer Rouge in

⁸ Stephen Heder with Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office, Washington College of Law, American University and Coalition for International Justice, June 2001.

1979.⁹ In a September 2011 decision, the Trial Chamber ordered Case 002 to be divided into a series of smaller trials to be adjudicated separately, in chronological order, commencing with the forced movement of the Cambodian population and related crimes.¹⁰ The goal of this order was to help ensure that at least a portion of the larger indictment was tried to conclusion before any of the accused (following the severance of the case against Ieng Thirith for lack of mental capacity) became incapacitated or died. While the parties did not dispute the wisdom of reducing the scope of the trial, the severance approach chosen by the Trial Chamber brought forth a number of objections from the prosecution and civil parties, both for the substance of the decision and for the chamber's failure to adequately consult with the parties. The parties argued that the chamber's approach to segmenting the indictment had a significant impact on the court's ability to establish with accuracy and completeness the historical record of Khmer Rouge crimes; who is eligible to seek reparations, if and when any of the accused is convicted; the rights of civil parties to meaningfully participate in the trial; and the range of penalties available following any finding of guilt.

On October 8, 2012, the Trial Chamber expanded the scope of the first trial slightly to include an execution site directly related to the Phnom Penh evacuation, but denied the request of the co-prosecutors to add additional crime sites, including the Tuol Sleng/S-21 prison, torture, and execution site.¹¹ The co-prosecutors appealed this order to the Supreme Court Chamber.

On February 8, 2013, the Supreme Court Chamber issued a decision annulling the severance order in its entirety because the Trial Chamber failed to seek the input of the parties on how to sever the case, provided insufficient reasoning for the ruling, and failed to either plan for subsequent trials or—if further trials were not likely—attempt to ensure that the charges covered in the first trial were representative of the entire indictment.¹²

The Trial Chamber responded quickly to the Supreme Court Chamber's order by scheduling a hearing with all the parties for the week of February 18, 2013 to consider what, at this late date in the process of the originally severed first phase trial, is an appropriate severance decision. The co-prosecutors argued that only one trial was likely to be completed in the case because of the health of the elderly

⁹ See Case 002 Closing Order, September 15, 2010, available at: <http://www.eccc.gov.kh/en/documents/court/closing-order>. The indictment (known formally as a "Closing Order") comprises 400 pages of allegations and charges, and more than 5,400 footnotes.

¹⁰ Severance Order Pursuant to Rule 89ter, September 22, 2011, available at: <http://www.eccc.gov.kh/en/document/court/severance-order-pursuant-internal-rule-89ter>.

¹¹ Trial Chamber Memorandum Entitled "Notification of Decision on Co-Prosecutions' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01," October 8, 2012, available at <http://203.176.141.125/en/document/court/trial-chamber-memorandum-entitled-notification-decision-co-prosecutions-request-inclu>.

¹² Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01, February 8, 2013, available at http://203.176.141.125/sites/default/files/documents/courtdoc/2013-02-11%2018:23/E163_5_1_13_EN-1.PDF.

accused, and that adding the Tuol Sleng crime site to the first trial would make it appropriately representative of the entire indictment as required by the Supreme Court Chamber's decision. The civil parties argued for proceeding with a trial of the entire indictment, but supported the co-prosecutors if that was not feasible. Counsel for Ieng Sary and Nuon Chea argued strongly that their clients' fair trial rights required that the trial be expanded to the entire Case 002 indictment.

Counsel for Khieu Samphan have argued that case against him should be severed from the case against Nuon Chea in recognition of his relatively good health and his desire for an expeditious conclusion to the proceedings. They point out that trial delays caused by the poor health of Nuon Chea are affecting Khieu Samphan's fair trial right to be tried within a reasonable period of time.¹³ Severing the cases against Khieu Samphan and Nuon Chea is an option that the Trial Chamber will have to consider if the health problems of Nuon Chea are likely to cause significant delays in the progress of a joint trial—especially if that trial is expanded beyond the charges included in the original severance order.

The Trial Chamber indicated that it would issue a decision on severance after it had received follow up reports from court assigned medical experts evaluating the fitness of the accused to stand trial. The experts are scheduled to appear before the chamber the week of March 25, 2013.¹⁴ This evidence will assist the chamber in determining whether it is feasible to hold a series of smaller trials which, when combined, span the entire indictment, or whether the health of the accused is so fragile that this is not feasible. If the latter is the case, the Trial Chamber must endeavor to sever the case into a single trial with charges that are representative of the entire indictment. Given the death of Ieng Sary, it is likely that the chamber will mandate a single trial, requiring it to redefine the scope of the trial more broadly than under the previous severance order. At its recent hearings, the chamber specifically requested information about the impact of adding crimes related to Tuol Sleng prison to the trial, thus hinting at one option it is considering.

In the interim, the Trial Chamber has recessed until it issues its revised severance order.¹⁵ Thus, the trial of Case 002 is currently in a state of uncertainty as to the scope of the charges, the time and number of witnesses needed to conclude the

¹³ See, Doreen Chen, Blog Post "Defense Teams argue for the Hearing of Entire Case 002, Severance of Case against Khieu Samphan," February 20, 2013, available at http://www.cambodiatribunal.org/sites/default/files/02-20-13_CTM%20Blog%20Entry_Trial%20002.pdf. More information about the health status of Nuon Chea should be available following the Trial Chamber examination during the week of March 25, 2013 of medical experts who have examined him.

¹⁴ Trial Chamber Memorandum Entitled "Scheduling of Experts Philip Short and Elizabeth Becker and Postponement of Fact Witnesses until Decision on Severance," February 26, 2013, available at <http://203.176.141.125/en/document/court/trial-chamber-memorandum-entitled-scheduling-experts-philip-short-and-elizabeth-becke>.

¹⁵ Trial Chamber Memo to All Parties in Case 002, Re: Postponement of Expert Testimony, March 6, 2013.

trial, and even when the proceedings will resume. The situation is further complicated by the uncertainty about the health of the accused and the walk-out of Cambodian translators, both discussed further below.

These difficulties highlight the problem of placing so much emphasis on one trial to deliver justice for the deaths of up to two million people. The delays and health problems of the accused risk setting Case 002 up for failure in meeting domestic and international expectations.

III. JUDICIAL INVESTIGATION OF CASES 003 AND 004

For many reasons highlighted by the Justice Initiative in previous reports, Cases 003 and 004 are a litmus test for accountability in Cambodia. Their success or failure may well determine the ultimate reputation of the ECCC for ending impunity for Khmer Rouge era crimes. Cases 003 and 004 involve the judicial investigation of five suspects (whose identities are officially confidential, but whose names have been widely reported in the press) for atrocities that include genocide, war crimes, and crimes against humanity. Even if the trial of the entire Case 002 indictment is successfully completed, which is extremely unlikely in view of the age and health of the remaining two defendants, Cases 003 and 004 are critical to understanding and conveying to the public how Khmer Rouge atrocities were actually carried out. The Cambodian government actively opposes these cases: senior government officials have expressly stated on numerous occasions that Cases 003 and 004 will not go ahead.¹⁶ While the government has publicly expressed concerns that pursuing Cases 003 and 004 could compromise political stability in Cambodia, it is widely suggested that the real concern is the threat that genuine investigations and prosecutions would pose to the reputation and dominance of leaders of the ruling Cambodian People's Party.¹⁷

The Cambodian government regularly uses the domestic justice system to punish political opponents and secure impunity for political allies.¹⁸ In this context, Cases 003 and 004 could either further entrench perceptions that the justice system exists to protect the politically powerful, or demonstrate that—in spite of strong and constant opposition from Cambodia's highest political leaders—the politically-connected are subject to the same standards of accountability as everyone else. In sum, the disposition of these cases is a test of the rule of law in Cambodia.

The offenses alleged against the two Case 003 suspects are extremely grave. Their actions individually and as part of a joint criminal enterprise are alleged to have

¹⁶ See October 2012 *Update Report*.

¹⁷ See *Stéphanie Giry*, "Necessary Scapegoats? The Making of the Khmer Rouge Tribunal," *The New York Review of Books*, July 23, 2012.

¹⁸ Evidence of this fact is widely available. The Justice Initiative has highlighted impunity in the Cambodian domestic justice sector in recent reports. See, for example, October 2012 *Update Report*, in particular at pp. 24-29 detailing recent examples of impunity for the politically connected in the domestic Cambodian justice system. See also OSJI June 2011 *Update Report*. See also, Cambodia Office of the High Commissioner for Human Rights, "Continuing Patterns of Impunity in Cambodia," October 2005, available at:

http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf.

Human Rights Watch recently released a report entitled "Tell Them That I Want to Kill Them: Two Decades of Impunity in Hun Sen's Cambodia," November 2012, available at:

<http://www.hrw.org/reports/2012/11/13/tell-them-i-want-kill-them>. The report highlights nine instances, or groups of instances, of grave impunity in Cambodia between 1992 and 2012 ("extrajudicial killings that have not been genuinely investigated or prosecuted by the authorities").

resulted in the deaths of several thousand members of the Royal Army of Kampuchea at notorious killing sites throughout the country.¹⁹ The Case 003 suspects are also alleged to have kidnapped an unknown number of foreign nationals, generally resulting in their torture and execution.

All three suspects in Case 004 are former Khmer Rouge cadre who exercised authority at the zone levels as well as at detention and torture centers.²⁰ They are consequently alleged to be responsible for tens of thousands of deaths, as well as for inhumane living conditions, forced labor, disappearances, and other human rights violations. Prosecutors at the ECCC estimate that between 250,000 and 300,000 people were killed while under the authority of the Case 004 suspects.²¹ It is difficult to conceive of legitimate jurisdictional grounds on which the case might be dismissed.

In an encouraging development, the recently released budget of the ECCC provides for full staffing on the international side of the Office of the Co-Investigating Judges (OCIJ) at least through the end of 2013.²² The budget has been approved by the court's international donors and, if fully funded, should allow the ECCC to hire the necessary staff to fill current vacancies and fully investigate Cases 003 and 004. Assuming the court's donors provide the requested funds and hiring proceeds without roadblocks, this budget approval for OCIJ staff is an important step in moving the investigations forward.

After over nine months of silence about the status of both investigations, the OCIJ has recently provided public information about the cases—some of it encouraging and some of it further evidence that Cambodian court officials refuse to cooperate in the investigations.

On December 19, 2012, following seven months with no public information about the progress or status of the Case 004 investigation, the international co-investigating judge—acting without the participation of his national counterpart—issued a public statement detailing 14 additional crime sites under investigation in Case 004, and inviting witnesses or victims with information concerning the sites to contact the ECCC.²³ This statement demonstrates that investigation into the

¹⁹ Case File No. 003/07-09-2009-ECCC-OCIJ, Decision of Personal Jurisdiction and Investigative Policy Regarding Suspect, May 2, 2012, D48, paras. 16-23.

²⁰ See Douglas Gillison, “Extra-ordinary Injustice,” February 27, 2012, *The Investigative Fund (The Nation Institute)*, available at:

http://www.theinvestigativefund.org/investigations/international/1612/extraordinary_injustice/.

²¹ See Douglas Gillison, “Crimes Scenes of the Khmer,” Feb. 27, 2012, *The Investigative Fund (The Nation Institute)*, available at:

http://www.theinvestigativefund.org/investigations/international/1614/crime_scenes_of_the_khmer/.

²² Revised ECCC Budget 2012-2013, February 26, 2013, available at <http://203.176.141.125/en/articles/revised-eccc-budget-2012-2013-published>. (2012-2013 Budget).

²³ Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case File 004, December 19, 2012, available at

case is ongoing, and that necessary information is being made available to victims who might wish to apply to become civil parties in the case.

On February 28, 2013, the ECCC released a “Statement by the Co-Investigating Judges Regarding Case 003.”²⁴ The release consisted of separate and contradictory statements by the international and national co-investigating judges.

The statement of Judge You Bunleng, the national co-investigating judge, confirms his view that an order he issued along with Judge Blunk—stating that the investigation concerning Case 003 be concluded and no indictment issued—is valid.²⁵ Over the objection of the international co-investigating judge, he forwarded the case file to the co-prosecutors with this recommendation. The statement indicates that a formal notice of disagreement between the co-investigating judges was filed in connection with this action. The ECCC rules provide for the filing of such a notice when the co-prosecutors or the co-investigating judges are unable to agree on proceeding with an investigation.²⁶ Because the substance of such filings is confidential, it is not clear who filed the disagreement or the precise nature of its contents. However, the rules provide that such disagreements will be resolved by the Pre-Trial Chamber on the timely request of either of the disputing judges or prosecutors.²⁷ If the Pre-Trial Chamber is unable to reach a supermajority decision (4 out of 5 votes) on how to resolve a dispute, a default presumption prevails requiring that the investigative actions to continue.²⁸ It is not clear from any information released by the co-investigating judges whether either of them has taken or plans to take the dispute to the Pre-Trial Chamber. Additional transparency on this point is necessary given the public controversy and skepticism surrounding the cases.

Under the rules of the court, once the case file in Case 003 was submitted to the

<http://203.176.141.125/en/articles/statement-international-co-investigating-judge-regarding-additional-crime-sites-case-file-0>.

²⁴ Statement by the Co-investigating Judges Regarding Case 003, February 28, 2013, available at <http://203.176.141.125/en/articles/statement-co-investigating-judges-regarding-case-003>.

²⁵ See Discussion in October 2012 *Update Report*. Judge Blunk (predecessor of International Co-Investigating Judge Kasper-Ansermet) and Judge You Bunleng agreed that no indictments in Case 003 should issue because none of the suspects were “persons most responsible” for Khmer Rouge atrocities as required under the jurisdictional provisions of the ECCC Law and Agreement. This action was widely condemned as having been politically driven. Subsequent to the resignation of Judge Blunk over this controversy, Judge Kasper-Ansermet, the reserve co-investigating judge, whose authority was never recognized by the RGC or Judge You Bunleng, re-instated the investigation. At page 13 the report disputes the legal basis for the conclusion that Judge Kasper-Ansermet’s actions in the case are without effect—including his decision to re-open the investigation of Case 003.

²⁶ See generally, Rules 71(1) and 72 (1).

²⁷ Rules 71(2) and 72(2).

²⁸ Rule 71 (4)(d).

co-prosecutors with a recommendation not to indict, the co-prosecutors have the opportunity to accept this outcome or dispute it and request additional investigation or an indictment.²⁹ Judge You Bunleng's statement indicates that the co-prosecutors could not agree on how to proceed once they received the file. It can safely be assumed that there is a disagreement between the co-prosecutors, with the international co-prosecutor seeking additional investigation rather than a dismissal of the indictment, and the national co-prosecutor seeking to dismiss the case. This would be consistent with the position that the co-prosecutors took when the case file was initially sent to the co-investigating judges for investigation.³⁰

In stark contrast to the statement of Judge You Bunleng, the statement of Co-Investigating Judge Mark Harmon indicated that he considers the investigation in Case 003 to be open and proceeding. He used the statement as an opportunity to advise victims, witnesses, and potential civil parties of the nature of the crimes alleged in the case. The statement also lists nine specific crime sites. This detailed notice is a critical step in providing needed information to potential civil party applicants who may wish to participate in the case.³¹

The efforts of the international co-investigating judge to provide official notice to victims and potential civil parties in Cases 003 and 004 are important steps in recognizing their interest and role in the proceedings. Unfortunately, without extensive outreach to Cambodians about the crime sites and their rights as potential civil parties, few Cambodians will be able to take advantage of this opportunity. There is no indication that the court either plans any such outreach or has requested additional funds to conduct outreach.³²

In a discouraging development, the Pre-Trial Chamber of the ECCC, which is designed to deal with disputes between co-prosecutors and co-investigating judges as well as other pretrial issues, recently failed to reach a decision on whether lawyers for civil party applicants could gain access to the case file in Case 003.³³ The international judges on the panel found that access to the case file was appropriate. The Cambodian judges voted as a block to bar access on the grounds that they considered the investigation closed—mirroring the position of

²⁹ Rule 66 (4) and (5).

³⁰ Public Redacted Version - Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 7 August, 18,2009 available at [Public redacted version Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 \(English\).pdf](#).

³¹ See Rule 26 *bis*, which describes the procedures and qualification requirements for victims to apply for civil party status and participate in a case.

³² See 2012-2013 Budget, Annex B-1, page 2. The budget for both 2012 and 2013 allocated 4 posts on the national side of the budget to outreach, with one director and four assistants. It seems unlikely that this staff can add outreach activities for Cases 003 and 004 to its existing work-load related to Case 002.

³³ Considerations of the Pre-Trial Chamber regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, February 13, 2013, available at <http://203.176.141.125/en/document/court/consideration-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-pa>.

Judge You Bunleng with respect to the case. As a result of the failure of the two sides to agree, the ruling preventing access to the case file will stand. In addition, defense counsel chosen by the suspects have not been allowed access to the case file for reasons that the OCIJ has not made public.³⁴ Given the central role of the investigative phase in the ECCC trial process, there appear no legitimate reasons to deny access of counsel to case file information.³⁵

It is clear from the competing statements of the co-investigating judges in Case 003 and the separate press release of the international co-investigating judge in Case 004, that the two judges are not operating cooperatively. In fact, it is apparent that the Cambodian side of the OCIJ is not participating in the investigation of either case. Consistent with prior practice in these investigations, disputes about how and if the cases will proceed will likely continue to be submitted to the Pre-Trial Chamber. Issues related to the investigation in Cases 003 and 004 that have been considered by the Pre-Trial Chamber to date have resulted in split decisions along nation lines with the Cambodian judges ruling to stop progress and the international judges voting to move the cases forward.³⁶

It appears that the Cambodian government's intent to block the completion of Cases 003 and 004 continues to influence the Cambodian court officials who handle the cases.³⁷ However, it is theoretically possible that an indictment in Cases 003 and 004 could progress all the way to the Trial Chamber over the objection of the Cambodian co-investigating judge, the Cambodian co-prosecutor, and Cambodian judges on the Pre-Trial Chamber.³⁸ But even if the investigation continues over the objection of Cambodian officials, they can create delays and practical roadblocks that severely hinder meaningful progress of the cases. While it seems increasingly unlikely that the Cambodian government will back down from its long-stated opposition to Cases 003 and 004, it could reduce some of the

³⁴ See Abby Seiff, "Judge Rift at Tribunal Continues," *The Phnom Penh Post*, March 1, 2013.

³⁵ Rule 21, Fundamental Principles, provides at paragraph 1(4) "Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent."

³⁶ See for example, Public Redacted Version - Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 7 August, 18,2009 available at [Public redacted version Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 \(English\).pdf](#); and Considerations of the Pre-Trial Chamber regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, February 13, 2013, available at <http://203.176.141.125/en/document/court/consideration-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-pa>.

³⁷ See October 2012 *Update Report* which describes in detail the lock-step alignment of the RGC and the Cambodian officials at the court in efforts to prevent the cases going forward and the direct statements of representatives of the RGC to the same effect.

³⁸ This is possible because of the provisions the ECCC *Agreement*, Article 7, and Rules 71(4)(c) and 72 (4)(d) that, in the event there is a disagreement as to how to proceed with an investigation and the Pre-Trial Chamber is unable to come to a super majority decision resolving it (4 out of 5 votes), the presumption that the investigation continues prevails.

damage by allowing at least the international component of the OCIJ to conduct thorough investigations without active hindrance.

Judge Harmon has demonstrated a commitment to doing as much investigation of the cases as is feasible given the lack of cooperation he is receiving. While this is necessary and admirable, questions remain about whether the cases—assuming completed investigations lead to indictments—will ever reach trial at the ECCC.³⁹ In addition to the stated refusal of the RGC to allow this to happen, the prospect that the case will be completed through a trial (should indictments be issued) is complicated by the lack of support from donors for funding the court through such trials. The only fully credible solution to this dilemma is for donors to commit to fully funding the court through completion of the cases, and for donors and the UN to send a clear message to the RGC that the cases must proceed on the law and evidence alone.

Finally, the investigations into Cases 003 and 004 provide the court with an opportunity to prioritize and rigorously evaluate potential charges related to gender violence crimes. The court has come under criticism for failing to sufficiently prioritize these crimes in Cases 001 and 002.⁴⁰ Yet there is a growing body of research that rape, sexual mutilation, and other forms of gender violence occurred routinely during the Khmer Rouge period.⁴¹ The international co-investigating judge should place priority on the investigation of such crimes as he makes hiring decisions, plans investigation priorities, and recommends charges in the cases.

IV. FUNDING ISSUES

Budget problems continue to impede progress at the ECCC. A budget for 2012-2013 approved by the court's international donors in February 2013 requests

³⁹ See October 2012 *Update Report* for a discussion of why the alternative of bringing these cases to trial in a domestic court is inappropriate.

⁴⁰ See Margot Wallström, "Victims of Khmer Rouge Sexual Violence Still Seek Justice," May 29, 2012, *The Cambodia Daily*, p. 30; see also "The Forgotten Khmer Rouge Victims," May 29, 2012, *Phnom Penh Post*, available at <http://www.phnompenhpost.com/index.php/2012052956444/National-news/option-the-forgotten-kr-victims.html>; and See Sin Soworn and Silke Studzinsky, "Tribunal Has Failed Victims of Sex Crimes," June 11, 2012, *Phnom Penh Post*, p. 18, available at <http://www.phnompenhpost.com/index.php/2012061156709/National-news/tribunal-has-failed-victims-of-sex-crimes.html>.

⁴¹ See Katrina Natale, *I Could Feel My Soul Flying Away From My Body: A Study of Gender-based Violence During Democratic Kampuchea in Battambang and Svay Rieng Provinces*, November 2011, Cambodia Defender's Project; see also Nakagawa Kasumi, *Gender-based Violence During the Khmer Rouge Regime: Story of Survivors from the Democratic Kampuchea 1975-1979* (Second Ed.) March 2008, Phnom Penh, Cambodia; and Cambodian Defenders Project, "Report on the Proceedings of the 2011 Women's Hearing on Sexual Violence under the Khmer Rouge Regime," and Panel Statement for Women's Hearing: True Voices of Women under the Khmer Rouge Regime, p. 2. See UN SCR 1325, UN SCR 1820, UN SCR 1888, UN SCR 1889, and UN SCR 1960.

\$35.4 million for 2013.⁴² The 2013 budget is split into an international component of \$26,005,100 and a national component of \$9,360,300.

The consistent challenge with ECCC budgets has been raising the money necessary to fund them on a timeframe that meets the needs of the court. For instance, in 2012 the court faced a crisis when funds for the international side of the budget ran dry, resulting in a hiring freeze and a risk that contracts of existing staff would not be renewed when they expired.⁴³ To date the contributions to the international side of the budget for 2013 are sufficient to fund operations through June 2013.⁴⁴ Failures or delays in funding the budget contribute to staff uncertainty and loss that could easily be avoided if the donors took a longer term approach.

The Cambodian side of the budget has been even more severely affected by funding shortfalls. There is an ongoing dispute between donors and the RGC about who should supply the funds for the \$9.3 million allocated as the Cambodian share of the overall budget. The RGC has historically paid \$1.8 million per year—much of it through in-kind contributions—toward its share of the budget. The RGC argues that it cannot afford to provide any additional funds, and that international donors must, as they have in the past, contribute funds to pay Cambodian salaries and other line items in the Cambodian budget.⁴⁵ In contrast, international donors and UN officials are requesting that the Cambodian government increase its contribution to the budget as a show of support for the court.⁴⁶

As a result of this stand-off, no funds have been available to pay the majority of Cambodian staff, who have been working without pay since the beginning of December 2012. A majority of staff members signed a statement in February 2013 threatening to stop work if payment is not received soon. Most recently, the Cambodian staff of the translation and interpretation unit—critical to ongoing trial proceedings—announced on March 4, 2013 that they were leaving their posts

⁴² See Press Release: Revised ECCC Budget for 2012-2013 Published, February 26, 2013, available at <http://203.176.141.125/en/articles/revised-eccc-budget-2012-2013-published>. The ECCC budget is split between the international component, for which the UN seeks voluntary funding from member states, and a national component, which is technically the responsibility of the RGC. In the past the RGC has claimed it could not afford to contribute more than \$1.8 million and has sought and, through 2012, received, funding from international donors for the remaining \$7 million of the national budget—including sections of the budget used to pay Cambodian staff salaries. International donors are now refusing to provide such funds and pressing the RGC to fund the national portion of the budget itself.

⁴³ See Bridget Di Certo, “KRT running on Empty,” *Phnom Penh Post*, page 1, May 16, 2012.

⁴⁴ Information provide by Knut Rosandhaug, deputy director of the ECCC, on March 7, 2013.

⁴⁵ See Justine Drennan, “Mum’s Still the Word for Translators,” *Phnom Penh Post*, March 6, 2013.

⁴⁶ Lauren Crothers, “KRT Staff Threaten Walk Out at Months End,” *The Cambodia Daily*, January 24, 2013.

immediately and would not return until paid in full.⁴⁷ The Trial Chamber has recessed the Case 002 trial sessions indefinitely.⁴⁸ Staff from other sections of the court did not leave their jobs. On March 14, 2013 the European Union made a payment of US\$ 390 to fund the December 2012 payment of Cambodian salaries and the striking staff agreed to return to work—at least temporarily.⁴⁹ These funds represent that final payment of a 2012 commitment by the European Union to the Cambodian side of the court, and there is still no indication about if and when funds for 2013 salaries will be available.

This is a ridiculous state of affairs for an internationalized tribunal and adds to longstanding skepticism about the court's ability to deliver meaningful justice. Firm commitments from both the Cambodian government and the international donors to fund the court's full budget are needed immediately to redeem this situation.

V. CONCLUSION

It remains doubtful that the ECCC will successfully complete its current caseload and make a positive contribution to ending impunity and increasing respect for the rule of law in Cambodia. The court's challenges stem from two main problems, one partially in control of ECCC stakeholders, and one generally outside of their control. The first factor is the specter of political interference hanging over the work and reputation of the court, as evidenced most starkly in the lack of progress in Cases 003 and 004.⁵⁰ The solution to this problem is fully in the control of the RGC, and other stakeholders to the court must insist that the RGC effectively and publicly remedy the existence and appearance of political interference in judicial decisions. The second factor is the recent death of Ieng Sary and the advanced age and frailty of the remaining accused persons—particularly in Case 002—which make it urgent to complete proceedings and produce a judgment before the remaining accused die or become incapacitated. This urgency must be dealt with transparently and must not be permitted to override the fair trial rights of the accused.

The next several months represent a critical period for the ECCC. In that time, there must be a resolution of the severance issue in Case 002, publicly-

⁴⁷ Lauren Crothers, "KR Tribunal Stopped by Strike Over Salaries." *The Cambodia Daily*, March 05, 2013.

⁴⁸ *Ibid.* A combination of reasons, including illness of Ieng Sary and uncertainty as to the scope of the questioning of the witnesses resulting from the recent order of the Supreme Court Chamber vacating the severance of the case, contribute to the need for this step, but it is likely that the work stoppage alone was sufficient to recess the proceedings.

⁴⁹ Joe Freeman and Justine Drennan, "Strike is over...for now," *The Phnom Penh Post*, March 15, 2013, P 3.

⁵⁰ The problem also bleeds into Case 002 in issues such as the scope of defense examination of witnesses and the refusal of certain witnesses to respect subpoenas. This topic will be explored more fully in a future report.

demonstrable progress of the investigations in Cases 003 and 004, and an appropriate resolution of the current funding crisis at the court.

**E-mail: info@justiceinitiative.org
www.justiceinitiative.org**



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