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**Equality of Arms and Judicial Independence in the Investigation of Case 002  
in the Extraordinary Chambers in the Courts of Cambodia**

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## List of Abbreviations

Agreement between the UN and the RGC Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea.....	Agreement
Cambodian People’s Party .....	CPP
Co-Investigating Judges.....	CIJ
European Convention on Human Rights .....	ECHR
European Court of Human Rights.....	ECtHR
Extraordinary Chambers in the Courts of Cambodia.....	ECCC
International Covenant on Civil and Political Rights .....	ICCPR
International Criminal Court.....	ICC
International Criminal Tribunal for Rwanda .....	ICTR
International Criminal Tribunal for the former Yugoslavia .....	ICTY
International Criminal Tribunal for the former Yugoslavia Manual on Developed Practices .....	ICTY Manual
Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia .....	Establishment Law [or] ECCC Law
Office of the Co-Investigating Judges .....	OCIJ
Office of the Co-Prosecutors .....	OCP
Open Society Justice Initiative.....	OSJI
Royal Government of Cambodia .....	RGC
United Nations .....	UN

## **I. Introduction**

The crux of the defence arguments in Case 002 in the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), challenging the Court’s transparency and investigative independence, is grounded on Internal Rule 55(5) which sets forth the accountability of the Co-Investigating Judges (“CIJs”) to focus their work on ascertaining the truth, impartial to inculpatory or exculpatory evidence.<sup>1</sup> The defence teams have filed numerous requests and objections often accusing the Office of the Co-Investigating Judges (“OCIJ”) of being pliable to political manipulation and incompetent to conduct an exhaustive investigation. Much of their arguments on political interference and bias appear implausible and their requests for investigative action superfluous. For example, the Ieng Sary defence team requested an inquiry be conducted of investigator Stephen Heder to determine whether or not he is a secret agent working for the Central Intelligence Agency; and the Nuon Chea defence team requested *all* government employees who were officials in Democratic Kampuchea be interviewed to ascertain whether Prime Minister Hun Sen is obstructing the investigation to protect certain political figures.<sup>2</sup> There have been several occasions, however, that do warrant apprehension regarding the quality and depth of the investigation in Case 002.

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<sup>1</sup> There are four defendants in Case 002 accused of crimes against humanity, grave breaches of the Geneva Conventions of 1949, genocide, and national crimes of homicide, torture, and religious persecution pursuant to the 1956 Cambodian Penal Code: Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea; Ieng Sary, former Deputy Prime Minister for Foreign Affairs; Khieu Samphan, former Head of State; and Ieng Thirith, former Minister of Social Affairs.

<sup>2</sup> The only evidence presented by the Ieng Sary defence team that Stephen Heder was an undercover C.I.A. agent was a book proposal Heder submitted exhibiting expansive research on the history of Cambodia acquired as an “intelligence officer.” See OCIJ, Case No. 002/19-09-2007-ECCC-OCIJ/A252, Letter from the Co-Investigating Judges to the Ieng Sary Defence Team re: Your Request for Information concerning Mr. Stephen Heder, 1 June 2009, A252/2; Nuon Chea Defence Team, Seventh Request for Investigative Action, 1 December 2008, D122. The Defence had previously sought other information on Mr. Heder’s prior employment with the OCP. Ieng Sary Defence Team, 002/19-09-2007-ECCC/OCIJ, Request for Information Regarding the Potential Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009 (“Heder Request”). See also Ieng Sary Defence Team, 002/19-09-2007-ECCC/OCIJ, Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008.

## **II. Inquisitorial Method of Investigation Necessitates Greater Reliance on Independence and Competence of the Judiciary**

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“Establishment Law” or “ECCC Law”) provides for an inquisitorial civil law system as opposed to the common law adversarial systems prevalent at international tribunals.<sup>3</sup> The key difference is that adversarial systems provide the parties more responsibility in the investigation and development of legal and factual issues. Inquisitorial systems based on French criminal law give sole discretion in the investigation to the *juge d’instruction* (“investigating judge”) who is tasked with uncovering the truth behind the allegations and who is expected to act in the interests of all parties impartial to inculpatory or exculpatory evidence.<sup>4</sup> The advantage of giving plenary investigative authority to one judge is that a comprehensive case file may be created without the delays of adversarial proceedings.<sup>5</sup> However, because of the extensive nature of his powers, abuse is much more possible than in an adversarial system where the parties perform their own examination of the evidence.<sup>6</sup> Thus, inquisitorial systems are premised on highly competent, impartial judges who are above reproach.

### **A. In the ECCC Inquisitorial System, Which Provides Little to No Participatory Rights to the Accused, Judges Must Be Above Reproach**

The negotiations to establish the ECCC were quite contentious as the Royal Government of Cambodia (“RGC”) insisted on maintaining a national court with international support while the United Nations (“UN”), expressing deep concern over the independence and impartiality of

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<sup>3</sup> Antonio Cassese, *International Criminal Law: Second Edition*, Oxford University Press (2008), at p. 374, 400. The Internal Rules of the ECCC are derived from the Cambodian criminal code, itself based on French civil law which also provides for an inquisitorial system.

<sup>4</sup> *Id.* at p. 356.

<sup>5</sup> *Id.* at p. 357.

<sup>6</sup> *Id.*

the Cambodian judiciary, insisted on an international tribunal with national participation.<sup>7</sup> The UN withdrew from the negotiations in 2002 in apprehension of a national court that could not meet basic international standards of justice required in all UN-backed criminal tribunals.<sup>8</sup> In the compromise to establish a ‘hybrid’ court, the OCIJ was organized under the split authority of two investigating judges, one national and one international.<sup>9</sup> The CIJs are tasked to work together on all matters, the national providing guidance on Cambodian law and national concerns and the international keeping the Court in line with international standards of fair trial justice.<sup>10</sup>

Pursuant to Article 23(new) of the ECCC Law and Rule 55 of the ECCC Internal Rules, the OCIJ is vested with authority over the investigations of factual circumstances referred to them by the Co-Prosecutors. The parties shall have access to the original case file throughout the proceedings and may at any time submit reasoned requests to the OCIJ to conduct specific investigative actions; however, the implementation of investigatory procedures and the collection of evidence are in the sole discretion of the OCIJ. Most pointedly, Internal Rule 60 states in unambiguous language that the accused, their lawyers, or any other party may not be present during witness interviews unless previously arranged by the OCIJ. In Case 002, the Co-Investigating Judges made it clear that the defence teams were prohibited from conducting any

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<sup>7</sup> Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York, “Negotiations Between the UN and Cambodia Regarding the Establishment of the Court to Try Khmer Rouge Leaders,” 8 February 2002, available at <<http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>>.

<sup>8</sup> Hans Correll, UN Legal Counsel, reasoned the RGC had dismissed the UN’s concerns for independence, impartiality, and objectivity. Id.

<sup>9</sup> The OCIJ is an independent office in the ECCC separate from the Chambers and is governed by a different set of rules and law. See Internal Rules 14, 55; <<http://www.ecc.gov.kh/en/ocij>>.

<sup>10</sup> Should the judges diverge in opinion, Article 23(new) of the Establishment Law and Internal Rule 72 provide a framework for lodging a disagreement with the Pre-Trial Chamber who would issue a decision not subject to appeal. Until the Pre-Trial Chamber settles the disagreement, the Co-Investigating Judges should continue to execute the action in dispute unless it would be open to appeal or it pertains to the notification of charges or an arrest and detention order. See Internal Rule 72(3).

investigative action or attending any interview on behalf of the accused, pursuant to their powers under Internal Rule 55.<sup>11</sup>

Restraints against defence participation in the investigation stem from the French criminal justice system in which “the defence lawyer remains something of an outsider, her professional status being that of an *avocat* rather than a *magistrat*.”<sup>12</sup> The public prosecutor or investigating judge is responsible for the investigation, and the accused have minimal opportunity to influence how the investigation is conducted.<sup>13</sup> This exclusion has undergone several reforms under pressure to conform to the European Convention on Human Rights (“ECHR”) and allot accused persons more due process and fair trial rights.<sup>14</sup> Specifically, there has been strong criticism that the French justice system does not respect the fundamental principle of *equality of arms* enshrined in Article 6 of the ECHR.<sup>15</sup> In 1991, the Delmas-Marty Commission expressed concern that under the French civil law system “the independence of the judicial function is undermined by having the investigator in the same professional grouping as the trial judge.”<sup>16</sup> After a wave of financial scandals and allegations of political influence in the courts, France underwent legal reform in June of 2000 to strengthen the rights of the accused and make French criminal procedure more compatible with the ECHR.<sup>17</sup> The reform was based on

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<sup>11</sup> OCIJ, Letter from the OCIJ to the Nuon Chea defence re: Response to your letter dated 20 December 2007 Concerning the Conduct of the Judicial Investigation, 10 January 2008, A110/1, ERN: 00157729-00157730.

<sup>12</sup> In the French civil law system, defence lawyers are of a different category of attorneys than prosecutors or judges, hence the term *avocat* instead of *magistrat*. Defence lawyers are not able to conduct investigations or act as a judge in any other case, their main function being ‘pleaders’ or ‘litigators’ for the benefit of their client at trial. Jacqueline Hodgson, *French Criminal Procedure: A Comparative Account of the Investigation and Prosecution of Crime in France*, OxfordHart Publishing (2005), at p. 65.

<sup>13</sup> Id.

<sup>14</sup> Id. at p. 39-40.

<sup>15</sup> Article 6 of the ECHR ensures accused the right to “examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

<sup>16</sup> *French Criminal Procedure* at p.71.

<sup>17</sup> Id. at p. 41-42.

the principle of *contradictoire*, the right of all parties to have the same opportunity to participate in all stages of the criminal process in the furtherance of fairness and justice.<sup>18</sup> Although the French criminal justice system has gradually resumed restrictions on the role of the accused during the investigative stage, there are several current movements in Europe to reform the system again to ensure fair trial rights.<sup>19</sup> Again, the concern is that with little to no participatory rights of accused, the judges must be above reproach to ensure a fair trial.<sup>20</sup>

**B. The Principle of Equality of Arms Requires an Equal Playing Field to Ensure a Balance of Rights Between the Parties**

Equality of arms is the fundamental principle that each party “must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”<sup>21</sup> This principle governs the ECCC according to Internal Rule 21(1)(a) which requires “fair and adversarial” proceedings to “preserve a balance between the rights of the parties.” This principle is especially crucial in a complex and politically charged legal environment such as the ECCC. The Chambers must go beyond ensuring the defence is merely not disadvantaged and instead make certain the prosecution and defence are *equal* before the Trial Chamber.<sup>22</sup> In Case 001, the Trial Chamber agreed that the defence and prosecution must be entitled to procedural equality in the interests of fair justice.<sup>23</sup>

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<sup>18</sup> *Id.* at p. 42-43.

<sup>19</sup> For example, in September of 2009, recommendations for reform drafted by the Léger Committee were criticized for falling below international standards of due process rights and human rights law. See Human Rights Watch News Release, France: Recommendations on Justice Reform Fall Short, 3 September 2009, available at <<http://www.hrw.org/en/news/2009/09/02france-recommendations-justice-reform-fall-short>>.

<sup>20</sup> In France, there have been numerous accusations of *juges d'instruction* bending to favor politicians that has resulted in concern for judicial independence more widely. See French Criminal Procedure at p. 81.

<sup>21</sup> *Dombo Beheer B.V. v. The Netherlands*, ECtHR, Judgment, 27 October 1993, App. No. 14448/88, at ¶ 33.

<sup>22</sup> *Prosecutor v. Duško Tadić*, ICTY, Judgement, 15 July 1999, Case No. IT-94-1-A, at ¶ 52.

<sup>23</sup> TC, Case No. 001/18-07-2007-ECCC/TC, Decision on Ieng Sary's Request to Make Submissions in Response to Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, at ¶ 4.



The defence teams in the ECCC’s Case 002 appear to not be concerned with the rejection or corruption of any specific witness or piece of evidence but rather with what they perceive as a general lack of regard for the interests of the accused by the OCIJ. They suspect inculpatory evidence was collected before the Court was officially established, and the ECCC was designed for the purpose of convicting the accused in Case 002 based on that evidence alone.<sup>24</sup> According to the defence teams, the OCIJ has not demonstrated an objective interest in uncovering the truth behind the crimes alleged or afforded the defence a reasonable opportunity to respond to accusations on behalf of their clients. More specifically, the defence teams argue the OCIJ has “routinely failed” to verify sources, authenticate documents, corroborate witness statements, identify evidentiary flaws, and seek exculpatory evidence.<sup>25</sup> Instead of being allowed the opportunity to supplement or resolve these deficiencies, the defence is barred by the Internal Rules from conducting any investigative actions or attending any interview.<sup>26</sup> Furthermore, the defence teams complain that nearly all of their requests that the OCIJ undertake investigative action have been denied.<sup>27</sup> “Blocked by the OCIJ at every turn,” the defence maintains that biased and deficient investigation has irreparably damaged the prospect of a fair trial.<sup>28</sup>

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<sup>24</sup> Specifically, the defence teams of Ieng Sary and Nuon Chea have objected to any documentation or witness statements received from the Documentation Center of Cambodia (“DC-Cam”), mainly on accusations of partiality toward exculpatory evidence. The Ieng Sary defence team argued evidence from DC-Cam has not been properly verified or tested, and the Nuon Chea team complained the volume of evidence in the case file originating from DC-Cam “suggests a magistrates’ office predisposed to a predetermined historical outcome.” Defence for Ieng Sary, Case No. 002/19-09-2007-ECCC/TC, Ieng Sary’s Motion Against the Use of All Material Collected by the Documentation Center of Cambodia, 24 February 2011, E59, at ¶ 15-16; Defence for Nuon Chea, Case No. 002/19-09-2007-ECCC/TC, Consolidated Preliminary Objections, 25 February 2011, E51/3, at ¶ 15.

<sup>25</sup> Nuon Chea’s Consolidated Preliminary Objections at ¶ 60.

<sup>26</sup> Letter from OCIJ to the Nuon Chea Defence Team re: Response to Your Letter Dated 20 December 2007 Concerning the Conduct of the Judicial Investigation, 10 January 2008, A110/1, ERN: 00157729-00157730.

<sup>27</sup> Nuon Chea’s Consolidated Preliminary Objections at ¶ 18.

<sup>28</sup> *Id.* at ¶ 63-64.

In response to such allegations, the Trial Chamber held that the accused have been afforded a fair advantage in the investigation.<sup>29</sup> Throughout the proceedings, the accused have taken advantage of their right to request investigative actions of the CIJs as well as to challenge rejections of their requests before the Pre-Trial Chamber.<sup>30</sup> The Trial Chamber further found that the judicial investigation is insulated by certain procedural safeguards embedded in the legal framework that should satisfy any dissatisfaction of the accused in the conduct of the judicial investigation.<sup>31</sup> Any appeals made pursuant to this legal framework should be addressed to the Pre-Trial Chamber as the Trial Chamber is not an appropriate forum for such disputes.<sup>32</sup> In any event, the Trial Chamber concluded, the accused are also afforded the opportunity to remedy any defects in the conduct of the investigation by requesting exculpatory witnesses and favorable evidence be brought before the Trial Chamber and by cross-examining witnesses and rebutting evidence against them.<sup>33</sup>

**i. The OCIJ Has Refused to Disclose Its Strategy and Methodology**

One of the prevailing complaints by the ECCC defence teams is an alleged lack of transparency in the strategy and methodology applied by the OCIJ during the investigative stage.<sup>34</sup> The defence teams have argued that the integrity of the investigation has been compromised by negligence, partiality, and political meddling and have requested access to information regarding the conduct of the investigation to ensure their clients' rights are not being

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<sup>29</sup> Trial Chamber, Case No. 002/19-09-2007/ECCC/TC, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, at ¶ 19.

<sup>30</sup> Id.

<sup>31</sup> Id. at ¶ 18.

<sup>32</sup> Id. at ¶ 17.

<sup>33</sup> Id. at ¶ 19.

<sup>34</sup> Defence for Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Third Request for Investigative Action, 21 May 2009, D171, at preface.

violated.<sup>35</sup> During preliminary objections, the Nuon Chea defence team maintained that at no time during the investigation in Case 002 “were the parties informed of the underlying reasons for conducting...specific investigatory acts.”<sup>36</sup> The Ieng Sary defence team, in its third request for investigative action, asserted that in the absence of any investigatory system or framework, it is impossible for the defence to assess whether exculpatory evidence had been sought.<sup>37</sup>

There is no specific provision in the ECCC Law or the Internal Rules requiring the OCIJ to provide information regarding its strategy or methodology during investigations; however, preference for disclosure underlies both the spirit of ECCC law and international jurisprudence. For example, citing the Istanbul Protocol, the ECtHR found that an investigative body is obligated to disseminate a report on the scope, procedures, and methods used in its investigation along with any findings of fact and analyses of law.<sup>38</sup> The report must also include details of the evidence collected and the names of the witnesses interviewed, unless the witnesses are categorized as protected and should be made public.<sup>39</sup> According to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Manual on Developed Practices (“ICTY Manual”), public disclosure of an unambiguous and comprehensive legal framework for any investigation is critical and must also be accompanied by an investigative plan with legal direction.<sup>40</sup>

The parties, especially the accused, would have been well served by disclosure of an investigative plan and report on investigative methodology at the ECCC. Such disclosure would have been useful to address the allegations of bias and corruption that have suffocated ECCC

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<sup>35</sup> Defence for Ieng Sary, Case No. 002/19-09-2007-ECCC/TC, Ieng Sary’s Motion for a Hearing on the Conduct of the Judicial Investigation, 25 March 2011, E71, at preface.

<sup>36</sup> Nuon Chea’s Consolidated Preliminary Objections at ¶ 59.

<sup>37</sup> Ieng Sary’s Third Request for Investigative Action at preface.

<sup>38</sup> *Bati v. Turkey*, ECtHR, Final Judgement, 3 September 2004, App. Nos. 33097/96 and 57834/00, at § II(D), ¶ 100. The Istanbul Protocol is a manual supported by the United Nations guiding courts in the investigation of torture and cruel, inhumane, or degrading treatment or punishment.

<sup>39</sup> *Id.*

<sup>40</sup> UNICRI, ICTY Manual on Developed Practices, 2009, at § IV, A.2, ¶ 9.

proceedings. Moreover, although the Co-Investigating Judges have plenary authority over investigative actions, their power is not without check; they must act transparently to avoid any activity that might violate the rights of the accused or threaten the legitimacy of the Court.<sup>41</sup> Should future cases be brought before the ECCC, the Chambers should consider making disclosure of a plan and report on investigative strategy and methodology a requirement.

**ii. Records of Witness Testimony Have Not Been Fully Disclosed**

In addition to being prohibited from participating in investigative actions, the defence teams argue they have not received full disclosure of witness testimony, further aggravating their right to a fair and impartial trial. They claim the OCIJ has filed summaries of interviews instead of transcripts, failed to include the questions asked in the transcripts, and cut short interviews before the witness had been fully interrogated.<sup>42</sup> The Ieng Sary defence team expressed concern that witness interviews were being handled in a capricious manner with minimal explanation or guidance to allow defence to properly evaluate the quality of the interrogatories.<sup>43</sup> The ECCC Law and Internal Rules obligate the OCIJ to disclose to the parties as much information as possible without endangering the security of the parties involved. For example, Article 35(new) of the ECCC Law and Article 13 of the Agreement between the UN and the RGC Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (“Agreement”), derived from Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), afford the accused the right to inspect inculpatory evidence and “examine or have examined the witnesses against him or her.” Pursuant to Internal Rule 25(1), witness interviews should be audio or video recorded in addition

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<sup>41</sup> See generally, Article 12(2) of the Agreement; Internal Rules 21(c), 55(6), 55(7), 55(11), 56.

<sup>42</sup> Nuon Chea’s Consolidated Preliminary Objections at ¶ 18.

<sup>43</sup> Ieng Sary’s Third Request for Investigative Action at preface.

to the written record of the interview and a copy provided to the Office of the Co-Prosecutors (“OCP”) and other parties’ counsel. If the circumstances do not allow recording, the reasons should be stated and included with the written record of the interview. Of persuasive interest, the ICTY Manual discourages paraphrasing or summarizing witness accounts.<sup>44</sup>

The OCIJ and Co-Prosecutors might argue, however, that all witness interviews are in fact provided in the case file which is open for examination by the OCP and the defence teams equally. International law may also be interpreted to suggest an obligation of reasonable, rather than complete, disclosure. For example, Article 56(1)(c) of the Rome Statute requires only relevant information be provided to the accused to allow him to be heard on the charges. Furthermore, significant safeguards at the ECCC under Internal Rules 28 and 29, also provided for in the Rules of Procedure at the ICTY and International Criminal Tribunal for Rwanda (“ICTR”), protect victims and witnesses from being contacted or confronted by the accused during the interview process.<sup>45</sup> It is difficult to assess the merits of defence concerns because, as stated previously, the CIJs are granted complete discretion as to what is disclosed, and those without privity may only speculate as to whether the CIJs are keeping with the spirit of the law.<sup>46</sup>

**iii. The OCP Has Requested Restrictions on the Right to Cross-Examine Witnesses**

Any violation in denying the accused the right to participate in and inspect witness interviews during the investigative stage could be remedied at trial during the examination of witnesses. Pursuant to the English version of Internal Rule 84(1), the accused are granted the

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<sup>44</sup> UNICRI, ICTY Manual on Developed Practices, 2009, at D.8.4, ¶ 66.

<sup>45</sup> These safeguards should only be applied in “exceptional circumstances.” Whether or not this case is “exceptional” must be determined by the Chambers. See Rules of Procedure and Evidence, ICTY, Rule 69; Rules of Procedure and Evidence, ICTR, Rule 69.

<sup>46</sup> PTC, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, at ¶ 22.

“absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the pre-trial stage.” The right “to examine or have examined the witnesses against him or her” is also provided for in Article 13 of the Agreement which must be ‘respected throughout the trial process.’ The Ieng Sary defence team maintains it has had no opportunity as of yet to examine numerous witness statements, and there should therefore be no restriction to examine these witnesses at trial.<sup>47</sup>

However, the Co-Prosecutors have requested that the Trial Chamber declare the right to examine witnesses at trial is not absolute and argued it may be limited at the discretion of the Trial Chamber.<sup>48</sup> In light of the supposedly thorough investigation conducted pursuant to the ECCC’s civil law system, the Co-Prosecutors have requested witness statements be admitted as evidence without providing the defence an opportunity to cross-examine the witnesses.<sup>49</sup> In support, the Co-Prosecutors first point out an incongruence among the lingual interpretations of Internal Rule 84(1), as the English translation is the sole version describing the right as “absolute.”<sup>50</sup> Second, the Co-Prosecutors submit that the Internal Rules and Establishment Law do not instruct the Court how to properly admit statements of witnesses who cannot be physically present, cannot be located, or are deceased.<sup>51</sup> Third, the Co-Prosecutors argue that witness statements already in the case file have been impartially gathered, rigorously examined by the OCIJ, made available to all parties for over three years, and made subject to appeal at the

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<sup>47</sup> Defence for Ieng Sary, Case No. 002/19-09-2007-ECCC/TC, Ieng Sary’s Response to the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing, 22 July 2011, E96/3, at ¶ 22.

<sup>48</sup> OCP, Case No. 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011, E96, at ¶ 41(a).

<sup>49</sup> *Id.* at ¶ 31.

<sup>50</sup> *Id.* at ¶ 3-4.

<sup>51</sup> *Id.* at ¶ 5.

pre-trial stage.<sup>52</sup> According to the Co-Prosecutors, the accused were allowed to participate in the investigation by filing requests for investigative action and had the opportunity to contest all witness statements through their right to appeal.<sup>53</sup>

The Internal Rules do, however, offer some guidance if read comprehensively. Under Internal Rule 26, testimony at trial should be given in person at all times possible. If witnesses are unable to be physically present, testimony may be given via audio or video technology so long as the Chambers and the parties are able to interview the witness at the time of the testimony. Nonetheless, “such technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights.”<sup>54</sup> The spirit of this Rule indicates a predilection to protect the rights of the accused according to Internal Rule 84(1).

Pursuant to Internal Rule 80 *bis*, during the Initial Hearing the Trial Chamber may reject a request that a witness be summoned should it decide the testimony “would not be conducive to the good administration of justice;” however, during the trial stage, Internal Rule 84(1) is the only relevant provision on summoning witnesses. The Chamber may reject a request for evidence under Internal Rule 87(3), but considering the prescription in Internal Rule 84(1), it is not clear this gives it the right to reject a request to summon a witness whose statement has been submitted against the interests of the accused.<sup>55</sup> Furthermore, the Trial Chamber in Case 001 found European Court of Human Rights (“ECtHR”) jurisprudence has established that the right to examine witnesses requires “the evidence be produced at a public hearing, in the presence of

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<sup>52</sup> *Id.* at ¶ 31, 32, 34.

<sup>53</sup> *Id.* at ¶ 34.

<sup>54</sup> Internal Rule 26(1).

<sup>55</sup> Internal Rule 87(3) allows the Chamber to reject evidence it finds irrelevant, repetitious, impossible to obtain, unpersuasive, impermissible, or unnecessary. The Ieng Sary team argues the notion that, given the right to examine witnesses against them, the defence teams will examine every witness is “absurd.” This right is subject to the discretion of the Trial Chamber under Internal Rule 87(3) ensuring efficiency of the proceedings. Ieng Sary’s Response to the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing at ¶ 21.

an Accused, with a view to adversarial argument.”<sup>56</sup> Although the Trial Chamber acknowledged some exceptions, “as a general rule an Accused must be given an adequate and proper opportunity to challenge and question a witness [against] him, either when he makes his statements or at a later stage.”<sup>57</sup> That the accused had not yet previously had an opportunity to confront the witnesses was a determinative factor in the Trial Chamber’s decision to exclude witness statements.<sup>58</sup>

The Co-Prosecutors also argue that the Court should consider Rule 92 *bis* of the Rules of Procedure and Evidence at the ICTY, as it explicitly sets out a procedure for entering witness statements in lieu of oral testimony.<sup>59</sup> According to this rule, only testimony that does not indicate the acts and conduct of the accused may be considered, and any testimony must be accompanied by a signed and witnessed declaration.<sup>60</sup> The statement may then be considered for admittance, subject to the discretion of the Trial Chamber.<sup>61</sup> However, ICTY Rule 92 *bis* implicates grave concern for the right of the accused to examine witnesses against him. A substantial portion of the rule lists factors for and against admitting written statements by witnesses unable to appear at trial to guide the judges in making such a weighty decision.<sup>62</sup> Furthermore, the Ieng Sary defence team note that the Rules of Procedure and Evidence at the International Criminal Court (“ICC”) only allow witness testimony to be admitted at trial without the witness present if both the

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<sup>56</sup> TC, Case No. 001/18-07-2007/ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, at ¶ 14, n.17.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ¶ 17.

<sup>59</sup> Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber at ¶ 16-19.

<sup>60</sup> ICTY Rules of Evidence and Procedure, Rule 92 *bis* (A) and (B).

<sup>61</sup> *Id.* at Rule 92 *bis* (C).

<sup>62</sup> *Id.* at Rule 92 *bis*(A)(i)-(ii).



prosecution and defence had an opportunity to examine the witness at the time the testimony was recorded.<sup>63</sup>

Internal Rule 84(1) and the delicate balancing of defence examination rights and practical efficiency interests attempted by international courts that allow adversarial defence participation underscore the difficulties inherent in prosecuting mass crimes. In order to ensure equality of arms and fair trial justice, any removal or denial of the right to interview witnesses at the ECCC should be taken with serious reserve. Understanding many of the witnesses are incapacitated or deceased, perhaps the Court will follow its decision in Case 001 and strictly limit restrictions to situations in which the witness has already been thoroughly tested and required to make an oath or sign a declaration in the presence of court officials. In any event, severe controversy may arise should the Court admit statements by witnesses not yet confronted by either the accused or the OCII, especially those not verified by competent court officials.

**iv. The OCP Has Maintained that the Case File Is Sufficiently Complete**

In response to all complaints by the ECCC defence teams, the Prosecution argues the defence teams have had ample opportunity to sculpt a defense with the evidence already entered in the case file. The Co-Prosecutors reference an e-mail by the Trial Chamber addressing the numerous requests by the defence teams to identify exculpatory material gathered during the investigation.<sup>64</sup> The Trial Chamber noted that all evidentiary documents and full records of all witness interviews, whether exculpatory or inculpatory, are provided in the case file, to which all parties have equal access.<sup>65</sup> The Co-Prosecutors argue it is the duty of the defence teams to

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<sup>63</sup> ICC Rules of Procedure and Evidence, Rule 68(a).

<sup>64</sup> OCP, Case No. 002/19-09-2007-ECCC/TC, Co-Prosecutors' Response to Ieng Sary's Motion for the Exclusion of Kang Guek Eav's Alias "Duch" Statements in the Event He Does Not Testify and for the Further Identification of Exculpatory Material, 9 May 2011, E78/1, at ¶ 3.

<sup>65</sup> Id.

assess which material is advantageous to their respective clients.<sup>66</sup> Some trial observers with inside knowledge have suggested there is, in fact, exculpatory evidence that would be propitious to the accused, but the co-lawyers have not performed a competent evaluation of the materials available.<sup>67</sup> Moreover, as discussed above, the Co-Prosecutors contend the investigation has been so thorough, witness statements should be admitted as evidence without according the accused the absolute right to cross-examine the witnesses at trial.<sup>68</sup> In the opinion of the Co-Prosecutors, the accused were allowed to participate in the investigation by filing requests for investigative action and had the opportunity to contest all evidence and witness statements through their right to appeal, which would have been decided at the discretion of the CIJs.<sup>69</sup> The Trial Chamber has recently agreed with this argument finding that equality of arms has been met through the procedural safeguards provided for in the ECCC legal framework.<sup>70</sup>

### **C. Conclusion**

In considering arguments related to investigatory rights and duties, it must be stressed that no specific provision under the Internal Rules or ECCC Law has been violated by the exclusion of defence participation in the investigation. According to Article 23 (new) of the ECCC Law and Internal Rule 55, the OCIJ is vested with plenary authority over investigations.<sup>71</sup> The parties shall have access to the original case file throughout the proceedings and may at any time submit reasoned requests to the OCIJ to conduct specific investigative actions; however, the

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<sup>66</sup> Id.

<sup>67</sup> As it is impossible for observers outside the Court to fully understand the intricate complexities of the disagreements that have arisen regarding the investigation and witness examinations, the extent to which the defence teams have analyzed the case file cannot be known at this stage in the proceedings. Perhaps at trial, the proficiency of the co-lawyers will be elucidated.

<sup>68</sup> Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber at ¶ 31-33.

<sup>69</sup> Id. at ¶ 34.

<sup>70</sup> Trial Chamber, Case No. 002/19-09-2007/ECCC/TC, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, at ¶ 18-19.

<sup>71</sup> In particular, see Internal Rule 55(5).

implementation of investigatory procedures and the collection of evidence are within the sole discretion of the OCIJ.<sup>72</sup> Most pointedly, Internal Rule 60 states in unambiguous language the accused, their lawyers, or any other party may not be present during witness interviews unless previously arranged by the OCIJ.<sup>73</sup>

Even if there has not been a specific violation of applicable ECCC Law or Rules, and even if the judges do have sole discretion on investigative actions, it appears the defence teams are entering the trial phase unarmed. If their accusations are true, they have not been granted an opportunity to supplement the investigation, the investigation has not been sufficiently transparent, and the defence may not have the opportunity at trial to challenge the evidence that has been collected. Further, there may be a lack of resources at trial to properly supplement the case file, and the proceedings will be obstructed if investigative disputes are not resolved in advance. It is not possible for those outside the judicial chambers, however, to ascertain whether these accusations are true because the entire investigation was executed by the OCIJ in complete confidentiality.

This is precisely the type of scenario opponents call attention to when criticizing the inquisitorial criminal justice system for its weakness in equality of arms. Since the trial of the accused in the ECCC depends almost completely upon evidence gathered under the absolute and confidential authority of the CIJs, judicial competence, independence, and impartiality are paramount to preserving the right to a fair trial. This is especially imperative in light of the actual

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<sup>72</sup> The presumption of impartiality attached to a Judge supports the broad discretion accorded the Co-Investigating Judges. *See* Internal Rules 55(6), 55(10), 86; PTC, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, at ¶ 22; Prosecutor v. Anto Furundžija, ICTY, Judgement, 21 July 2000, IT-95-17/1-A, at ¶ 196-97.

<sup>73</sup> “Except where a confrontation is organised, the Co-Investigating Judges or their delegates shall interview witnesses in the absence of the Charged Person, any other party, or their lawyers, in a place and manner that protects confidentiality.” Internal Rule 60(2).

and possible restrictions on the accused to participate in confronting the evidence against them at trial. However, there have been numerous accusations that the CIJs have not afforded the accused fair and impartial consideration in the investigation and that the investigation has been tainted by incompetence, partiality, and political meddling.

### **III. Allegations Regarding the Lack of Judicial Independence in the Investigation**

As early as 1999, during the negotiations to form the ECCC, United Nations officials advised that Cambodia's lack of "respect for an impartial criminal justice system" would vitiate the Chambers of the ECCC.<sup>74</sup> Corruption and political interference were found to pervade the Cambodian judiciary: judges were paid unbearably low wages, leading to bribery and side deals; there was an understanding that all judges, even those not involved with the Cambodian People's Party ("CPP"), kept their positions depending "upon the approval of political elements;" pure incompetence obstructed justice; and law enforcement acted almost without restraint.<sup>75</sup> In 2007, the United Nations also expressed reserve about continuing forward with national judges who were appointed by the executive branch rather than the Supreme Council of Magistracy in the judicial branch and reiterated the need for complete judicial independence throughout the development of the Court.<sup>76</sup> Even today, it is commonly understood that membership in the CPP is an unofficial prerequisite for aspiring judges.<sup>77</sup> Reminding her colleagues of their role as exemplars for the developing Cambodian justice system, on August 1, 2011, Trial Chamber

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<sup>74</sup> Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, "Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council," 18 February 1999, at ¶ 129.

<sup>75</sup> Id.

<sup>76</sup> Joint Public Statement, "The United Nations Special Representative of the Secretary General for Human Rights in Cambodia and the Special Rapporteur on the Independence of Judges and Lawyers Express Concern over Judicial Independence in Cambodia in the Light of Recent Judicial Appointments," 23 August 2007.

<sup>77</sup> Private conversation with anonymous Cambodian legal students and practicing attorneys.

Judge Silvia Cartwright stressed they should consider “the fact that the world watches all facets of these trials and will judge *us* individually and collectively.”<sup>78</sup>

The rules governing judicial impartiality are well defined. Article 5(2) and (3) of the Agreement requires all judges be of “high moral character, impartiality and integrity” and that they “be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.” Article 10(new) of the ECCC Law requires judges have “high moral character, a spirit of impartiality and integrity, and experience.” Internal Rule 34(2) allows “any party” to “file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.” These rules mirror international standards as provided at the ICCPR, ECHR, ICC, ICTY, and ICTR.<sup>79</sup> Thus, the defence teams are within their right to file applications for disqualification if they have evidence of actual bias or an appearance of bias.

However, the requirements to prove actual bias or an appearance of bias are extremely high as judges enjoy a presumption of impartiality, and the burden of proving otherwise rests on the petitioner.<sup>80</sup> In Case 002, there have been no allegations of actual bias committed by any of the judges; instead, all allegations have been limited to an appearance of bias. The ECCC Pre-

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<sup>78</sup> Opening Speech at the 10<sup>th</sup> Session of the ECCC Plenary, by Judge Silvia Cartwright, Vice-President of the ECCC Plenary, 1 August 2011, available at <<http://www.eccc.gov.kh/en/document/public-affair/opening-speech-10th-session-eccc-plenary-judge-silvia-cartwright-vice-preside>>.

<sup>79</sup> ICCPR, Article 14(1); ECtHR, Article 21 and Article 23(4); ICC, Rules of Procedure and Evidence, Ch. 2 §1, Rule 5(1)(a) and Ch. 2 §4.2, Rule 34(1); ICTY, Rules of Procedure and Evidence, Part III, §1, Rule 14(A) and Rule 15(A); ICTR, Rules of Procedure and Evidence, Part III, §1, Rule 14(A) and Rule 15(A).

<sup>80</sup> Hauschildt v. Denmark, ECtHR 7, No. 10486/83, Judgement, 24 May 1989, at § II, ¶ 47.

Trial Chamber adopted a two-pronged rule to govern an appearance of bias set out by the Appeals Chamber in the ICTY:

- i. a judge is a party to the case, has a financial or proprietary interest in the case, or is involved in any cause affected by the case; or
- ii. “the surrounding circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”<sup>81</sup>

Generally, the objective test (assessing an appearance of bias) requires the petitioner to show the factual background of the judge raises an apprehension of bias under the specific circumstances.<sup>82</sup> Indeed, the second prong of the ICTY appearance of bias test could arguably require the disqualification of national judges altogether, due to the widespread assumptions of corruption at every level of the Cambodian judiciary. “What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.”<sup>83</sup>

#### **A. Political Persuasion and Partiality Among the National Court Officials**

No direct evidence has been made public that National Co-Investigating Judge You Bunleng has not acted independently in fulfilling the duties of his office. However, the notorious lack of independence of the Cambodian judiciary combined with allegations against other ECCC judges and politically suspect decisions on his part have cast doubt on his impartiality. For example, the Nuon Chea defence team has alleged that Judge You Bunleng has “demonstrated an

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<sup>81</sup> PTC, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, at ¶ 20; The Prosecutor v. Anto Furundžija, ICTY, Case No. IT-95-17/1-A, Judgement, 21 July 200, at ¶ 189(B).

<sup>82</sup> Id. at (4) Objective Impartiality of a Judge and Findings; Hauschildt v. Denmark, ECtHR 7, No. 10486/83, Judgement, 24 May 1989, at ¶ 48. For a more detailed discussion of the international legal standards for allegations of judicial bias, see “Legal regime for addressing administrative and judicial corruption allegations” by 2009 DC-Cam Legal Associate Elizabeth Nielsen available at < [http://www.dccam.org/Abouts/Intern/Interns\\_2004\\_2011.htm](http://www.dccam.org/Abouts/Intern/Interns_2004_2011.htm)>.

<sup>83</sup> Hauschildt v. Denmark, ECtHR 7, No. 10486/83, Judgement, 24 May 1989, at ¶ 48.

apparent willingness to improperly utilize his judicial power in the service of the Government's agenda" by inactions in the judicial investigation of Cases 002 and 003.<sup>84</sup> Even the appearance of such influence may be detrimental to the success of the Court; "what is at stake is the confidence which the courts in a democratic society must inspire in the public."<sup>85</sup>

**i. Refusal to Comply with a Request for an Interview with King Father and Summonses for Government Officials**

In perhaps the most manifest instance of alleged political interference, Judge You Bunleng apparently refused to sign OCIJ letters requesting the interviews of King Father Norodom Sihanouk and six government officials. The OCIJ also did not pursue enforcement of the summonses as would be within their authority pursuant to Internal Rules 60(3) and 35(1)(b), Article 23(new) of the Establishment Law, and Article 25 of the Agreement.<sup>86</sup> The Nuon Chea defence team suggested that national judges and court officials likely resisted assisting the OCIJ in compelling appearance of the proposed witnesses after public comments were made by political leaders declaring the government position as "no."<sup>87</sup> First, when the OCIJ issued a letter requesting the audience of the King Father in July of 2009, Royal Palace representatives proclaimed "he will not go," and Kong Sam Ol, Deputy Prime Minister and Minister of the Royal Palace, prevented OCIJ officials from contacting the King Father.<sup>88</sup> Similarly,

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<sup>84</sup> PTC, Case No. 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, 8, at ¶ 17 (citing Application for the Disqualification of Judge You Bunleng filed by the Nuon Chea Defence Team on 17 June 2010, Doc No. 1, ERN 00535168-00535181).

<sup>85</sup> Ferrantelli and Santangelo v. Italy, ECtHR, No. 19874/92, Judgment, 7 August 1996, at ¶ 58.

<sup>86</sup> Defence for Nuon Chea, Case No. 002/19-09-2007-ECCC/TC, Consolidated Preliminary Objections, 25 February 2011, E51/3, at ¶ 6(a); Open Society Justice Initiative, Recent Developments at the ECCC, November 2009 Update, p. 5. See also PTC, Case No. 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, 8, at ¶ 16.

<sup>87</sup> Agence France-Presse (AFP), "Khmer Rouge Court Calls Government Witnesses," 7 October 2009. Prime Minister Hun Sen had also made numerous comments in public regarding his preference to terminate the Court after Case 002 including a speech broadcasted by Voice of America, 18 March 2009.

<sup>88</sup> Sok Khemara, Voice of America (VOA) Khmer, "Sihanouk 'Will Not Go' to Tribunal: Aid," 20 July 2009; Nuon Chea Defence Team, Case No. 002/19-09-2007-ECCC/TC, Consolidated Preliminary Objections, 25 February 2011, E51/3, at ¶ 6(a).

Government spokesman Khieu Kanharith declared the official position on the issue was “no” and if any international court officials were unsatisfied, they could “pack their clothes and return home.”<sup>89</sup>

Further frustrating the defence teams, the national and international judges of the Pre-Trial Chamber could not form a majority vote and issued separate opinions on whether an interference pursuant to Internal Rule 35(1)(b) occurred.<sup>90</sup> The three national judges uniformly opined that no interference occurred, raising more suspicion.<sup>91</sup> The international judges, however, chastised the Co-Investigating Judges for providing no legal reasoning for refusing to apply Internal Rule 35(2) which grants them the authority to deal with the matter summarily, conduct further investigations into possible interference, or refer the matter to the RGC or UN.<sup>92</sup> They further found that “no reasonable trier of fact could have failed to consider...the facts and their sequence constitute a reason to believe that one or more members of the RGC may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs,” and the Co-Investigating Judges were therefore in error to repeatedly deny the requests for investigative action.<sup>93</sup> The international judges concluded that the Pre-Trial Chamber should have conducted the investigation and taken action as the OCIJ is evidently not the most “suitable” body to ‘conduct an investigation into these allegations of interference.’<sup>94</sup>

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<sup>89</sup> Agence France-Presse (AFP), “Khmer Rouge Court Calls Government Witnesses,” 7 October 2009.

<sup>90</sup> Case No. 002/19-09-2007-ECCC/OCIJ (PTC 50), Second Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summon Witnesses, 10 September 2010, D314/1/12, at ¶ 9, 41. Internal Rule 35(1)(b) grants the ECCC the authority to sanction or refer to appropriate authorities any person who, without just reason, fails to comply with an order from the Co-Investigating Judges or Chambers to appear.

<sup>91</sup> *Id.* at Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy, at ¶ 7.

<sup>92</sup> *Id.* at Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, at ¶ 1.

<sup>93</sup> *Id.* at ¶ 6.

<sup>94</sup> *Id.* at ¶ 8.



**ii. Lack of Investigative Action in Case 003**

Judge You Bunleng also decided to remove his signature from rogatory letters in Cases 003 and 004 one day after a government spokesman made a public statement articulating the government's opposition to indicting additional suspects.<sup>95</sup> Since the inception of the Court, the RGC has consistently and publicly declared its plans to prevent any investigation beyond Case 002.<sup>96</sup> Prime Minister Hun Sen, while pronouncing he is acting in the interests of peace and reconciliation, has promised fellow former Khmer Rouge officials the prosecutions at the ECCC would be limited to only "four or five" individuals.<sup>97</sup> At first, the UN reproached the government's audacity and urged the Cambodian government to allow the judges full discretion regarding which individuals to prosecute.<sup>98</sup> Since that time, the UN has become less critical of the political maneuverings of Hun Sen to limit the scope of the Court in favor of highlighting the progress made in Cases 001 and 002.<sup>99</sup> There has also been discord between the National and International Judges and between the Co-Prosecutors as the national counterparts have consistently followed RGC policies.<sup>100</sup>

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<sup>95</sup> Nuon Chea's Consolidated Preliminary Objections at ¶ 50.

<sup>96</sup> See Douglas Gillison, Time, "At Opening of Cambodia War Crimes Trial, Anger, Doubt and Suspicion Linger," 28 June 2011; Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," November 2009; German Parliament, "Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid 25 October – 3 November 2008," 14 November 2008.

<sup>97</sup> See Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," November 2009.

<sup>98</sup> The UN Secretary-General's Remarks at ECCC, 27 October 2010, available at <[http://www.cambodiatribunal.org/sites/default/files/reports/ban\\_ki\\_moon\\_remarks.pdf](http://www.cambodiatribunal.org/sites/default/files/reports/ban_ki_moon_remarks.pdf)>.

<sup>99</sup> Remarks by Mr. Clint Williamson, Special Expert of the UN Secretary-General on the ECCC at the Meeting Hosted by His Excellency Dr. Sok An Deputy Prime Minister of the Kingdom of Cambodia with Representatives of ASEAN Plus India and the Republic of Korea, 1 April 2011, available at <<http://www.eccc.gov.kh/en/document/public-affair/remarks-mr-clint-williamson-special-expert-united-nations-secretary-general-1>>.

<sup>100</sup> For instance, regarding the initial disagreement between the International and National Co-Prosecutors on whether to forward the Introductory Submissions for Cases 003 and 004 to the Co-Investigating Judges, the Pre-Trial Chamber was unable to reach a majority vote. While the international judges opined the New Submissions should be forwarded, the national judges opined the New Submissions are unnecessary and should be blocked. Disagreement No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009 at ¶ 29-30.

Without having summoned the two suspects, conducted one witness interview, or examined any of the crime sites, the Co-Investigating Judges, You Bunleng and Siegfried Blunk, concluded the judicial investigation in Case 003 arousing strong indignation of the international community.<sup>101</sup> The International Co-Prosecutor concluded in a public statement criticizing the investigation as being inadequate and requesting further, comprehensive investigative actions before the decision to indict the suspects or dismiss the case.<sup>102</sup> The National Co-Prosecutor, in contention with her international counterpart, issued a public statement declaring her conclusion that the suspects in Case 003 were not senior leaders or those most responsible.<sup>103</sup> To date, there has been neither a dismissal nor an indictment, and the Co-Investigating Judges have denied the International Co-Prosecutor's requests for further investigative action.<sup>104</sup>

### **iii. National Judges in the Context of the Cambodian Judiciary**

These examples, not by any means the sole deficits in the investigation, have serious implications for the fair trial rights of the accused in Case 002. They insinuate the national judges, possibly Judge You Bunleng, have been making decisions as a direct response to the political motives of the RGC. However, when taken alone, each accusation of political interference and bias has not been sufficient to satisfy the high burden of proof required to

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<sup>101</sup> James A. Goldston, Open Society Justice Initiative, "No Justice in the Killing Fields, 28 April 2011.

<sup>102</sup> ECCC Press Release, "Statement by the International Co-Prosecutor Regarding Case File 003," 9 May 2011.

<sup>103</sup> Of note, the Co-Investigating Judges had reproached the International Co-Prosecutor for expressing his opinion of the alleged crimes and investigation but made no mention of the opinion in the National Co-Prosecutor's public statement. ECCC Press Release, "Statement by the National Co-Prosecutor Regarding Case File 003," 10 May 2011. See also, Case No. 003/07-09-2009-ECCC-OCIJ, Order on International Co-Prosecutor's Public Statement Regarding Case File 003, 18 May 2011, D14, at ¶ 4.

<sup>104</sup> See Douglas Gillison, Time, "At Opening of Cambodia War Crimes Trial, Anger, Doubt and Suspicion Linger," 28 June 2011; Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," November 2009; German Parliament, "Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid 25 October – 3 November 2008," 14 November 2008. Several OCIJ staff left after the failure to adequately investigate Case 003. Stephen Heder, a respected advisor to the Court, described the office as a "toxic atmosphere of mutual distrust" and "professionally dysfunctional." James O'Toole, Phnom Penh Post, "Disorder in the Court," 13 June 2011; Andrew Buncombe, The Independent, "A 'Toxic Mistrust' at Cambodia's Dysfunctional Genocide Trial," 13 June 2011.

override the presumption of impartiality attached to a judge. The Pre-Trial Chamber has repeatedly held that Judge You Bunleng has not violated any specific rule or law, and there is no evidence he acted in overt obedience with government direction. When viewed in context with the public statements by government officials, the disposition of the Cambodian judiciary, and the allegations against other national judges, the behavior of Judge You Bunleng raises many observer’s suspicions as to the quality and impartiality of the investigation in Case 002.

In the Cambodian context, any national court arouses at least an intimation of suspicion as the judiciary is well known for its corruption and political submissiveness.<sup>105</sup> In a World Bank survey report, the Cambodian judiciary is one of three public services requiring the highest and most frequent bribes.<sup>106</sup> Sixty-four percent of Cambodian citizens believe the judiciary is very corrupt, sixty-three percent agree the courts are only for the elite, and fifty-eight percent have no trust in the judicial system.<sup>107</sup> In this regard, addressing the frequent accusations of an appearance of bias, which have targeted every Chamber and resulted in minimal success for the defence, has been a heavy burden since nearly every national Judge has a checkered past.

For example, Judge Nil Nonn, President of the Trial Chamber, had openly admitted to accepting bribes in his role as President of the Court of Battambang.<sup>108</sup> “He admits that, yes, he does take bribes—of course—but only after a case is over. After all, he earns only \$30 a month,

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<sup>105</sup> See Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, “Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council,” 18 February 1999; Joint Public Statement, “The United Nations Special Representative of the Secretary General for Human Rights in Cambodia and the Special Rapporteur on the Independence of Judges and Lawyers Express Concern over Judicial Independence in Cambodia in the Light of Recent Judicial Appointments,” 23 August 2007.

<sup>106</sup> World Bank at the Request of the Royal Government of Cambodia, “Cambodia Governance and Corruption Diagnostic: Evidence from Citizen, Enterprise and Public Official Surveys,” May 2000, at <[www.worldbank.org/wbi/governance](http://www.worldbank.org/wbi/governance)>.

<sup>107</sup> *Id.*

<sup>108</sup> Ieng Sary Defence Team, Case No. 002/19-09-2007-ECCC/TC, Ieng Sary’s Application to Disqualify Judge Nil Nonn Due to His Purported Admission that He Has Accepted Bribes, 14 January 2011, E5, at ¶ 8.

not nearly enough to provide for his family.”<sup>109</sup> Additionally, the Ieng Thirith and Ieng Sary defence teams submitted an application for the disqualification of Judge Som Sereyvuth of the Supreme Court Chamber and Judge You Ottara on the Special Bench due to a previous decision in their roles on the Supreme Court of Cambodia in 2010.<sup>110</sup> The Supreme Court panel had rejected an appeal by Mu Sochea, a leader in the Sam Rainsy opposition party, on charges of defamation of Prime Minister Hun Sen.<sup>111</sup> The decision was criticized by the international community as a violation of civil and political rights and for lacking any legal reasoning.<sup>112</sup>

With similar arguments, the Duch defence team in Case 001 and the Nuon Chea defence team in Case 002 accused Pre-Trial Chamber Judge Ney Thol of having an appearance of bias arising mainly from his role as president of the military court since 1987.<sup>113</sup> In 1998, Judge Ney Thol presided over a case accusing Prince Norodom Ranariddh of weapons smuggling,

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<sup>109</sup> Amanda Pike, PBS Frontline/World, “Battambang: The Judge,” October 2002, available at <<http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>>.

<sup>110</sup> Case No. 002/19-09-2007-ECCC/SC(1), Decision on Ieng Thirith’s Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, 1/4, at ¶ 1.

<sup>111</sup> *Id.* at ¶ 2.

<sup>112</sup> *Id.*; see also UN News Centre, “Defamation Case against Cambodian Opposition Political Sparks UN Concern,” available at <<http://www.un.org/apps/news/story.asp?NewsID=35310&Cr=cambodia&Cr1=>>>; SF State Magazine, “Taking a Stand,” available at <[http://www.sfsu.edu/~sfsumag/archive/fall\\_09/alumni6.html](http://www.sfsu.edu/~sfsumag/archive/fall_09/alumni6.html)>. The ECCC Supreme Court noted that decisions by the Cambodian Supreme Court are published en masse, so it is not possible to analyze how Judge Som Sereyvuth or Judge You Ottara acted or opined in this instance. The mere fact that a judge “performed the judicial duties assigned to him by sitting on a panel that issued a widely criticized decision neither demonstrates that he endorsed the decision nor acted without independence.” Case No. 002/19-09-2007-ECCC/SC(1), Decision on Ieng Thirith’s Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, 1/4, at ¶ 12. The ECCC Supreme Court also pointed out that the bulk of the allegations in the applications for disqualification are focused on the lack of political freedom in Cambodia and violations of Mu Sochea’s rights that were not part of the case before the Supreme Court panel on her appeal. Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Thirith and Ieng Sary’s Applications for Disqualification of Judge You Ottara from the Special Bench & Requests for a Public Hearing, 9 May 2011, E63/5, at ¶ 14.

<sup>113</sup> They also complained of his positions as an officer in the Royal Armed Forces of Cambodia (RCAF) and a member of the central committee of the Cambodian People’s Party (CPP), Hun Sen’s ruling political party. Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Public Notification of Recusal of Judge Ney Thol, 13 October 2008, D99/3/20, at ¶ 1; Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, at ¶ 1; ECCC website at <<http://www.eccc.gov.kh/en/judicial-person/he-mr-ney-thol>>.

sentencing him to seven years in prison.<sup>114</sup> The case was touted as a move by Hun Sen to neutralize a political rival he had ousted in a coup one year prior.<sup>115</sup> Judge Ney Thol also convicted Cheam Channy, a legislator and member of the opposition party led by Sam Rainsy, in a controversial case described as a “complete sham” by Brian Adams, Asia director for Human Rights Watch.<sup>116</sup> Court monitors immediately criticized the case, calling it a “show trial,” partly because it is contrary to Cambodian law for a civilian to be tried in a military court when the crimes alleged do not fall under its subject matter jurisdiction.<sup>117</sup> More importantly, during the trial, Judge Ney Thol consistently interrupted Cheam Channy’s defence during cross-examination of prosecution witnesses and refused to allow the defence to call their own witnesses.<sup>118</sup>

#### **B. Partiality in the Investigation by the International Co-Investigating Judges**

In light of the suspicions regarding the national judges, and the fact that the ECCC was designed to include international participation to insulate the Court from domestic political pressures, it is imperative the international judges be above reproach. The Bangalore Principles require that a judge not only be independent of all political agendas but also appear to be independent to reasonable, informed observers.<sup>119</sup> “A judge shall exhibit and promote high

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<sup>114</sup> Ker Munthit, Associated Press, “Cambodia Judges’ Credibility Questioned,” 22 May 2006. See also Nuon Chea Defence Team, Case No. 002/19-09-2007-ECCC/PTC, Urgent Application for Disqualification of Judge Ney Thol, 28 January 2008, C11/21, at ¶ 35.

<sup>115</sup> Id.

<sup>116</sup> Human Rights Watch News Report, “Cambodia: Opposition MP Jailed after Sham Trial,” 9 August 2005. See also Human Rights Watch Report, “Cambodia: Opposition Politicians Arrested, Forced to Flee,” 6 February 2005; Urgent Application for Disqualification of Judge Ney Thol, at ¶ 29.

<sup>117</sup> Id.

<sup>118</sup> Amnesty International categorized Cheam Channy as a “prisoner of conscience” and HRW asserted the conviction of Cheam Channy for forming a secret army “is a blatant attempt to eliminate the political opposition.” See Ker Munthit, Associated Press, “Cambodia Judges’ Credibility Questioned,” 22 May 2006; Amnesty International Public Statement, “Cambodia: “Sentencing of parliamentarian reflects continuing flaws in the judicial system,” 10 August 2005, AI Index: ASA 23/005/2005, News Service No. 218; Human Rights Watch News Report, “Cambodia: Opposition MP Jailed after Sham Trial,” 9 August 2005.

<sup>119</sup> The Bangalore Principles of Judicial Conduct, 25-26 November 2002, at Value 1.3.

standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.”<sup>120</sup> The UN had insisted on the inclusion of international judges in establishing the ECCC to keep the national judges in line with international standards of fair justice and judicial independence.<sup>121</sup> The supermajority vote was written into the provisions as a compromise between the RGC’s desire to maintain national control over the Court and the UN’s requirement of an international check on judicial functions. The first International Co-Investigating Judge, Marcel Lemonde, was thus tasked with ensuring adherence to notions of fair trial justice in the investigation. In contravention to both his national counterpart and the RGC, Judge Lemonde attempted to initiate the investigations in Case 003 and actively pursue the interviews of the King Father and six government officials in Case 002. He also filed a disagreement, according to Internal Rule 72 and Article 23 (new) of the Establishment Law, with Judge You Bunleng when they diverged on whether to initiate the investigation in Case 003 showing his willingness to challenge his national counterpart.<sup>122</sup>

However, in one of the more publicized accusations of judicial bias, Judge Lemonde received much criticism for allegedly stating at an informal meeting, “I would prefer that we find more inculpatory evidence than exculpatory evidence.”<sup>123</sup> Wayne Bastin, former chief of the Intelligence and Analysis Unit, was present at the meeting and reported the incident to the Co-Lawyers for Ieng Sary two months later.<sup>124</sup> The Ieng Sary and Khieu Samphan defence teams

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<sup>120</sup> Id. at Value 1.6.

<sup>121</sup> Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, “Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council,” 18 February 1999, at ¶ 181, 187.

<sup>122</sup> ECCC Press Release, “Statement from the Co-Investigating Judges,” 9 June 2010 (available in French only).

<sup>123</sup> PTC, Case No. 002/13-10-2009-ECCC/PTC (02), Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, 7, ¶ 5. See also Sebastian Strangio, Phnom Penh Post, “Second bias motion planned,” 12 October 2009.

<sup>124</sup> Id.

immediately filed applications to disqualify Judge Lemonde based on Bastin's account.<sup>125</sup> In his consolidated response, Judge Lemonde puts forth numerous defenses including that the meeting took place in his own home, he was not comfortable speaking in English, and he does not remember making the statement.<sup>126</sup> If he did in fact utter those words, he argues, "it would have been made in jest, as would have been obvious to everyone present."<sup>127</sup>

Whether Judge Lemonde meant his words to be taken lightheartedly or as an explicit instruction, remarks of this character are wholly unacceptable and should be weighted heavily. The Bangalore Principles have laid out extensive standards against such behavior:

"A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities;

As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office;

A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality."<sup>128</sup>

That the meeting took place at his home and English is not his native language should not be mitigating factors in making a determination of bias; particularly in light of the exactness of the statement made by Judge Lemonde, "more inculpatory than exculpatory evidence." However,

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<sup>125</sup> The applications to disqualify filed by the defence teams are not available to the public. In the alternative, see PTC, Case No. 002/09-10-2009-ECCC/PTC(01), Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, 7, ¶ 1, 5; and Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde at ¶ 1, 5.

<sup>126</sup> Case No. 002/09-10-2009-ECCC/PTC(01) and 002/13-10-2009-ECCC/PTC(02), Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan, 5 November 2009, 4, ¶ 8; Annex 'A' ¶ 5.

<sup>127</sup> Id. at ¶ 8.

<sup>128</sup> Values 4.1-4.3. See also Values 3.1-3.2. The Bangalore Principles were adopted at The Hague by the Judicial Group on Strengthening Judicial Integrity in 2002 and recognized by ECOSOC in 2006. ECOSOC invited member states to apply the Bangalore Principles when developing their judiciaries. Since this recommendation, many states world-wide have implemented the Principles in codes of ethics for judges. See also U.N. Economic and Social Council, Strengthening Basic Principles of Judicial Conduct, Resolution 2006/23; and Commentary on the Bangalore Principles of Judicial Conduct by the Judicial Integrity Group, March 2007.

the defence teams failed to provide supporting evidence beyond one statement signed by Wayne Bastin at an Australian police station.<sup>129</sup> With lack of substantiation, the alleged statement by Lemonde does not fulfill the high standard required of bias. As set out in the ICTY, there is a presumption of impartiality attached to judges, and unless evidence is submitted to the contrary, “it must be assumed that the judges of the international tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions.”<sup>130</sup>

Judge Lemonde’s successor, Siegfried Blunk, has received greater criticism for his performance of the investigations in Cases 003 and 004. For example, since the close of the investigation in Case 003, numerous OCIJ staff have resigned due to frustration with the quality of the investigation and their suspicions of political interference.<sup>131</sup> One insider reported some of the discontent in the OCIJ specifically stems from the policies of Judge Blunk and lack of confidence in his leadership.<sup>132</sup> The Open Society Justice Initiative (“OSJI”) pointed out that between the date Judge Blunk took office and the closing of the investigation, no field work was performed.<sup>133</sup> This highlights concerns of the defence teams that the legitimacy of the ECCC is deteriorating due to lack of judicial independence.<sup>134</sup> As stated previously, the absolute discretion entrusted in the Co-Investigating Judges, which is not subject to review by the Pre-Trial Chamber, mandates absolute independence and competency in the judges.<sup>135</sup> Due to the dubious

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<sup>129</sup> Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde at ¶ 5.

<sup>130</sup> The Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-A, Judgement, 21 July 2000, at ¶ 196-97.

<sup>131</sup> See, e.g., James O’Toole, Phnom Penh Post, “Disorder in the Court,” 13 June 2011; Jared Ferrie, Christian Science Monitor, “More Leaked Documents Highlight Khmer Rouge Tribunal under Fire in Cambodia,” 15 June 2011.

<sup>132</sup> James O’Toole, Phnom Penh Post, “Disorder in the Court,” 13 June 2011; Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia,” June 2011.

<sup>133</sup> Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia,” June 2011.

<sup>134</sup> Nuon Chea’s Consolidated Preliminary Objections at ¶ 57.

<sup>135</sup> See PTC, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), “Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive,” 18 November 2009, D164/4/13, at ¶ 25.



character of the Cambodian judiciary and the specific instances warranting suspicion of the national Co-Investigating Judge, the international Co-Investigating Judge must at all times and incontrovertibly align with international standards of transparency and fair trial justice to maintain public confidence in the Court.<sup>136</sup>

#### **IV. Conclusion**

The inquisitorial method itself is a legitimate and respected criminal justice system and is in many ways efficient for such a complex tribunal as the ECCC with numerous defendants being tried for the same event. Due to inherent restraints against participation in the investigation, however, the judges must be above reproach to ensure the interests of the accused are protected. In light of the incomplete investigations in Cases 003 and 004, it is all the more imperative to ensure fair justice and judicial independence in Case 002. Deputy Prime Minister Dr. Sok An stated, regarding the pending conclusion of Case 001, “The work of the tribunal is not yet finished and the stakes are too high for the future of the tribunal as a potential model for delivering justice for the international community to walk away now.”<sup>137</sup>

However, restraints on investigative participation have led to accusations of inequality of arms on behalf of the accused in Case 002. And there is now a possibility the accused will not be able to remedy any defects in the investigation by confronting all witnesses against them at trial. Should the Court accept the Co-Prosecutors’ request regarding admissibility of witness statements, the accused would never have been afforded an opportunity to fully question the

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<sup>136</sup> “WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.” The Bangalore Principles of Judicial Conduct, 25-26 November 2002.

<sup>137</sup> Remarks to the Meeting on the ECCC of Representatives of ASEAN Plus India and the Republic of Korea by H.E. Dr. Sok An, Deputy Prime Minister, Minister in Charge of the Office of the Council of Ministers, Chairman of the Khmer Rouge Task Force and Signatory to the Agreement Between the Royal Government of Cambodia and United Nations, 1 April 2011.

evidence against them, which is a fundamental right mandated by international law.<sup>138</sup> This, combined with the dubious behavior of the CIJs, suggests deficiency in the investigation in the ECCC's Case 002.

The Trial Court has the ability to rectify any deficiencies in the investigation by ensuring equality in the examination of evidence at trial. In particular, the accused must be afforded the opportunity to challenge all witness statements and documentation that attest to an act, conduct, or position of the accused. Furthermore, the Judges of the Trial Chamber must act in complete transparency, including fully reasoned decisions, to avoid creating an appearance of bias. As Judge Silvia Cartwright has forewarned, every activity by the Trial Chamber will be under public scrutiny, and the Judges must keep in mind their role in the legacy of the ECCC: “to restore a system that gives Cambodian people confidence that they will receive justice from their courts” and “to show the international community that Cambodia is making efforts to put in place a system that meets international standards.”<sup>139</sup>

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<sup>138</sup> See ECHR, Article 6(3)(d); ICCPR, Article 14(3)(e).

<sup>139</sup> Opening Speech at the 10<sup>th</sup> Session of the ECCC Plenary, by Judge Silvia Cartwright, Vice-President of the ECCC Plenary, 1 August 2011.