

Summer 2013

ECCC in the Year 2011: Atrocity Crime Litigation Review for the Year 2011

Melissa Hindman

Victoria Jiha Lee

Alice Lin

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Melissa Hindman, Victoria Jiha Lee, and Alice Lin, *ECCC in the Year 2011: Atrocity Crime Litigation Review for the Year 2011*, 11 Nw.J. INT'L HUM. RTS. 164 (2013).
<http://scholarlycommons.law.northwestern.edu/njihr/vol11/iss3/7>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

ECCC in the Year 2011: Atrocity Crime Litigation Review in the Year 2011

Melissa Hindman

Victoria Jiha Lee

Alice Lin

CASE 001¹

A. Conviction

¶1 On July 26, 2010, Kiang Guek Eav (alias Duch) was found individually criminally responsible, pursuant to article 29 of the Law on the Establishment of the ECCC (“ECCC Law”), for his acts or omissions in Cambodia between April 17, 1975, and January 6, 1979, during the conflict between the Cambodian and Vietnamese armed forces in the first case (“Case 001”). These acts were committed while he was the Deputy and continued when he became the Chairman of S-21, a security center for interrogation and execution of perceived opponents of the Communist Party of Kampuchea (“CPK”). Case 001 was the first to be tried by the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) for the prosecution of crimes committed during the period of the Democratic Kampuchea. Specifically, pursuant to ECCC Law article 5, Duch was convicted of the crime against humanity of persecution on political grounds, which subsumed crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts. Duch was further convicted, pursuant to article 6 of the ECCC Law for grave breaches of the Geneva Convention of 1949 including willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. The Trial Chamber sentenced Duch to 35 years of imprisonment, with a reduction of 5 years due to his illegal detention by the Cambodia Military Court between May 10, 1999, and July 30, 2007.

B. Appeals

¶2 Among other grounds, the Co-Prosecutors appealed the alleged error of law in the Trial Chamber’s judgment regarding its failure to convict Duch cumulatively for all of his alleged crimes. Specifically, the Co-Prosecutors alleged that the Trial Chamber erred in subsuming (1) the various specific crimes into the crime against humanity of persecution on political grounds, and (2) the crime against humanity of rape under that of torture. The ground for their appeal was the test formulated by the International Criminal Tribunal for the former Yugoslavia (“ICTY”)

¹ ECCC, Prosecutor v. KAING Guek Eav alias ‘DUCH’, 001, <http://www.eccc.gov.kh/en/case/topic/1>.

Appeals Chamber, which required the presence of a “materially distinct element” in order to enter multiple criminal convictions under different statutory provisions. The Co-Prosecutors alleged that the subsumed crimes against humanity all contained a materially distinct element not found in the crime against humanity of persecution on political grounds.

¶3 However, the Trial Chamber’s reasoning in Case 001 for choosing to subsume the various crimes against humanity under that of persecution on political grounds was also founded on the ICTY’s test. The Trial Chamber reconciled the facial incongruity of this application by arguing that the test and the subsequent jurisprudence that has applied it emphasized the legal elements of each crime involved in the potential cumulative conviction, rather than the underlying conduct of the accused party. The Trial Chamber pointed out that, while the elements that make up the offense of persecution and the subsumed offenses might appear distinct, they were not “materially” distinct as defined by the ICTY. Thus, it seems that the Trial Chamber anticipatorily addressed the issue of cumulative convictions.

¶4 Following the Trial Chamber’s judgment, Duch appealed his conviction based in part on the ground of lack of personal jurisdiction.² The Defense argued that Duch did not fit the description of either of the two classes of people over which the ECCC has personal jurisdiction—senior leaders and those most responsible.³ The Defense appealed based on a number of factors, such as the responsibility within the administrative structure of leadership, the exercise of decision-making power within the hierarchy of the CPK leadership, psychological assessment reports by experts, and the limited responsibility within the organization structure of the CPK. The Defense contended that these factors showed that Duch was among those least responsible for the crimes and serious violations of national and international law, and thus was not within the ECCC’s jurisdiction. The Trial Chamber, on the other hand, focused on the gravity of the crimes and the level of responsibility of the accused party in its determination of whether a party could be considered “most responsible” pursuant to the jurisprudence of other international tribunals. Furthermore, the Trial Chamber had already addressed the issue of psychological assessments by citing an expert report that stated that Duch’s evaluation showed no indication of a mental or psychological disorder. Duch’s grounds for appeal seemed reminiscent of the mitigating factors (that Duch acted pursuant to superior orders and under duress), which his counsel argued should be considered in the evaluation of the gravity of the crimes.

¶5 Of particular interest is the Group 1 Civil Parties’ Co-Lawyers’ supplementary request to admit additional evidence in support of their appeal against the Trial Chamber’s judgment.⁴ The information sought to be admitted were two additional witness statements, previously unavailable, attesting to the family link between Norng Sarath, a Civil Party applicant who was

² The Trial Chamber had already found that the Appellant’s objection on personal jurisdiction grounds was inadmissible pursuant to IR 89 because it was presented on the last day of over nine months of trial proceedings and was thus “belated.” The Co-Prosecutors’ further criticized this appeal as being “inconsistent with the position he took at the beginning and throughout most of the Case 001 Proceedings.” They further noted that “the nature of how the Appellant’s personal jurisdiction objection was raised – on the last day of over nine months of trial proceedings, after the parties’ final written submissions had already been made, and after the Appellant’s prior express denials of any intent to challenge personal jurisdiction – demonstrates a lack of good faith on the part of the Appellant in dealing with the ECCC.”

³ The ECCC has personal jurisdiction over “senior leaders of DK” or “those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.”

⁴ This request was filed in response to the Supreme Court Chamber’s reminder on February 22, 2011 regarding Internal Rule (“IR”) 108(7) and request for confirmation from Co-Lawyers for Civil Parties Group 1 whether or not it intended to file a request to admit additional evidence.

denied Civil Party status by the Trial Chamber, and his cousin and uncle, who were both detained and executed at S-21.⁵ This appeal highlighted a problem caused by the significant time lapse between the alleged offenses and the trial proceedings – the difficulty of finding sufficient evidence. While the request was granted by the Supreme Court Chamber on March 28, 2011, allegedly due to its consideration of the “interests of justice and the circumstances of this case,” the situation suggests that the lack of sufficient evidence to prove the requisite “injury” will continue to be a problem in future proceedings.

C. Reparations

¶6 The ECCC allowed victims and families of victims to participate in proceedings as “Civil Parties” under Internal Rule (“IR”) 23, perhaps in response to criticism of the ICTY for limited victim inclusion. IR 100(1) gave the Trial Chamber the authority to make decisions on any Civil Party participation and to rule on the admissibility and substance of such participation. This designation as a Civil Party provides victims the right to claim reparations.

¶7 However, in order to participate as a Civil Party, the alleged victim’s application must first be deemed admissible by the Trial Chamber. Proof of identity must be unequivocal and this requirement was not satisfied by information provided merely to be true. If identity was not proven, then the Trial Chamber could deem the application inadmissible under IR 23(3). Even after being declared admissible, Civil Parties had to satisfy the Trial Chamber of the existence of an injury that was “physical, material or psychological” and the “direct consequence of the offence, [and] actually [came] into being” under the revised IR 23(2).⁶

¶8 Of the eight Civil Parties who claimed to be survivors of S-21 or S-24, four failed to substantiated their right to be a Civil Party for various reasons, including lack of “objective proof from official registers, photographs or confessions” that corroborated their claims, inconsistency between the information in the Civil Party Application and in-court statements, and inconsistent descriptions of the S-21 complex. In addition, the Trial Chamber also found that several parties claiming to be victims due to a loss of a close relative at S-21 and S-24 were deficient for Civil Party status for failure to prove either “dependency or special bonds of affection” or the identity of the deceased.

¶9 The Trial Chamber requested that the Civil Parties found to have suffered harm as a direct consequence of the crimes for which Duch was convicted submit a written document of the forms of collective and moral reparations being sought. Victim’s requested, among other things: the compilation and dissemination of statements of apology [by Duch]; access to free medical care including transportation to and from the medical facilities; funding of educational programs which would inform Cambodians of the crimes committed by the Khmer Rouge; erection of

⁵ The Trial Chamber found that Norng Sarath had not provided any “documentary proof in support of his alleged detention [or] any attestation establishing kinship.”

⁶ The admissibility criteria and standard of proof were clarified in the amendments adopted at the 7th Plenary Session. Rule 23*bis* (1) now provides:

“In order for a Civil Party action to be admissible, the Civil Party applicant shall:

- a) Be clearly identified; and
- b) Demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered, physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.”

memorials and pagoda fences at S-21 and elsewhere; inclusion of the names of the Civil Parties in Case 001 in the final judgment; and assistance in the form of a fund for the Civil Parties. In the end, reparations to these Civil Parties were limited to the Trial Chamber’s compiled statements of apology and acknowledgements of responsibility made by Duch during the course of the trial. Because IR 23*bis* (1)(b) limits reparation to that of a collective and moral nature, the Trial Chamber rejected the other requests, holding that the ECCC lacked the authority to enforce the other forms of reparation requested by the Civil Parties.⁷

¶10 As a result of the limitations shown by Case 001, amendments were effected to the IRs in February and September 2010. In response to criticisms regarding the sufficiency of reparations given in Case 001, one possible effect is the expansion of the mandate of the Victims Support System, which has the power to develop and implement non-judicial programs and measures to support victims, including specific moral and collective reparation measures.

CASE 002⁸

¶11 Case 002 currently before the ECCC has been called “the most complex case since Nuremberg,” with more than 10,000 documents and 700 witness interviews presented to the Co-Investigating Judges (“CIJs”). There is also much pressure on the court to successfully adjudicate this case as the four accused are the surviving Senior Leaders of the Khmer Rouge. The primary challenge is achieving a balance between accurately and thoroughly managing such an expansive case and making efficient progress towards prosecuting individuals with various age-related complications.

¶12 The ECCC’s personal jurisdiction over the four accused is rooted in their identification as “senior leaders of Democratic Kampuchea.” On September 15, 2010, the chamber of the CIJs issued its closing order indicting Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith with crimes against humanity, genocide, and grave breaches of the Geneva Conventions of 1949, under multiple legal theories of responsibility, including joint criminal enterprise. The indictment also included crimes punishable by Cambodia’s domestic Penal Code – namely murder, torture and religious persecution.

¶13 Throughout the year, the Pre-Trial Chamber has addressed the various appeals by the accused persons, the prosecutors, and civil parties; challenges to the accused’s provisional detention; and motions aimed at shaping the trial plan. Most of the accused also made several claims regarding their individual circumstances, including assertions concerning their fitness to stand trial. In November 2011, opening statements were finally heard after the court agreed to sever the trial into phases and declared one of the accused unfit.

A. *The Parties*

¶14 Nuon Chea, also known as Brother Number Two, was second in command of the Khmer Rouge under Pol Pot. On several occasions, he angered many people by walking out of the court either in protest of the proceedings or with the stated intention to participate only when his own

⁷ The departure from national law (i.e. lack of competence to award individual monetary compensation to Civil Parties) was seen as necessary in light of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the losses suffered by an indeterminate class of victims. As such, reparations were intended essentially to be symbolic and serve as official recognition of the victims.

⁸ ECCC, Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith, 002, <http://www.eccc.gov.kh/en/case/topic/2>.

case was at issue. Nuon Chea claimed he was unfit to stand trial as he was unable to maintain meaningful participation physically or mentally for more than an hour and half each day, despite his express desire to exercise his right to be present during trial. After extensive testing and hearings, he was determined to be fit to stand trial.

¶15 Ieng Sary was the Deputy Prime Minister and Foreign Minister of Democratic Kampuchea. On November 3, 2011, the Trial Chamber issued a ruling regarding Ieng Sary's claim of *ne bis in idem* – also referred to as *non bis* or double jeopardy – that could have wide-spread implications on future war crimes prosecutions, especially those facing the unique legal challenges presented by various reintegration and disarmament strategies. Prior to the establishment of the ECCC, Ieng Sary was prosecuted *in absentia* for genocide, convicted, and sentenced to death and confiscation of all his property. He was pardoned before any sentence could be carried out, but his claim of *ne bis in idem* could have been held to bar his prosecution by the ECCC. However, the court instead employed reasoning that would allow for his full prosecution for all crimes, and set a high standard for future similar claims to meet. The court's decision nonetheless supported the purposes of *ne bis* – “to protect an accused from enduring multiple trials and penalties,” or the individual's interest in being shielded from abuse of power by the state, as well as promoting the state's interest in legal certainty and finality and the related public confidence in the judicial system. Ieng Sary also requested shorter days in court and other considerations due to his declining health and old age.

¶16 Ieng Thirith is the wife of Ieng Sary and served as the Minister of Social Affairs of Democratic Kampuchea. After extensive hearings and a diagnosis of “moderate to severe dementia most likely attributable to Alzheimer's,” she was declared unfit to stand trial and has not participated in any of the trial proceedings, beginning with the opening statements. Her charges were severed from the indictment in Case 002 and the proceedings against her were stayed.

¶17 She was initially ordered to be released by the Trial Chamber as it had no factual basis to believe her health would improve and no legal basis to continue detention – based on the fitness, severance of charges, and stay – but the Co-Prosecutors filed an immediate appeal requesting that she remain in detention, undergoing medical treatment subject to review in six months. The Supreme Court ruled that during a stay of the proceedings conditional on factors that may change, such as the status of the accused's health, the accused could remain detained and conditions could be imposed upon her. Given the experts' opinion that a certain drug might help Ieng Thirith's condition, the Court noted that “the ECCC is obliged to exhaust all measures available to it which may help improve the [a]ccused to... become fit to stand trial” and ordered the Trial Chamber to institute the recommended treatment with a review within six months time.

¶18 Khieu Samphan, the fourth accused, was the President and Prime Minister of Democratic Kampuchea.

¶19 There are currently 3,850 Civil Parties for Case 002 represented as a consolidated group by Civil Party Lead Co-Lawyers. In 2011, the Case 002 Civil Parties participated in the appeals of the closing order as well as various decisions regarding the plan for trial. Many of their pleadings were procedural in nature regarding the admissibility of evidence in support of applications for inclusion as Civil Parties and appeals to such decisions. In October, a hearing was held to discuss initial reparations requests from Civil Parties, which have been broken down into four categories: remembrance and memorialization requests, rehabilitation and health services, documentation and education, and other projects. The last category included the creation of a historical book commemorating victims with a registry. Interestingly the Civil Parties requested health services

for all low-income Cambodians as well as those identified as victims – reflecting the perceived wide-spread effect these atrocities had on Cambodian society.

B. Progress of Trial

¶20 On November 21, 2011, opening statements commenced for the long-awaited first phase of the trial for Case 002.

C. Advancement to Trial

¶21 Over the course of the year, several decisions were made regarding the substance and procedure of the Case 002 trial, including framing the charges brought against the accused. The Trial Chamber articulated the forms of joint criminal liability applied to the accused to hold them accountable for the atrocities, reaffirming the closing order and Pre-Trial Chamber’s previous decision. In doing so, the court drew from the jurisprudence of various other tribunals to reject the motions of the Defense that Joint Criminal Enterprise (“JCE”) I (basic criminal liability) and II (systemic criminal liability) were not “recognized forms of [criminal] responsibility in customary international law during the period relevant to Case 002.” The court evaluated the applicability of JCE I and II, and also ruled that JCE III (extended criminal liability) was not a general principle in customary international law at the relevant time, and was therefore not applicable in Case 002.

¶22 In late October 2011, the Trial Chamber also granted the Co-Prosecutors’ request to exclude the armed conflict nexus requirement from the applicable definition of crimes against humanity. This element was not included in the 2010 closing order, but had been added at the request of Ieng Thirith in the Pre-Trial Chamber’s February 2011 closing order. Upon appeal by the Co-Prosecutors, it was removed by the Trial Chamber, and thus no link between the alleged underlying acts of the accused and an armed conflict was necessary to prove crimes against humanity. The Court reasoned that the nexus element was not included in the current definition of crimes against humanity, nor was it in article 5 of the ECCC Law. Furthermore, it reviewed “pertinent state practice and *opinion juris* between 1945 and 1975” to conclude that the trajectory of increasing disfavor towards the nexus requirement proscribed its inclusion in customary international law between 1975 and 1979.

D. Severance

¶23 In September, the Trial Chamber issued a severance order pursuant to IR 89*ter*, which divided up the trial into phases based on factual allegations and charges. Prosecutors asked that the severance order be reconsidered in the interest of justice, primarily based on the argument that expediency would be frustrated as the decision and appellate process of the first trial must be concluded for its holdings to be the groundwork for later trials. Yet this argument was denied and the court rejected the request for reconsideration.

E. Motions to Disqualify Judges

¶24 Over the course of 2011, several motions were presented challenging the qualifications of various judges. First of all, after three applications to disqualify all judges of the Trial Chamber for the appearance of bias based on their participation in Case 001, the Judicial Administrative Committee appointed a panel of five judges, referred to as the Special Bench, to hear the

requests. Ieng Sary and Ieng Thirith motioned for Judge You Ottara to be dismissed from the Special Bench. The Judge refused to recuse himself or respond to the application. Before a decision had been announced regarding his disqualification, the Special Bench ruled on the consolidated motions for which it was created and rejected the applications on the basis that there was no concrete evidence establishing a reasonable apprehension of bias for these judges (the court indicated that bias cannot be inferred from a judicial decision even if it shows a “predisposition toward a certain resolution,” and none of the court’s rulings in the Duch case predetermined the guilt of the accused in Case 002). The Special Bench cited the international tribunals for Sierra Leone, Yugoslavia, and Rwanda in adopting the generally accepted rule that judges are “not prohibited from presiding over two separate criminal prosecutions arising from the same set of facts, even if the cases involve overlapping questions of fact or law.” The Trial Chamber then relied on IR 34(5), which allows for a judge’s discretion in his or her participation in judicial decisions while disqualification proceedings are pending, and IR 34(9), which maintains the validity of his or her decisions if he or she is subsequently disqualified. By this reasoning, the court allowed the holding of the Special Bench to stand and dismissed Judge You Ottara’s disqualification petition as moot.

¶25 Other judges subjected to disqualification requests over the course of the year include Judge Nil Nonn for alleged misconduct prior to the establishment of the ECCC, including comments made to a documentary filmmaker implicating him in bribery, Judge Som Sereyvuth for lack of independence based on his previous participation in decisions by the Supreme Court of Cambodia, and most recently Judge Cartwright on the basis of alleged *ex parte* communications with the International Co-Prosecutor.

¶26 The application against Judge Nil Nonn was held to be moot as the allegations pertained not to his actions in his current position but to his fitness to be appointed to the ECCC in the first place, and the appropriate remedial mechanism was found in Cambodia’s national legal system rather than the ECCC. The request against Judge Som Sereyvuth noted that decisions by the Supreme Court of Cambodia were not attributable to individual justices and therefore were not valid grounds upon which to allege a lack of independence. Lastly, the motion against Judge Cartwright – which was interjected before opening statements proceeded on November 21, 2011 – was denied for lack of merit and no investigation was allowed, although the Court noted that there was no specific provision for *ex parte* communication in the ECCC Code of Judicial Ethics.

F. Other Pending Cases⁹

¶27 On September 7, 2009, Robert Petit, then the international Co-Prosecutor, requested the CIJs to investigate five additional suspected persons over the protests of his Cambodian counterpart, Cheat Leang. Case 003 deals with air force commander Sou Met, and navy commander Meas Muth. Case 004 involves Khmer Rouge regional officials Aom An, Yim Tith, and Im Chem.

⁹ ECCC, Prosecutor v. Sou Met and Meas Muth, 003, <http://www.eccc.gov.kh/en/case/topic/286>; ECCC, Prosecutor v. Aom An, Yim Tith, and Im Chem, 004, <http://www.eccc.gov.kh/en/case/topic/98>.

CASE 003

¶28 On April 29, 2011, You Bunleng and Siegfried Blunk, the CIJs, notified the Co-Prosecutors about the conclusion of their investigation in Case 003. Controversy regarding personal jurisdiction of the ECCC threatened the ECCC's legitimacy and crippled investigations.

¶29 Much of the U.N. investigating staff quit after the formal close of the investigation because they believed the investigation represented a failure of justice. Some in the Cambodian government, including Prime Minister Hun Sen, Khieu Kanharith, Cambodia's information minister, and Hor Namhong, Cambodia's Foreign Minister, expressed resistance beyond Cases 001 and 002.

¶30 On September 7, 2009, then Acting International Co-Prosecutor submitted the Second Introductory Submission to the CIJ in regards to opening a judicial investigation in Case 003. On April 29, 2011, the CIJs responded by issuing a statement noting the end of their judicial investigation of Case 003. On May 18, 2011, the International Co-Prosecutor filed three requests for investigative actions (known as the "Investigative Requests") which asked that certain documents be included in Case File 003, some of which were part of Case File 002, and that additional investigative actions be undertaken in regards to the alleged crime sites and the roles of the suspects named in the Introductory Submission.

A. Public Statements by the International Co-Prosecutor

¶31 On May 9, 2011, prior to filing the Investigative Requests, International Co-Prosecutor Andrew Cayley challenged the conclusion of Case 003 and the CIJs' decision not to investigate suspects identified by Cayley.

¶32 He issued a press release pursuant to IR 54 with the stated purpose of informing the public regarding the proceedings in Case 003, particularly his Introductory Submission. In this statement, the International Co-Prosecutor conveyed his intent to request further investigative action after the CIJs had concluded the investigation for Case 003 without thoroughly pursuing the issues addressed in the Co-Prosecutor's Introductory Submission. In so doing, he stated his opinion that the crimes alleged had not been fully investigated despite the official conclusion by the CIJs. The press release listed the specific action requested: to examine the entirety of the potential evidence and witnesses relevant to the crimes and suspects at issue in Case 003. Furthermore, due to misalignment of the Civil Party application deadline and the close of investigation, the Co-Prosecutor stated his intent to request a six-week extension on that timeframe (the Co-Prosecutor had no chance to investigate some of the Case 003 crime sites because the Civil Party application deadline was 15 days after the close of investigation).

¶33 On the same day, the CIJs issued an order that the International Co-Prosecutor had violated confidentiality by publicizing the specific details of his Introductory Submission without legal basis to do so and by informing the public of his intent to make requests for further investigations. A retraction was ordered from the International Co-Prosecutor within three days "to restore public confidence in the legality and confidentiality of the investigations."

¶34 The International Co-Prosecutor appealed the retraction order, asking for it to be invalidated based on its lack of legal basis,¹⁰ and a stay was granted by the Pre-Trial Chamber

¹⁰ The International Co-Prosecutor submitted in his appeal that the Retraction Order should be overturned because: in relation to the part of the Order dealing with Item A of the Public Statement, the Order was not supported by law and was void *ab initio*, and in the alternative, the Co-Investigating Judges erred in declaring that the International Co-Prosecutor had no legal basis for stating his opinion. The International Co-Prosecutor argued that he acted within

pending appeal. The appeal also requested transparency in the appeals process by making those documents available to the public, at least in redacted form. The Retraction Order stood on appeal as the Pre-Trial Chamber judges were unable to reach the required four votes to rule on the merits of the appeal – three judges voted the Retraction Order should be upheld in its entirety, and two judges voted for a partial grant of the appeal as the disposition of the Retraction Order was without effect. Accordingly, the International Co-Prosecutor issued a retraction three days after the ruling on the appeal was announced.

¶35 The decision on appeal stated the IRs neither required nor obliged the Co-Prosecutor to provide any general summary of investigations to the public and also differentiated between the Prosecutor’s duty to inform the public under IR 54 in the *preliminary* investigation stage as opposed to the *judicial* investigation phase.

¶36 According to Cayley, the CIJs’ powers to issue coercive orders against parties were confined to circumstances when it might interfere with the administration of justice. Cayley suggested that the ECCC turn to the ICTY’s example in dealing with the principle of contempt of court. The Appeals Chamber of the ICTY called upon Milan Vujin, Attorney of Belgrade acting for Dusko Tadić to respond to allegations that he acted in contempt and willfully intended to interfere with the administration of justice. The court found Mr. Vujin guilty of contempt for presenting additional evidence in the Tadić appeal which Mr. Vujin knew to be false, manipulating proposed witnesses, and bribing a proposed witness to tell lies to another witness. The ICTY emphasized that the principles of dealing with contempt in court were “not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court of a tribunal; rather it is justice itself which is flouted by contempt of court, not the individual court or judge who is attempting to administer justice.”

¶37 The IRs encourage the ECCC Judges, Co-Prosecutors, legal staff, and other officials to inform the public of the work of the ECCC in order to facilitate public involvement and understanding. This is important, as part of the aim of the court is to bring about healing to the country. Cayley argued that the CIJ’s Retraction Order prevented such publicity and that if they disagreed with the International Co-Prosecutor’s view on the law governing the judicial investigation, they should have brought it up in the Closing Order or contributed to the public discussion.

¶38 In addition, to secure a fair and public hearing and credibility of the procedure, representatives of Member States of the United Nations, the Secretary-General, the media, and national and international non-governmental organizations should have access at all times to the proceedings unless publicity would be detrimental to the interests of justice.

¶39 U.N. Secretary-General Kofi Annan described the personal jurisdiction of the ECCC in March 2000 as “limited to senior leaders of Democratic Kampuchea and those responsible for crimes and serious violations of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia and which were committed during the period from April 17, 1975, to January 6, 1979.” According to Professor David Scheffer, there is no way to narrow the personal jurisdiction to only the “most responsible”; rather, there follows a two-group formula of 1) senior leaders and 2) “those responsible” beyond those “most responsible.”

his powers and obligations under the law. In relation to the part of the Order dealing with Item B of the Public Statement, the International Co-Prosecutor contended that it did not contain any confidential information that affected the rights of any party and as such, did not contravene IR 56(1). In addition to these grounds, the International Co-Prosecutor asserted that the Retraction Order as unreasonable, arbitrary and had no effect.

¶40 In a non-majority ruling in October 2011, the Pre-Trial Chamber found that the International Co-Prosecutor's right to make public comment or to express public opinion in relation to the judicial investigations was limited and the International Co-Prosecutor had no obligation to provide a summary to the public.

B. Disagreement Between the Co-Prosecutors

¶41 Following the issuance of the public statement, the International Co-Prosecutor submitted a request for an extension of the deadline for submission by Civil Parties on May 10, 2011, and three investigative requests on May 18, 2011. In response, the CIJs requested clarification as to whether the Co-Prosecutors had delegated power to the International Co-Prosecutor to make these requests (see IR 13(3)) or whether they had recorded a disagreement (see IR 71(1)). The Co-Prosecutors filed responses separately stating that neither a delegation of power nor a recorded disagreement specifically for these requests had occurred, and the International Co-Prosecutor asserted that neither was necessary in light of the handling of previous proceedings and the prior recording of an Initial Disagreement regarding Case 003 allowing him to act alone once the National Co-Prosecutor was notified. However, the CIJs held that either a delegation or disagreement must be recorded, and therefore the requests were deemed invalid.

¶42 As a result, the International Co-Prosecutor then formally recorded a disagreement with the National Co-Prosecutor in relation to the Investigative Requests and re-filed the Investigative Requests on June 10, 2011. The CIJs rejected the second request on July 27, 2011, via their “Impugned Order” on various grounds including:

C. Being unable to decide on the issues raised due to being seized at the time of an appeal against their First Decision

¶43 Being unable to exercise their discretion under IR 39(4) as requested by the International Co-Prosecutor due to violation of IRs, International Co-Prosecutor's delayed requests for investigative action, insufficient consideration to jurisdiction requirements of article 2 of the ECCC Law, etc.

¶44 On appeal, the International Co-Prosecutor argued that the CIJs misinterpreted the law as the decision to delegate power or record a disagreement is optional, rather than mandatory, and the practice of one prosecutor filing alone had been previously accepted by the CIJs. Furthermore, the four invalidated requests were directly related to the overarching disagreement previously recorded between the Co-Prosecutors over Case 003 through the Pre-Trial Chamber in 2009. Lastly, he argued that the requests should not have been rejected even if the delegation or disagreement recording was deemed mandatory. IR 21 justifies a broader reading of the Rules in the interest of fairness, transparency, and legal certainty, which along with the consideration of the rights of the parties (and particularly the victims), justified the examination of the requests.

¶45 As the Pre-Trial Chamber was unable to reach the requisite four votes to decide on the International Co-Prosecutor's appeal, it was rejected, and the CIJs' ruling invalidating the requests stood. Three judges held that as the requested extended deadline for the application of Civil Parties had passed prior to the International Co-Prosecutor's appeal on the rejection of his requests, his appeal on this issue was inadmissible. They also opined that prosecutors must act in coordination, and any action alone is invalid. A recording of disagreement when there was a lack of coordination was necessary – thus the investigative requests were also invalid. Two of the judges voted the requests to be validly submitted by the International Co-Prosecutor alone and

thus the requests should have been considered on their merits, as the procedures for addressing disagreements between prosecutors is optional.

D. Defense Support Section's Request for a Stay in Case 003 Proceedings

¶46 The Defense Support Section (“DSS”) requested a stay in any Case 003 proceedings before the Pre-Trial Chamber. In support, the DSS alleged that the suspects in Case 003 had the right to effective legal representation pursuant to article 24 of the ECCC Law, read in conjunction with IR 21(1) and the IR Glossary’s definition of “suspect,” which left no ambiguity in regards to suspects’ unconditional right to legal representation pursuant to their fundamental fair trial rights. As they asserted these rights had not been met, the DSS pointed out that allowing the proceedings to continue would result in the undermining of the suspects’ rights.¹¹

¶47 The DSS Officer-in-Charge (“OIC”) requested that the Pre-Trial Chamber: (1) order a stay of proceedings and allow the DSS to take the steps needed to provide suspects in Case 003 with effective legal representation; (2) issue an order to compel the Office of Administration to comply with DSS’ request for help with contacting the suspects so that the DSS could present them with lists of counsel pursuant to IR 11(2)(e); and (3) to issue an order to compel the Deputy Director of Administration to comply with DSS’ request to extend the contract of counsel assigned by the DSS to represent the interests of the suspect until they were assigned individual counsel.

¶48 The beginning of Case 003 dates back to September 8, 2009, when the Acting International Co-Prosecutor issued a press statement confirming the filing of the Second Introductory Submission with the CIJs. A new rule was issued by the Co-Investigating Judges on April 29, 2011 regarding notice, and investigation in Case 003 was done without the participation of the Defense.

¶49 By July 29, 2010, there was concern expressed by the former Head of DSS in regards to efforts needed to safeguard the fair trial rights of, and to protect an effective defense for, suspects in Case 003. As such, on October 7, 2010, the former head of the DSS submitted a memorandum to the Office of Administration requesting a contract¹² that included provisions regarding the requirement that the Consultant assist the DSS on Cases 003 and 004 by representing the unnamed suspects and providing other advice and assistance as required. On the following day, the former head of DSS assigned counsel to represent the interests of the unnamed suspects in Cases 003 and 004.

¶50 Although the initial contract expired on April 30, 2011 and the DSS submitted two memoranda requesting the extension of the contract, the Deputy Director of Administration did not approve the request but, instead, requested additional information. As such, a third memorandum was submitted to the Deputy Director of Administration on July 6, 2011.

¶51 Pursuant to IR 11(2)(e), the DSS OIC submitted a memorandum regarding the DSS’s presentation of lists of national and foreign lawyers to suspects on June 14, 2011.¹³ This memorandum stated that the DSS would need assistance in formulating the list and information

¹¹ IR 22(1)(b) provides in part that “indigent persons entitled to representation under these Rules shall have the right freely to choose from amongst national lawyers and foreign lawyers included in the list provided for in Rule 11(2)(d).”

¹² IR 11(2)(g) provides in part that the DSS shall “[e]nter into contracts with defence lawyers for any indigent Suspects...”

¹³ IR 11(2)(e) provides that the DSS shall “present the list of lawyers as provided in sub-rules 2(c) and 2(d) to persons entitled to a defence lawyer under these IRs.”

that would help the DSS locate the two suspects. Furthermore, the authority of the DSS OIC to assign counsel was found in IR 11(6).¹⁴

¶52 The DSS’s request for a stay in the proceedings for Case 003 is within the right of the DSS under article 33 of the ECCC Law. The right to request for a stay of proceedings was connected to a request for annulment and was described as being allowed where if not granted, a procedural defect that “infringes the rights of the party making the application” would arise.

¶53 The suspects in Case 003 have a fundamental right to legal representation according to the ECCC Law, the IRs and the International Covenant on Civil and Political Rights (“ICCPR”). More specifically, article 24 of the ECCC Law states that “suspects shall be unconditionally entitled to assistance of counsel of their own choosing...,” while IR 21(1) guarantees the defense by a lawyer for “[e]very person suspected or prosecuted.” Articles 14 and 15 of the ICCPR espouse international fair trial standards that are made applicable to all ECCC proceedings by article 33 of the ECCC Law—within which is the requirement of notice of allegation of criminal offenses. The factors that have amounted to an implication of an allegation of criminal charges against suspects in Case 003 were alleged to gravely undermine the suspects’ presumption of innocence and a suspect’s right to be informed of his right to remain silent. Thus, these factors were thought to create an essential need for effective legal representation to safeguard these and other fair trial rights of the suspects.

E. Decision on Defense Support Section Request for a Stay in Proceedings

¶54 The Pre-Trial Chamber in its decision on the DSS request for a stay in Case 003 proceedings reiterated the grounds for the DSS’s request as being made in order to “allow the DSS to undertake all necessary steps to provide effective legal representation to the suspects in Case 003.” Not allowing the requested stay in proceedings was alleged by the DSS to be the breach of various aspects to a fair trial, including the right to equality of arms, effective representation and the adversarial nature of proceedings enshrined in IR 21(1).

¶55 Pointing out that the DSS did not address the issue of the Pre-Trial Chamber’s jurisdiction over the matter, the Pre-Trial Chamber listed its express jurisdiction as including:

- Settlement of disagreements between the Co-Prosecutors and disagreements between the CIJs as provided in IR 71
- Appeals against decisions of the CIJs as provided in IR 74
- Applications to annul investigative actions as provided in IR 76
- Appeals provided for in IRs 11(5), 11(6), 35(6), 38(3), and 77bis

¶56 Although the DSS request does not fall within any of the above provisions, the Pre-Trial Chamber could invoke its inherent jurisdiction, as it has previously done when issues of fairness of the proceedings had been involved.

¶57 Before answering the question of jurisdiction directly, the Pre-Trial Chamber commented on the rights of the suspects by referencing the clarification given by the CIJs to the DSS on September 23, 2010, that highlighted that Defendants’ rights were fully exercisable after they had been charged. Until a person has been officially charged, he is not a party to the proceedings and thus his rights remain limited. In the ECCC, the CIJs have the power (governed by the IRs),

¹⁴ IR 11(6) states in part, “The Head of the Defence Support Section shall make determinations on indigence and the assignment of lawyers to indigent persons [...]”

but not the obligation, to charge. Thus their prosecutorial power is discretionary as to who and when to charge people. The Pre-Trial Chamber pointed to this prosecutorial discretion to explain why the timing for when certain rights became available depended on the development of the investigation.

¶58 The Pre-Trial Chamber further noted that the CIJs had not decided on the requests made by the International Co-Prosecutor for the arrest and detention of the persons first named in the Introductory Submissions for Case 003 in 2009. Investigations were still pending in the criminal proceedings of Case 003. Since it is the CIJs who were in charge of the pending criminal investigations in Case 003, the issue of legal representation lay in their sphere of control and thus was outside of the Pre-Trial Chamber's jurisdiction. Thus, the request was held inadmissible.

CASE 004

¶59 On July 28, 2011, the International Co-Prosecutor Andrew Cayley stated that the court was obligated to ensure that the public was informed about ongoing ECCC proceedings in Case 004. He cited the June 24, 2011 ruling in Case 002, where the Pre-Trial Chamber stated that CIJs were obliged "to keep victims informed throughout the proceeding, in order to allow victims to have reasonable time to file civil party applications."

¶60 The Office of the CIJs stated that they hesitated to publicize the crime sites for Case 004 because of controversy regarding whether the suspects were "most responsible" according to the jurisdictional requirement of article 2 of ECCC Law. The Court feared that encouraging party applications would raise expectations of trial results, which might not be able to be met. In response to misinformation by the media, however, the court published the crime sites as follows:

- KAMPONG CHAM PROVINCE (CENTRAL ZONE)
- KAMPONG THOM PROVINCE (CENTRAL ZONE)
- PURSAT PROVINCE (NORD-WEST ZONE)
- BATTAMBANG PROVINCE (NORD-WEST ZONE)
- BANTEAY MEANCHEY PROVINCE (NORD-WEST ZONE)
- TAKEO PROVINCE (SOUTH-WEST ZONE)

¶61 On August 10, 2011, Voice of America Khmer quoted a confidential document of the ECCC, prompting the CIJs to institute proceedings against the Administration of Justice (contempt of court). It will be interesting to see whether the ECCC follows the principles of the ICTY in their contempt proceedings.

A. *Civil Parties*

¶62 Appeal Against Order on the Admissibility of Civil Party Application of Seng Chan Theary

¶63 On April 3, 2011, Seng submitted a public application entitled "Civil Party Application to Case No. 003/004" which was filed with the CIJs on April 22, 2011, and verbally confirmed by then ECCC Public Affairs Chief Reach Sambath. However, appellant Seng never received a formal documentary receipt of her application. After the CIJs publicly announced the closing of investigation of Case 003 "in one sentence" on April 29, 2011, Seng's lawyer Choung received two documents on May 3, 2011, explaining the decisions of the CIJs (dated the day of the

closing of investigation announcement) that stated Seng's application to become a Civil Party in Cases 003 and 004 was rejected. The document was classified "Confidential" even though the application did not disclose sensitive information such as names of the five charged persons and scope of investigations.

¶64 Seng appeals on the basis that:

She was not "afforded the fundamental principle of procedural fairness of timely and sufficient information."

1. The CIJs did not investigate crime sites and criminal episodes as the related to Seng.
2. The CIJs "misapplied and misinterpreted the facts and the law."
3. The CIJs failed to provide "reasoned decisions for the inadmissibility" of Seng's application to become a Civil Party.

¶65 Seng held the Khmer Rouge directly, personally, and individually responsible for crimes against humanity (including murder, enslavement, torture, etc.) and "for their material contribution in developing and implementing the common design and purpose of a joint criminal enterprise which impacted the whole of Cambodia." Seng's allegations against the RAK included: they were responsible because the Revolutionary Army of Kampuchea ("RAK") was a core institution within the CPK governing Democratic Kampuchea (according to Case 002); they (the RAK) were responsible for the disappearance of her father and for the imprisonment of her family; and they caused her to witness the death of her mother (along with 30,000 others estimated to have been extinguished at Boeung Rai). Allegations similar to Seng's were included in International Co-Prosecutor Andrew Cayley's public statement of May 9, 2011, as being within the scope of Case 003.

¶66 The CIJs allegedly rejected Seng's application because her facts did not relate to the cases under investigation, and her claims of injury did not have foundational premise because the "names of the suspects in Case 003 [and Case 004] were confidential and thus the names cited in her application were purely speculative."

¶67 Seng's first argument was that "[t]he Co-Investigating Judges violated IR 56 and IR 21, the Basic Principles of Victims Rights, and fundamental principal (*sic*) of procedural fairness to provide public information about Cases 003 and 004". Seng claims that the CIJs kept her and other victims in the dark and did not keep them informed in a "predictable, proper and defined manner," but instead responded with "unreasonable secrecy, intimidation and harassment upon the lodging of her application." Additionally Seng claims that the CIJs treated her case inconsistently from others before the Court on the premise that the CIJs did provide public statements before closing out Case 002. Public statements made it easier for victim applicants in Case 002 to file coherent claims. This is not the case with Cases 003 and 004, because "no information has been made available about the suspects' names, the crimes and the crime sites with which the CIJs are seized."

¶68 Seng's second argument was that "[t]he CIJs violated IR 14 (1), 55 (5), article 10 new ECCC Law, article 5 (2) and (3) of the Agreement by failing to properly and independently investigate Case 003". Seng claimed that the CIJs did not do any field investigations of Cases 003 and 004 as they related to her, based on statements released by CIJs on what work they were doing at various times. Also, the National CIJ You Bunleng agreed to allow investigations into Cases 003 and 004, but then withdrew his signature later after the Cambodian Interior Ministry spokesman said "only the five top leaders [are] to be tried. Not six. Just five." The implication was that the investigation by the ECCC was clearly not independent of the Royal Government of

Cambodia. The CIJs did not conduct new investigations in Case 003, and only looked at material from Cases 001 and 002, which "concerned five entirely different suspects and the CIJs' approach to investigations is unreasonable and does not demonstrate any will or drive to exercise their functions fully, properly and independently."

¶69 Seng's third argument was that "[t]he CIJs misapplied and misinterpreted the facts and law, in particular the principles of Joint Criminal Enterprise and Common Design/Purpose." Seng claimed that two suspects bore "individual criminal responsibility" and as such, as a matter of international law, were responsible for her legal injuries. "The legal nexus is the crimes committed, not the geographically defined districts and zones the Charged Persons physically commandeered, *vis-à-vis* the Appellant [*sic*]." Also, Seng argued that it was "incomprehensible to believe" that neither of the two suspects made any material contribution to the fall and exodus of Phnom Penh (where she suffered her legal injuries), since admissibility as a Civil Party applicant required that Seng demonstrate a link to only one crime.

¶70 Seng also argued that by "failing to give proper reasons... the CIJs have violated IR 21 concerning the fundamental principal [*sic*] of procedural fairness to provide reasons for a decision." The right to a fair determination of a matter is protected under article 14.1 of the ICCPR. The CIJs' failure to give a properly reasoned decision was a clear denial of the right to a fair determination. Seng also argued that "the CIJs have been blatantly disingenuous" and had "blatantly erred in stating" that the appellant's factual situations didn't relate to the cases. Lastly, Seng argued that "judgments of courts and tribunals should adequately state the reasons on which they are based," but the CIJs have "failed to fulfill their obligations under [IR] 21 'to ensure legal certainty and transparency'."

¶71 Appellant Seng respectfully requested that the Pre-Trial Chamber:

1. Declare the appeal admissible.
2. Set aside the decision of the CIJs that Seng was inadmissible as a Civil Party.
3. Consider all representations and legal submissions made.
4. Grant the appellant the status of Civil Party.

B. Application of Rob Hamill

¶72 On April 12, 2011, Civil Party Applicant Rob Hamill submitted an application to the CIJs by the ECCC Victims Support System requesting to be a party to Cases 003 and 004. He alleged that he suffered psychological injuries from learning about the death of his brother Kerry Hamill. Kerry Hamill was arrested in August 1978 by the Democratic Kampuchea Navy and transferred to S-21 where he was detained, interrogated, tortured, and executed. Hamill argues his injuries were the direct consequences of crimes within the ECCC jurisdiction.

¶73 On April 29, 2011, the day the CIJs closed the investigation in Case 003, they rejected the Application on the basis that Hamill did not demonstrate that his alleged psychological injuries were the direct consequence of criminal activity pursuant to IR 23*bis* 1(b). The death of the brother was an intermediate link that broke the causal chain between the injury of the Applicant and the crime of the charged person. The CIJs said that this ruling complied with the Practice Direction on Victim Participation, which listed psychological injury in a discretionary fashion, as something that "may" include death of kin, rather than as mandatory law.

¶74 Even though the Applicant was admitted as a Civil Party in Case 002, the CIJs said that those previous cases did not define the term "direct" in regards to "direct influence" and that the considerations that led to the decision were non-binding on the present CIJs. The CIJs disagreed

with the reasoning of the Trial Chamber in the Judgment of Case 001, which also said that the harm was a direct consequence.

¶75 Hamill received the Admissibility Order regarding his rejection from Case 003 via mail. The CIJs also rejected him from Case 004. According to the Co-Lawyers, neither he nor his lawyers were notified of the decision. The international lawyer for Hamill sought access to the case files on May 1, 2011, and repeatedly thereafter. The Co-Lawyers indicated that it was impossible to exercise Civil Party rights such as the right to seek further investigations without the case file. On May 16, 2011, the Co-Lawyers filed a notice of Appeal with the CIJs. Gruffer stated that the CIJs had not recognized the Co-Lawyers despite several subsequent inquiries by the lawyers.

¶76 The Civil Party Co-Lawyers intended to file an expedited appeal. On May 24, the Co-Lawyers indicated that they had not yet been granted access to the case file. They asked the Pre-Trial Chamber to either suspend the deadline to file the appeal to a reasonable time after the Appellant's legal representatives had been granted access to the case file or to grant them leave to submit additional legal and factual arguments at a reasonable time following grant of access to the case file.

¶77 The Co-Lawyers also filed an Appeal on six grounds:

1. The CIJs did not ensure legal certainty and transparency when they rejected the Appellant on the basis of his being an indirect victim since Hamill was accepted on the same facts for Cases 001 and 002, and Judge You Bunleng was the same judge as in Case 002.
2. The CIJs violated the Practice Direction on Victims Participation which explicitly included death of kin as an immediate victim.
3. The CIJs violated the Basic Principles of Victims Rights and fundamental principles of procedural fairness by providing public information about Cases 003 and 004, as contrasted to that of Cases 001 and 002.
4. The CIJs violated the rule concerning the fundamental principle of procedural fairness to provide reasons for a decision.
5. The CIJs failed to properly and independently investigate Case 003 since they did not conduct new trials for Cases 003 and 004 but only referred to existing material, and additionally, Judge You Bunleng took the politically-motivated act of un-signing the authorization for investigation.
6. The Co-Investigating Judges blocked the ECCC's process of justice for victims and the international community, promoting the message that impunity prevails.

¶78 According to the Co-Lawyers, the Impugned Order rejected the application to be a Civil Party in Case File 004 but neither they nor the Appellant received the Order issued in Case 004. They filed a single Appeal in Cases 003 and 004.

¶79 On July 6, 2011, the CIJs filed a request for correction to the English version of the Impugned Order and replaced it in the file. On July 13, 2011, the Pre-Trial Chamber informed the parties that it would decide on the request for access to the case file in its address of the Appeal. On August 5, 2011, the Appellant was notified of the Order on the Admissibility of the Civil Party Application but the lawyers were not notified despite explicitly requesting notification of the expected Order.

¶80 In their decision on October 24, 2011, the Pre-Trial Chamber voted against the request for access to the case file and the Appeal, and the Impugned Order stood. The Pre-Trial Chamber's

October 24, 2011 decision deals only with the Appeal insofar as it concerns the Impugned Order in Case 003. Another decision will be issued regarding Case 004.

C. Context Surrounding the Court

1. Political Context

¶81 Much political tension and resistance towards initial development, and now the progress of the ECCC, has arisen allegedly due to the fact that many people in the current Cambodian administration were once a part of the Khmer Rouge. For example, the Cambodian government under Prime Minister Hun Sen, who was once part of an anti-republican movement that consisted of several resistance groups including the Khmer Rouge and a former Khmer Rouge commander, has been criticized for obstructing the ECCC in its efforts to try Khmer Rouge leaders for their crimes. Hun Sen has also been reported as saying that he would rather see the ECCC fail than take up more cases, which, in combination with his invitation to former Khmer Rouge members to his home in 1998, fueled allegations that he was protecting some of the former Khmer Rouge members in the ruling Cambodian People's Party.

¶82 Even within the judiciary there have been allegations of corruption and criticism over the long delays between court proceedings. You Bunleng, the Cambodian Co-investigating Judge, and Siegfried Blunk, his U.N.-nominated counterpart, were heavily criticized for mishandling the case when they moved to close a case against additional Khmer Rouge commanders without investigating key witnesses or conducting crime site investigations. On October 3, 2011, Human Rights Watch voiced widespread concern and demanded the resignation of these two CIJs of the ECCC, alleging that they "egregiously violated their legal and judicial duties... [in failing] to conduct genuine, impartial, and effective investigations into ECCC Cases 003 and 004." Amidst the aftermath of severe criticism, the Secretary-General of the U.N. received Judge Blunk's resignation on October 10, 2011. There is concern that Prime Minister Hun Sen's control over the Cambodian judiciary, his alleged desire to interfere with the prosecution of former Khmer Rouge commanders, and his repeated public objections to Cases 003 and 004 were in fact responsible for the CIJs' failure to investigate properly and will continue to obstruct ECCC proceedings.

¶83 There are also troubles regarding political influence that allegedly seek to obstruct NGO participation as ECCC monitors. Cambodia's draft Law on Associations and NGOs ("LANGO") is criticized as posing a serious threat to civil society's freedom of association and freedom of expression, due to its vague and broad registration requirements. The ambiguity of the registration requirement is seen as a potential threat to NGO participation in the ECCC because, if enacted, it could serve as the basis for arbitrarily denying registration to certain NGOs or associations. The U.N. Special Rapporteur on Cambodia called on the Cambodian government to change the draft law, expressing concern over the complex and mandatory registration process and ambiguous criteria for registration eligibility. By banning registered groups, LANGO is even seen by some to risk breaching an international treaty – the ICCPR. Some even go so far as to say that the mandatory nature of LANGO does not just pose a potential threat, but is a "clear infringement of the right to freedom of association." As of November 16, 2011, the LANGO has reportedly been sent back to the Ministry of Interior for review and re-drafting.

2. Information Security

¶84 In addition to problems regarding political influence over ECCC proceedings, there has been contention over the availability of information regarding these proceedings. In response to leaks of confidential court documents, the ECCC is considering contempt proceedings against the people who leaked the confidential information as well as those who published the information. Among those the court is considering holding in contempt are: the New Zealand-based Scoop news site for its publication of the judges' rejection of a Case 003 Civil Party application and former International Co-Prosecutor Andrew Cayley for his May 9 2011 Public Statement regarding investigations in Case 003. The ECCC followed through on its warning and started contempt of court proceedings against Voice of America Khmer ("VOA Khmer"), a US-funded news service, for posting an article that allegedly quoted verbatim from a confidential court document and a video showing that document. Following its institution of proceedings against VOA Khmer, the ECCC gave a formal warning that "[a]nyone intending further disclosure of confidential court documents is hereby warned that his case could be transferred to the National Co-Prosecutor pursuant to Rule 35(2)(c)." The ECCC's intent to prevent further information from leaking out to the public seems to suggest a desire for a lack of transparency that goes against its ruling in Case 002 where the Pre-Trial Chamber stated that it is obliged "to keep victims informed 'throughout the proceeding,' in order to allow victims to have reasonable time to file civil party applications." A lack of transparency is problematic for a court that is already plagued by criticisms of corruption and inefficiency.

¶85 Alongside leaks from court proceedings, a cable from the U.S. Embassy in Phnom Penh released by WikiLeaks suggested that, contrary to its protestations, the U.N. officials did discuss removing Case 003 from the Tribunal's caseload in order to reduce the financial burden of the court.

3. Time Lapse

¶86 In addition to allegations of corruption and inefficiency, the ECCC also faces problems due to the logistics of holding a trial more than thirty years after the occurrences of the crimes. This significant time lapse means that not only are the witnesses and accused parties of a substantial age, but there are also obstacles to finding and collecting evidence. For example, Mr. Vann Nath was a key witness in Case 001, as one of the few surviving victims of S-21. While Nath was able to testify in court against Duch, his death brings up the very real possibility of the death of key witnesses in future proceedings prior to testifying, which could potentially raise serious problems for the prosecution.