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ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 004/2/07-09-2009-ECCC-OCIJ

Before:	**The Co-Investigating Judges**
Date:	**11 August 2017**
Language(s):	**English and Khmer**
Classification:	**PUBLIC [REDACTED]**

COMBINED DECISION ON THE IMPACT OF THE BUDGETARY SITUATION ON CASES 003, 004, AND 004/2 AND RELATED SUBMISSIONS BY THE DEFENCE FOR YIM TITH

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1. PROCEDURAL HISTORY

1. On 5 June 2017, we received comments pursuant to our Request for Submissions of 5 May 2017 ("Request")[1] from the Office of Administration ("OA"),[2] including statements by the United Nations ("UN"),[3] the Principal Donor Group ("PDG"),[4] and the Special Expert of the Secretary-General ("SESG)", David Scheffer,[5] from the Defence for Meas Muth,[6] Ao An,[7] and Yim Tith,[8] as well as from the International Co-Prosecutor ("ICP").[9] We note that the Royal Government of Cambodia ("RGC"), despite being one of the parties to the UN-RGC Agreement establishing the ECCC, did not submit a separate statement to the OA. The National Co-Prosecutor and the Civil Parties did not file any submissions, either.

2. We refer to those documents for the details and, in order to avoid repetition, will quote from them only as necessary.

3. By memo of 20 June 2017,[10] we informed the parties and the OA that the original deadline for our decision of 31 June 2017 had become moot, because we had been informed that staff contracts were going to be extended beyond that date; specifically on 26 May 2017, the Deputy Director of the Office of Administration ("DDOA") informed staff that contracts would be extended until September 2017, and on 27 June 2017 staff were further informed that contracts would be extended until the end of 2017.[11] Given the enormity of the impact of a stay, and the absence of a continuing need for an urgent ruling, we took the time provided by this extension to consider the submissions in depth, while simultaneously progressing the cases as effectively as possible.

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[11] This information was first circulated via email by Deputy Director of the Office of Administration, Knut Rosandhaug, on 26 May and 27 June 2017. On 26 July 2017, the OA sent an official interoffice memorandum to the Co-Investigating Judges informing them that international staff's contracts had been extended until the end of 2017 and that national staff's contracts were in the process of being extended, *see* Case File No. 004/2-D349/5, *Memorandum from Office of Administration re Further Information regarding the "Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2"*, 26 July 2017.

4. Within hours of its being released, the Request, or at least an excerpt of it, was unlawfully leaked to the Phnom Penh Post in violation of the duty of confidentiality. This led to heightened media coverage and elicited comments from a number of persons, both inside and outside of the ECCC, asking, *inter alia*, for the Request to be made public so a public discussion of its merits could be held, because a confidential treatment would amount to a "denial of due process" since it was a "purely administrative matter".[12]

2. SUBMISSIONS

5. The responses by the parties to our Request developed along the following lines: The Defence across all teams supported a permanent stay at the earliest opportunity;[13] the ICP, while sharing our "frustration"[14] about the funding situation, nonetheless found our consideration of a stay "fundamentally unsound"[15] and the order of a stay "*ultra vires*".[16]

6. The response by the OA itself is mostly a description of the budget and funding development based in part on Annexes 1 to 3. It lays out the recent increase in voluntary funding which, including pledges, is said to have closed the previous funding gap to a little over $2 million.[17]

7. The essence of the various points put forward in the ultimately determinative statements by the UN, the PDG and – to a lesser extent – the SESG can be summarised as follows:

    a. The Co-Investigating Judges' ("CIJs") mandate does not encompass ruling on the financial aspects related to the budget and funding, and they should focus on conducting the investigations and deciding the cases on their legal merits;[18]

[12] See Andrew Nachemson & Erin Handley, "Staying Khmer Rouge tribunal cases mulled", *Phnom Penh Post*, 8 May 2017, online at http://www.phnompenhpost.com/national/staying-khmer-rouge-tribunal-cases-mulled; Erin Handley & Kong Meta, "Khmer Rouge tribunal judges have 'deep concerns' about future", *Phnom Penh Post*, 9 May 2017, online at http://www.phnompenhpost.com/national/khmer-rouge-tribunal-judges-have-deep-concerns-about-future; Andrew Nachemson & Erin Handley, "Stay a 'denial of due process'", *Phnom Penh Post*, 10 May 2017, online at http://www.phnompenhpost.com/national/stay-denial-due-process; Michael G. Karnavas, "Due Process not negotiable, even in Khmer Rouge tribunal", *Cambodia Daily*, 15 May 2017, online at https://www.cambodiadaily.com/opinion/opinion-due-process-not-negotiable-even-khmer-rouge-tribunal-129742/.

b. financial concerns beyond the end of the investigations are, if at all, a matter for the judges of the Chambers seised after the closing orders have been issued;[19]

c. there is no unusual funding crisis as set out in the Request and it is unclear why the CIJs should feel there is one, especially since they give no further details or analysis;[20]

d. the funding situation at the ECCC had always been difficult and the examples of other international courts, be it based on a voluntary funding or an assessed contributions model, showed that they suffer from similar problems; in fact many states do not pay their share in time and some at the Assembly of States Parties ("ASP") at the International Criminal Court ("ICC") are that far in arrears that they have lost voting rights in the ASP; the current scenario at the ECCC was thus nothing out of the ordinary in the wider context of international criminal justice;[21]

e. there is no legal requirement for the UN, the RGC or the PDG to guarantee funding for the ECCC during the Court's lifetime;[22]

f. it is impossible due to the respective budgetary frameworks of the UN and the members of the PDG to issue a guarantee for funding across the entire lifetime of the Court;[23]

g. the use of results-based budgeting ("RBB") was on the one hand required under UN rules due to the repeated use of the subvention,[24] and on the other hand not meant to directly influence future funding decisions;[25]

h. the PDG in particular express "regret" at the suggestion in the Request that through the funding they tried to influence the outcome of Cases 003, 004, and 004/2;[26]

i. the OA explains that the UN and the PDG are currently not considering an exit strategy;[27]

j. finally, the PDG state repeatedly that they remain "deeply committed" to securing the funding of the ECCC.[28]

[redacted]

8. We will address these with the necessary brevity. There are also incorrect statements regarding the recruitment process in the response of the OA itself which will be addressed below.

9. The Defence for Yim Tith submitted two notices with information related to the budgetary situation which they deemed relevant to the issues raised in the Request.[29] These will, for reasons of judicial economy, all be addressed in this decision and not in separate ones for Case File 004.

3. DISCUSSION

A. Preliminary: Leak of the Request; media coverage

10. The Request was meant precisely as what its title stated, i.e. an attempt at obtaining clarification in writing mainly from the stakeholders of the funding community, because normally such information is passed on orally at meetings, as described, for example, by the OA in its submission,[30] with the minutes of these meetings produced by the OA being confidential.

11. It was mentioned in the Request[31] that the CIJs have over time expressed their concerns to members of the PDG in different fora, including to the SESG, and of course the CIJs constantly remain in close contact with their counterparts in the OA regarding the potential impact of budgetary matters as they arise. Similarly, the substance of the quarterly completion reports is contributed by the judges of the different sections and only the final version of the reports is edited by the OA; in such a context, there is a permanent flow of conversation regarding timelines, milestones etc. However, as we will explain later, it seems to us that the nature of the information we have been provided from several sources on the ground, as it were, and the view of the UN and PDG at the seat of UN Headquarters ("UNHQ") or even their local diplomatic representatives, are not fully congruent.

12. There is, furthermore, no merit in the assumption that the CIJs should have involved the wider public or "civil society" in the debate[32] and that not having done so was a "denial of due process". It is in our view absurd to argue that judges should as a matter of due process submit the procedural developments in a

[redacted]

[32] *"First, there is no legitimate basis for the judges' filing to be made under the veil of confidentiality that protects legitimate investigative actions and strategy. The judges are explicit that funding concerns are the "sole basis" for their contemplated actions and they do not relate or rely on any facts or case-specific considerations. This is an administrative and political matter that civil society and the Cambodian people have a right to understand, comment on, and perhaps contribute to solutions for. Stating publicly that their ultimatum and filing raises a "delicate matter and not properly discussed in the public domain at this stage" is insulting to civil society, which has worked hard to support the goals of the court, and of Cambodians generally. It is an improper use of the confidentiality rules governing the court."*- See https://www.opensocietyfoundations.org/briefing-papers/recent-developments-extraordinary-chambers-courts-cambodia-june-2017, p. 3.

particular case to a public debate or possibly even a referendum, especially if they arise in a confidential part of the proceedings. Judges answer to the public interest for their decisions through appellate courts and for their conduct in office to disciplinary tribunals or the general criminal courts, which are established under the relevant legal statutes of any country under the Rule of Law to exercise a state's – and through it its citizens' – legitimate democratic oversight of the judiciary. Further legitimate scrutiny is *de facto* exercised by the media, as long as they make every prior effort to obtain accurate facts and to acquire a proper understanding of the basics of judicial proceedings, based on which they express their views.

13. This includes abiding by the judges' classification of decisions as confidential. Outside this framework, civil society, the media and the public have no generic overriding claim to be informed beyond what the competent judges have decided is to be revealed. The fact that unlawful leaks of confidential information at the ECCC have in the past been endemic and have gone virtually unpunished is not a justification for continuing this disgraceful practice. As stated in international cases involving violations of judicial confidentiality, individuals, including journalists, may not - with impunity - publish information classified by judges as confidential on the basis of their own assessment of the public interest in that information.[33] Such behaviour may endanger the integrity of the proceedings and reduce the public's confidence in a court's ability to preserve confidentiality.[34] The cooperation of individuals, organisations, and states is vital for the proper functioning of international criminal courts. Breaches of confidentiality which, in undermining confidence in a court's ability to preserve confidentiality, jeopardise such cooperation, must therefore be prosecuted.

14. To state that this matter was "purely administrative" and should therefore have been made public is on the one hand an example of loose use of terminology – court staff employment matters are also administrative in nature but clearly confidential – and on the other hand it disregards the simple fact that matters such as recurring funding shortages are politically highly sensitive and should be approached in a manner that makes constructive conversations with the aim of finding a solution possible. Our aim was to encourage the donors to provide adequate funding, not to put them on the spot by naming and shaming them publicly. The leak of the Request and the ensuing media speculations about sinister judicial dealings had all the potential of ruining such a constructive environment. Finally, we disagree that the matters raised in the Request were actually purely administrative in nature. To state that is to lose sight of the fundamental role of judges in criminal proceedings. While the financing mechanisms are essentially administrative, lack of funding may encroach on the conduct, substance, fairness, and integrity of the judicial proceedings. When this happens, or is at risk of happening, these matters cease to be purely administrative and trigger the competent judicial body's responsibility to take those measures that are necessary to avoid injustice.

15. Now that the process of submissions is complete, we will issue a public redacted version of this decision. We will, however, not tolerate disrespect of confidential judicial orders any longer and hereby put the parties and the OA as well as all

[33] *Re Hartmann*, Judgement, ICTY Appeals Chamber (IT-02-54-R77.5-A), 19 July 2011, paras 52, 71.
[34] *Ibid.*, para. 74.

persons at the ECCC who may have lawful access to the confidential version on notice that we consider disclosure of the text or the content of the remaining confidential sections of this decision, be it by parties or staff of the ECCC or by the media, and of future confidential decisions as a violation of Internal Rule 35(1)(a) and will deal with any future offence according to Internal Rule 35(2) and (4), in connection with Article 314 of the 2009 Cambodian Criminal Code, and will take other measures as necessary.

B. Power to order a stay

16. We conducted an extensive study of the law relating to a stay of proceedings, both nationally and internationally. We are confident that both Cambodian and international law foresee scenarios where such an order would be appropriate. The ICP in effect admits as much when he refers to a ruling of the ICC on the matter.[35] We would not have issued the Request if there was any doubt in our minds about that. Naturally, different minds may disagree over the question of whether the facts are so egregious that they warrant such a drastic step. Given the outcome of this decision, we think it unnecessary to dwell on the issue at this stage.[36]

C. No power to rule on financial obligations of the UN, PDG or RGC; the CIJs should stick to conducting their investigations and deciding cases on the legal merits

17. This argument is a red herring. We never held that we have jurisdiction over the financial aspects – but we most certainly do have jurisdiction to adjudicate on the impact the financial situation may have on the fairness of the proceedings. A simple example may clarify the difference: If the donors inform the Court tomorrow that they will no longer pay any funds towards the budget of Cases 003, 004, and 004/2, we would not have the power to order them to pay, let alone enforce such an order. We would, however, have the power to stop all investigations because of a fundamental breach of fair trial rights and the *de facto* abolition of our office as CIJs. The reference to "legal merits" furthermore seems to betray a rather narrow understanding of our mandate as judges, as if it was only related to finding whether the charged persons are liable under the provisions of substantive law or not. It surely is common *acquis* among "civilized nations" in the meaning of Article 38(1)(d) of the Statute of the International Court of Justice by now that judges also have to ensure respect for the procedural safeguards in criminal proceedings.[37]

[redacted]

[36] We note that the ICP (at fn. 43) cites a passage from a book by the International CIJ to support his own conclusions. Apart from the fact that it deals with German law, it would have been preferable if the ICP had also engaged with the case law cited on the opposite page, which specifically refers to the concept of a stay in the terms of a "procedural bar" and the development of the jurisprudence around *agents provocateurs* in particular. A further close reading of the book (at pp. 188 – 189) would have shown that the Federal Constitutional Court as recently as 2009 held in the context of sentencing that in extreme cases of the violation of fair trial rights under the European Convention on Human Rights, German constitutional law may require a discontinuance or discharge.

[37] This is clearly envisaged by Article 23 new of the ECCC Law, which gives the CIJs the responsibility over the investigations. Article 35 new of the ECCC Law (also applicable at the investigative stage of the proceedings) reproduces the fundamental rights of charged persons set forth in Article 14 of the International Covenant on Civil and Political Rights. Similarly, Internal Rule 21 sets forth the rights applicable, *inter alia*, to persons charged in a judicial investigation at the ECCC. It

D. Financial concerns beyond the investigation stage are for the Chambers after the closing orders are issued

18. We have made our different view of this amply clear in the Request and refer to the relevant sections.[38] However, it is a banality that it will indeed be a matter for our judicial colleagues in the Chambers to protect the procedural safeguards of the charged persons/accused once we are *functus officio after issuing the last closing order*, be it an indictment or a dismissal. They may or may not then agree with us – such is the nature of judicial office.

E. There is no funding crisis and the CIJs have not given any detailed reasoning or analysis for their concerns

19. It has become clear to us that there must be at least two distinct narratives about the state of the funding in circulation – one that was presented to us by the OA and the SESG, and another that has seemingly enjoyed prevalence at the PDG Steering Committee at the seat of UNHQ. Those two apparently do not match and the mutual channels of communication may not be fully open, either, as our occasional conversations with local diplomats from the PDG members visiting the Court have shown, as they were also unaware of the discrepancy. As we explained above, we are in constant conversation with the OA and, during his regular visits to the Court and, on occasion, in between also with the SESG.

20. The messages that were transmitted to us by these sources were sufficiently alarming for us to take the drastic step of issuing the Request. We saw and see no reason to think that either of them would present us with such a bleak picture without good cause, given the implications for the prospect of the proceedings, and hence we proceeded on the assumption that they were presenting information obtained through their own official channels of communication and basing their evaluation on those and their considerable experience of the development of the ECCC.

21. As we will also show below, the OA, the UN – and through the UN, we would assume, the PDG – have been on notice of this possible development since October 2016.

22. It is most unfortunate that we now have to make reference to the content of the communications with the individual sources, yet the implied accusation by the UN and the PDG of us causing unwarranted panic leaves us with no choice. In this context and later on in this decision, we have refrained from reproducing the internal written communications with the OA in detail; the parties have no right of access to them in any event, regardless of the extent to which they might also be subject to UN privilege.

23. On 21 September 2016, we took the step, unprecedented in the history of the ECCC, of meeting – at our own initiative – with the diplomatic representatives of the PDG at the French Embassy in Phnom Penh; during the roughly 90 minutes of that meeting we tried to explain the strictures under which we worked and to answer questions from the PDG, in order to provide as much insight as was permissible under the law to avoid any misunderstandings, and to press our case for adequate funding. We provided the participants with extensive materials to

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is axiomatic that the responsibility referred by Article 23 new of the ECCC Law includes guaranteeing the respect of these fundamental rights.

[redacted]

illustrate our points. However, the first comment expressed criticism of the pace of the investigations, while another related to countering delaying tactics by the defence – which we informed the meeting was not an issue in the investigations. Finally, another question was aimed at what would happen if the funding became insufficient or stopped, to which our response was that we would consider such a scenario at the time it arose but that any decision taken could never be to the detriment of the defence.

24. The minutes from a staff union meeting submitted by the Defence for Yim Tith on 16 June 2017[39] are in line with conversations the International CIJ ("ICIJ") had over a longer period of time with the OA. They also chime with the general statement by the OA itself in Revision 12 of the Quarterly Completion Report prepared by the OA and issued on the very same day as the Request:

> Key staff leaving, *for instance against the background of the overall funding situation*; the approaching end of the Office's mandate; or career planning, represents another *serious risk* to the projected time lines [our emphasis].[40]

25. [redacted]

26. [redacted]

[redacted]

[40] *See* www.eccc.gov.kh/en/eccc-completion-plan-revision-12, at para. 23. *See also ibid.* at para. 18 stating that the investigations are "also contingent on other factors outside the judges' control such as, for example, sufficient funding for vacant posts and timely recruitment procedures".

[redacted]

27. In sum, we had very good cause indeed to be seriously concerned at the time and request written submissions to provide us with the necessary degree of clarity and reliability of information. In any event, we would have expected that the stakeholders would credit us with enough professional experience and detachment not to accuse us of coming to rash conclusions about such important matters.

F. The funding situation has always been difficult; states do not fulfil their contribution obligations in other international courts, either, whether under voluntary funding or assessed contributions models.

28. This is an interesting proposition. Translated to a domestic context it would equate to the average tax payer stating in his defence for paying tax late, not in full or not at all, that other tax payers in his country or in other countries do not pay their tax in time, in full or at all, either, and that the state authorities depending on the tax payments should just adapt their operations accordingly. We struggle to comprehend the normative value of this argument: The donors who after all have endorsed the budget – and the ICP[42] – say that while voluntary funding is not ideal,[43] even under an assessed contributions model, experience shows that a number of states simply will not pay their contributions in time or in full or at all. In essence, they are saying that this is just the way things work at the international level and that the Court must live with that. If that is an accurate description of reality, then it is an admission of failure by states to live up to what is expected of them under treaties or resolutions they themselves created, not a justification for not paying the full amount of a budget endorsed by the very same states.[44]

G. There is no legal requirement to "guarantee" funding during the Court's lifetime

29. We observe that the donors seem to put a special emphasis on the term "guarantee". Why that is appears unclear. We only used the word "guarantee" in the financial sense for the context relevant here in the following sections of the Request:

    a. "On a plain reading of the ECCC Law the distinction between the two categories of expenses to be funded connotes that one is a category of expense to be **guaranteed** by the UN while the other is based on additional donations that are not **guaranteed**."[45]

    b. "It would [...] be an act of moral irresponsibility for the international community to establish a criminal court system necessarily involving loss of liberty by arrest and detention as well as by the possibility of custodial sentence which lacked the financial **guarantees** necessary to complete its task."[46]

[redacted]

[44] In the context of the ECCC, there is not even a threat of loss of any voting rights as in the ASP of the ICC, but we would in any event not put too much stock by the effectiveness of a threat to lose the right to vote in an organisation one is not willing to support financially in the first place and that has no powers to take any enforcement action.

[redacted]

[46] Request, para 69 – quote from a separate opinion by Judge Geoffrey Robertson.

30. The meaning of our use of the term in a. is clear from the context. Its use in b. refers to a question of general policy from another court's context. What it means is this: The UN-RGC Agreement obliges ("**shall** be borne") the UN and the RGC to pay certain parts of the expenses as long as the Agreement is in force and the Court is active. And that really is the nub of the matter.

31. Either the Agreement is in force or it is not. In the former case, the parties are obliged under it to make their contributions; it is irrelevant whether this is done by voluntary funding through what appear to be third parties. Strictly speaking, however, there are no third parties, because the states that rejected the assessed contributions model – and in our case the most recent subvention amount as requested by the SG – are the same that then have to take up the shortfall by paying voluntary contributions. "Voluntary contributions" here means the opposite of "assessed contributions", i.e., the voluntary model puts the burden on some member states of the UN and not on all, as the assessed contributions model would have done. "Voluntary" in this context cannot mean "optional".

32. If the Agreement is terminated, the obligations cease and the lifetime of the Court in its current form ends. Mere non-fulfilment of the obligations does not affect the validity of the Agreement, unless the exit mechanism provided for under the Agreement is triggered. What we were referring to was neither more nor less than that the parties to the Agreement should honour the commitments they subjected themselves to.

H. The budgetary frameworks of the UN and the PDG member states do not allow for an advance "guarantee" of funding across the Court's lifetime

33. This argument is related to the previous and equally unconvincing. We appreciate the strictures arising from the donors' internal budget procedures but ultimately cannot give them decisive weight regarding the matter at hand. It is a general principle of law that one has to have the funds to pay for one's obligations. The parties to the Agreement may plead substitution of their own payments by voluntary contributions from others if they agree to that interpretation of the Agreement, as we analysed in the Request.[47] However, implied in the Agreement is that the manner of payment must allow for a proper functioning of the Court: The Agreement is a means to an end, not an end in itself. Its one and only purpose is to create, and thereafter serve, the Court's judicial mandate. This also means that the parties cannot plead internal procedures if this violates the purpose of the Agreement. They must make reasonable accommodation for this disjunctive scenario, which is in any event not something that was unforeseeable at the time the Agreement was signed.

34. The shape of such solutions is, of course, solely a matter for the UN and the states, but solutions must be found that allow for a smooth functioning of a judicial institution aimed at securing a speedy investigation and, in the case of indictment, trial with respect for the rights of the defence.

I. Use of results-based budgeting (RBB)

35. We have explained in the Request that we consider an application of RBB or "milestones" as a measure of success and/or progress to judicial decision-making

[redacted]

processes incompatible with judicial independence in decision-making.[48] We refer to those comments and permit ourselves the following observations.

36. The OA's submission and the UN's statement are not fully in line with each other, either. The UN argues[49] that under ST/SGB/2016/6 "*which indicates that 'in the proposed programme budget the requested resources shall be justified in terms of the requirements of output delivery in contribution to the expected accomplishments' any future request for subvention to the ECCC from the programme budget will need to be submitted and presented in a results-based format*". It is difficult to reconcile this with the language used by the OA in its own submission which states that "*future funding is not contingent on success in achieving the expected accomplishments in prior periods, as measured by performance indicators*".[50] The OA's submission actually raises the question of what useful purpose RBB can serve if success in attaining certain performance indicators is not required to trigger future funding.

37. It is worth noting in this context the ICC's recent efforts at developing its own performance indicators, which are a telling example of the difficulties a court faces when trying to reconcile managerialist demands around effectiveness and efficiency from the donor community with those arising out of fair trial principles. The ICC issued a report on the development of performance indicators of 11 November 2016 ("Report")[51] in response to a request by the ASP in 2014 for the ICC to develop qualitative and quantitative indicators to demonstrate the Court's achievements and needs and to allow State Parties to assess the Court's performance more strategically.[52]

38. In the Report, the four indicators are listed as follows:

    a. The Court's proceedings are expeditious, fair and transparent at every stage;

    b. The ICC's leadership and management are effective;

    c. The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and

    d. Victims have (adequate) access to the Court.[53]

39. It is revealing that 3 out of the 4 indicators are essentially management or support-services-related. Discussions regarding their interplay in the past have highlighted the

> [...] question of viability of performance indicators for an international criminal court and the need to preserve judicial and prosecutorial independence while striving for an optimal organisational performance. It was also emphasized that the ICC's performance depends

[redacted]

[51] International Criminal Court, "Second Court's Report on the Development of Performance Indicators for the International Criminal Court", 11 November 2016.
[52] *Ibid.*, para. 1.
[53] *Ibid.*, para. 5 – The "adequate" was ultimately dropped from the text as opposed to the previous report.

> in many respects on the support and cooperation that it receives from the global community.[54]

40. The Report explicitly recognises the complexity of indicator selection particularly in relation to the fairness of the proceedings, which can be very difficult to measure. The Report notes that the goal of fairness potentially conflicts with that of expeditiousness, evidencing the difficulties of qualitatively measuring the performance of a judicial institution.

41. The Report wisely acknowledges that the speed of proceedings will be constrained by the time and participation that must be afforded to the parties in accordance with the needs for procedural fairness and to establish the truth,[55] and that in

> [...] practice, what appears to be mostly used to measure fairness at the national level are workload indicators on defence issues that could point towards a level of fairness of proceedings (such as time spent addressing concerns raised by the defence; time given to defence in making their case; etc.).[56]

42. The Report warns against equating duration and speed of cases with efficiency, noting that care must be taken to balance speed with fairness. The Report also warns against benchmarking across cases, stating:

> [E]ach case has its unique features and benchmarking from one case to another will therefore not be possible *stricto sensu*. The duration of each case is affected by a number of case-specific factors such as the number of accused persons, the number and nature of the charges, the volume of evidence and likely number of witnesses and the geographical scope of the case (localised or extensive), cooperation of States in providing needed assistance, and the speed with which such assistance is provided. These and any other relevant factors taken together may contribute to assess the relative complexity of a case, which is likely to affect its overall duration. In principle, the more complex and voluminous a case, the longer its duration.[57]

43. The same considerations apply, *mutatis mutandis*, to the proceedings before the ECCC. The Report's findings strengthen us in our view that despite the executive-driven trend in that direction, applying managerial criteria to the core judicial activity[58] is either bound to end as an exercise in futility or risks making dangerous inroads to the judicial self-perception.[59]

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[54] *Ibid.*, para 14.
[55] *Ibid.*, para. 29.
[56] *Ibid.*, para. 32.
[57] *Ibid.*, paras. 35 – 36.
[58] *See for example* on the actual merits of managerial judging in practice Maximo Langer, "The Rise of Managerial Judging in international criminal law", 2005, *American Journal of Comparative Law*, vol. 53, pp. 835-909; Maximo Langer & Joseph W. Doherty, "Managerial Judging Goes International, but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms", 2011, *The Yale Journal of International Law*, vol. 36, pp. 241-305.
[59] *See* critically on the ICC's Office of the Prosecutor's own policy on performance indicators Birju Kotecha, "The ICC's Office of the Prosecutor and the Limits of Performance Indicators", 2017, *Journal of International Criminal Justice* (advance article doi:10.1093/jicj/mqx028). Kotecha rightly states: "*First, economy risks shaping the purpose of performance measurement into a simple 'reward or punish' exercise. This comes with the belief that hard numbers are the basis for positive external judgment and the search for funding. Second, and relatedly, economy pushes performance indicators to produce as much as possible hard data, for the purpose of auditing. As argued in the literature, auditing and the development of performance indicators are mutually constitutive. The development of performance measurement tends to conform to the image and practice of auditing. Thus, both accountability and audit explain why the OTP prioritizes indicators based on prosecutorial outputs: because they are readily amenable to auditable standards of performance. One should then question why audit-rooted performance measurement excludes or disincentivizes the measurement of*

J. No influence by PDG on judicial investigations

44. We note the expression of regret by the PDG at the suggestion that they might try to influence the judicial investigations through the funding allocation. We respectfully would express our own regretful disagreement with such a fulsome statement. As with so many things, the fact of whether there is a perceived influence lies in the eye of the beholder.

45. The Defence for Meas Muth has accurately pointed out[60] the developments around the budget proposal for 2017 in the United States, one of the major donors within the PDG. The proposed bill and the accompanying report contain the following sections:

    a. "(2) KHMER ROUGE TRIBUNAL.—Funds appropriated by this Act that are made available for assistance for Cambodia may only be made available for a contribution to the Extraordinary Chambers in the Court of Cambodia (ECCC) **if the Secretary of State certifies and reports to the Committees on Appropriations that the ECCC will consider Case 003:** Provided, That such funds shall be subject to prior consultation with, and the regular notification procedures of, such Committees: Provided further, That the Secretary of State shall seek reimbursements from the Principal Donors Group for the Documentation Center of Cambodia for costs incurred in support of the ECCC."[61]

    b. "In addition, section 7043(c)(2) of the **act limits a U.S. contribution to the Extraordinary Chambers in the Court of Cambodia [ECCC] to Case 003, regarding former Khmer Rouge navy commander Meas Muth who is implicated in the 1975 Mayaguez Incident. The Committee endorses the Department of State's plan to cease contributions to the ECCC if a closing order is issued for Case 003.**"[62]

46. Apart from the fact that the PDG were also apparently meant to pay for the work of DC-Cam in supporting the ECCC,[63] with any such payment possibly reducing the overall funds available to the ECCC, the bill and report, under the only reasonable interpretation, envisaged that the US should a) ring-fence its contribution to Case 003, and b) cease contributing to the ECCC at all if Case 003 is dismissed by us.[64] They also seemed to focus on the *Mayaguez* incident, having impacted on US citizens, as the reason why funding Case 003 was justified.

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prosecution effectiveness. Generally, one explanation is that these indicators may generate a powerful (and unanticipated) cultural consequence on the organization's personnel. In short, audit indicators may deeply implant audit values within professional identities. This may lead personnel to change their vision about who they professionally are and what it is they do." – at p. 13.

[redacted]

[61] United States Congress, S.3117 (Report No. 114-290), *A Bill making appropriations for the Department of State, foreign operations, and related programs for the fiscal year ending September 30, 2017, and for other purposes,* 29 June 2016, at www.appropriations/senate/gov/imo/media/doc/FY2017-State-Foreign-Operations- Appropriations-Report 114 290.pdf, p. 221.

[62] United States Congress, *Report to Accompany S. 3117*, 29 June 2016, at www.congress.gov/congressional-report/114th-congress/senate-report/290/1, p. 15.

[63] We note that all the archive material held at DC-Cam is, from the perspective of the ECCC, potential evidence and DC-Cam is under law obliged to allow the ECCC access to it; ultimately, the material is even subject to search and seizure.

[64] The International Co-Lawyer for Meas Muth has rightly pointed out the lack of knowledge of the ECCC procedural terminology by the drafters of this section, see "Inducing Case 003 Outcome: US Purse Strings Wielded as a Whip", *Cambodia Daily*, 6 July 2016, at

47. This proposal naturally received media attention and attracted adverse comments from different quarters in Cambodia at the time.[65] It was enacted in the following form on 5 May 2017:

> (2) KHMER ROUGE TRIBUNAL.—Of the funds appropriated by this Act that are made available for assistance for Cambodia under the heading "Economic Support Fund", not more than $1,500,000 may be made available for a contribution to the Extraordinary Chambers in the Court of Cambodia (ECCC): *Provided,* **That such funds may only be made available if the Secretary of State certifies and reports to the Committees on Appropriations that such contribution is in the national interest of the United States and will support the prosecution and punishment of individuals responsible for genocide in Cambodia in a credible manner**: *Provided further*, That if the Secretary of State is unable to make the certification required by the previous proviso, such funds shall be made available for research and education programs associated with the **Khmer Rouge genocide** in Cambodia, which are in addition to funds otherwise made available under paragraph (3): *Provided further*, That such funds shall be subject to prior consultation with, and the regular notification procedures of, such Committees: *Provided further*, That the Secretary of State shall seek reimbursements from the Principal Donors Group for the Documentation Center of Cambodia for costs incurred in support of the ECCC.[emphasis added].[66]

48. It does not require much imagination to realise the position that the text of the original bill alone put us in: If we indict Meas Muth, court observers may say that we caved in to US demands; if we dismiss the case or do not indict for the *Mayaguez* incident, we risk the loss of a major donor to the ECCC. The version of the enacted legislation does not contain the same crude conditions as the bill but does at the end of the day do little to assuage our concerns: It makes a certification of the "prosecution and punishment of individuals responsible for genocide in Cambodia in a credible manner" into a precondition for disbursement of funds, and it ties the grant to the question of whether it is "in the national interest of the United States" to do so. This could, on the one hand, easily be interpreted as requiring indictments and convictions for genocide and as a pre-determination of the legal question of whether there was a genocide in Cambodia, an issue that still has to be decided by the only court with the competence to do so. On the other hand, we wonder when the prevention or punishment of genocide could not be in the "national interest" of a country, especially if it has ratified the 1948 Genocide Convention. Finally, it is left to a member of the US executive to certify the credibility of the judicial proceedings before the ECCC for the purpose of releasing the funds. To our mind, the average observer might be forgiven for thinking that this is at least a *prima facie* case of implied influence on the actual outcome of a case.[67]

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https://www.cambodiadaily.com/opinion/inducing-case-003-outcome-us-purse-strings-wielded-as-a-whip-115088/.

[65] On 6 July 2016, the *Cambodia Daily* published a commentary by the International Co-Lawyer for Meas Muth, entitled "Inducing Case 003 Outcome: US Purse Strings Wielded as a Whip" (https://www.cambodiadaily.com/opinion/inducing-case-003-outcome-us-purse-strings-wielded-as-a-whip-115088/), to which Heather Ryan, a consultant to the Open Society Justice Initiative, responded in "Tribunal Is Tainted by Political Interference, but Not From US" on 12 July 16 (https://www.cambodiadaily.com/opinion/tribunal-is-tainted-by-political-interference-but-not-from-us-115355/). The International Co-Lawyer's rebuttal appeared in "Consultant's Analysis of US Senate Bill Cherry-Picks Facts" on 13 July 16 (https://www.cambodiadaily.com/opinion/consultants-analysis-of-us-senate-bill-cherry-picks-facts-115388/).

[66] Section 7043(c)(2) of the Consolidated Appropriations Act 2017, online at https://www.congress.gov/bill/115th-congress/house-bill/244/.

[67] *Colorandi causa*, a similar approach was taken, again by the United States, in the context of UNSC Res. 1422 - *see* Aly Mokhtar, "The fine art of arm-twisting: The US, Resolution 1422 and Security

49. However, direct outcome-related influence is only one aspect. Expressions of discontent with the pace of the investigations are another and this links to the previous point about RBB. We have had repetitive requests from members of the PDG during the budgeting process in 2016 that were made at a level of detail which we find problematic in a judicial environment.

50. [redacted]

51. Given that we have for some time now explained the reasons for repeated delays in our contributions to the quarterly completion reports, which are after all aimed at keeping the UN, the RGC, the PDG and the wider public informed, this could only be interpreted as a desire for more specific information on our investigation strategy, case management and the parties' behaviour, which in our view encroached upon the confidentiality of the investigations.

52. [redacted]

53. [redacted]

54. [redacted]

55. Apart from showing the level of intended intrusion into judicial case management and decision-making, this shows that the UN and the PDG were put on full notice of the possibility of a stay if the funding did not match the OCIJ's core needs, as early as October 2016.

56. Last but not least, the very introduction of Internal Rule 66 *bis* – which the public was informed has been used by the ICIJ in all cases except Case 004/1 – was in no small part the result of donor concern with the duration of the proceedings and the desire to reduce the complexity of the cases in order to achieve a situation where an eventual trial would remain manageable and, hence, short.[68]

Council deferral power under the Rome Statute", *International Criminal Law Review*, Vol. 3, 2003, pp. 295 – 344.

[68] *See* the Press Release of 16 January 2015 "11th Plenary Session Concludes" where it was announced that the amendment was adopted with the aim of expediting the proceedings before the ECCC.

K. Exit strategy

57. We note that an exit strategy is not currently being considered. We refer to our explanations about the lack of any residual jurisdiction of the ordinary Cambodian courts in the Closing Order (Reasons) in Case 004/1.[69] Lack of sufficient funding in the future may thus mean an unorderly breakdown of and an unregulated limbo for pending proceedings.

L. Statement by the OA on availability of OCIJ posts

58. The OA's submission[70] seems to create the impression that the ICIJ did not request posts in time despite the fact that funds existed, and that the posts were approved *post haste* once the request was submitted. This is a minor factor, yet it paints an incorrect picture of the interaction between the OA and the OCIJ that needs to be put into proper perspective for completeness' sake.

59. Firstly, this matter must be viewed against the general background of the UN's cumbersome recruitment procedures, which are ill-suited for an institution such as an *ad hoc* criminal court that is meant to proceed at speed and has an *ex ante* finite life expectancy, as opposed to being a permanent administrative fixture such as, for example, UNHQ. A request in 2016 by the ICIJ to UNHQ via the OA, to free the OCIJ from these criteria in order to allow faster replacement of staff was rejected summarily by UNHQ, as the ICIJ was informed by the OA. It must be stressed that against the background of the uncertainty in the financial situation of the Court and related to the duration of their contracts, several legal officers and investigators have in the past years left the OCIJ for more secure employment.[71] There has thus been the need – as there might be again in the future – to conduct a number of time-consuming recruitment exercises. Under the current system, it can take about two months from the posting of a vacancy to recruiting[72] a new UN staff member, somewhat less if a consultancy is requested – however, we have been informed by the OA that UNHQ increasingly frowns upon the use of consultancy contracts. The summary rejection of the request to allow a faster recruitment process was thus unfortunate, because it could have prevented months of delays and saved a substantial amount of money.

60. [redacted]

[69] Case File 004/1-D308/3, *Closing Order (Reasons)*, 10 July 2017, paras 11-25.

[70] Case File No. 004/2-D349/3, *Office of Administration's Submission on the Budgetary Situation of the ECCC and Its Impact on Cases 003, 004, and 004/2*, 5 June 2017, para. 12.

[71] This applies especially in Case 003, where the ICIJ has only recently learned that his office will lose a long-standing senior legal team member in August 2017 through resignation, which comes on top of another legal officer leaving at the same time due to his taking up further postgraduate study.

[72] This period does not necessarily include the 21-day period that must elapse between recruitment and arranging travel for the person recruited, unless an exception is granted. It should be noted that the ICIJ and his Chef de Cabinet paid for the air travel of a consultant out of their own pockets, because an exception from the 21-day period was not forthcoming and the 21 days would have meant an unacceptable loss of progress in the case for which she was recruited.

M. Conclusion

61. The responses by the UN and PDG submitted through the OA have not reached the full degree of specificity we had hoped for. However, the response does not fall to a level of total lack of engagement with our concerns, especially if seen in light of funding developments since the Request was issued.

62. The PDG in particular have provided written assurances of being "deeply committed" to the further financing of the ECCC, a statement which has been supported so far by a rapid increase in the funding for 2017, compared to the impressions previously conveyed to us by both the OA and the SESG. It is, as far as we know, the first time that the UN and above all the PDG, who, due to the residual nature of any UN subvention, are *de facto* responsible for the funding of the international and also of some of the national side, have made such a commitment directly through an intervention in a judicial proceeding. We trust that the PDG are aware of the heightened moral responsibility such a statement entails, not least in the eyes of the international community and, above all, of the Cambodian people, especially given their stance on an exit strategy and the consequences of its absence in the case of funding failure which we outlined above.

63. We consider that there is a less incisive way for the moment to address the issue. The depth of the PDG's renewed commitment will be easily monitored through the amount of further funding actually provided for the rest of 2017 and the nature of the impending budget negotiations for 2018, with the PDG honouring the budget they endorse in full, and refraining from making ex-post declarations that despite a shortfall, the Court is still able to function satisfactorily. The decision on what is satisfactory under fair trial aspects is ultimately for the judges and no-one else. We appreciate in this context that staff contracts were already extended in June 2017 until the end of the year, providing at least some foreseeability on staffing development and the concomitant investigation planning. We see it as a first sign that our concerns have been understood. In this regard, we have recently learned from an article in the *Phnom Penh Post* that the European Union ("EU") has apparently pledged €10 million to the ECCC to cover part of the Court's costs until 2019. We have also recently been informed that the Government of Japan has announced a new contribution of just over US $1.2 million to the international component of the ECCC for the 2017 fiscal year.[73] We welcome these pledges and contributions as further evidence of the PDG's stated deep commitment to the completion of the proceedings pending before the ECCC.[74] We note, however, that it is both unfortunate and inefficient, especially against the potentially disruptive impact of the current proceedings regarding the Request, that we had to learn about the EU's pledge through the media, rather than from the OA (or the PDG), for example in its memorandum of 26 July 2017.[75] Enhanced transparency and prompt communication of budgetary developments – an issue that we have

[73] ECCC Press Release, *Japan makes a new contribution to the Extraordinary Chambers in the Courts of Cambodia*, 3 August 2017, available at: https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20Japan%20makes%20a%20new%20contribution%20to%20the%20ECCC%20English.pdf.

[74] See the *Phnom Penh Post*'s article titled "Khmer Rouge tribunal gets funds, case deadline extension", 26 July 2017, available at: http://www.phnompenhpost.com/national/khmer-rouge-tribunal-gets-funds-case-deadline-extension.

[redacted]

flagged as crucial for all cases – should thus be of paramount importance to the OA going forward.

64. The arguments advanced by the UN and PDG are at the end of the day of a broader systemic nature and symptoms of the fact that despite the existence of modern international criminal tribunals since the early 1990s and recurring complaints across tribunals about funding shortfalls, the community of states has yet to establish a reliable funding model that allows courts to function on the international level as they would on the national level under a tax-based system, and to accommodate the demands of judicial independence in an otherwise overwhelmingly executive-driven institutional and political environment. The PDG itself has acknowledged that the voluntary funding model is not ideal. Notwithstanding the choice of model, and again by the UN's and PDG's own admission, the actual compliance of the donors with their funding obligations is another problematic issue.

65. Therefore, upon much deliberation and despite remaining misgivings, we think on balance that it is not the time and place yet to address the above-mentioned systemic shortcomings through the order of a full stay.

66. This approach of judicial restraint will, however, only remain viable if the future funding matches the Court's requirements, as set out in the forthcoming budget proposals of the Court, by complying with the budget accepted and endorsed by the UN and the PDG in a timely fashion and ideally with early and reliable assurance of compliance, as well as joined-up communication channels. There can be no bridge from the "is" of the prevalent imperfect funding practice on the international level to the "ought" of determining the normative parameters of judicial independence, fair trial and due process.

67. We will therefore remain actively seised of the matter and will take the necessary measures, should matters deteriorate again to a degree that in our view judicial independence, fairness, and the integrity of the proceedings are threatened.

68. We will invite the OA to provide regular written updates on the funding situation, possibly through a new section in the quarterly completion reports as, in essence, the mirror image of the RBB methodology applied *vis-à-vis* the Court. This would also provide public accountability for the funding development where it belongs, namely outside specific confidential investigations.

WE[76] THEREFORE:

69. **INFORM** the Parties and the OA that we defer the decision on a stay for the time being but will remain actively seised of the matter until the last closing order has been issued. Should a future lack of funds or financial uncertainty threaten judicial independence, fairness, and the integrity of the proceedings, we will take the measures that we consider necessary to address the situation;

[76] While both Judges sign this decision jointly, the National CIJ wishes to recall that he does not recognise or accept as valid any documents created and/or filed by former International Reserve CIJ Laurent Kasper-Ansermet, and hence the Case File document numbering should run from the last document put on the Case File by former ICIJ Blunk and not count any documents filed by Judge Kasper-Ansermet.

70. **INVITE** the OA to report in the future on at least a quarterly basis on the status of the funding *vis-à-vis* the approved budget, for example, by adding a section on funding development to the public quarterly completion reports;

71. **PUT THE PARTIES AND THE OA ON NOTICE** that this decision is confidential and that we consider disclosing this decision or any part of its text or of its content not contained in the public redacted version as a violation of Internal Rule 35(1)(a) and will deal with any future offence according to Internal Rule 35(2) and (4), in connection with Article 314 of the 2009 Cambodian Criminal Code;

72. **PERMIT** the OA to forward this decision to the relevant authorities within the RGC, the UN, and the PDG; and

73. **INSTRUCT** the Greffier to place a copy of this decision on Case Files 003 and 004, and a public redacted version on Case Files 003, 004, and 004/2.

Dated 11 August 2017, Phnom Penh

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges

Co-juge d'instruction

YOU Bunleng **Michael BOHLANDER**