



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge  
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត  
Office of the Co-Investigating Judges  
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Case File No: 004/2/07-09-2009-ECCC-OCIJ

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**REQUEST FOR SUBMISSIONS ON THE BUDGETARY  
SITUATION OF THE ECCC AND ITS IMPACT ON CASES 003,  
004, AND 004/2**

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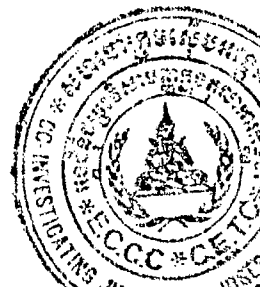
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## I. PRELIMINARY REMARKS

1. We have decided to issue this request for submissions because of our deep concerns over the funding arrangements currently in place for the ECCC, both on the national and the international sides, and because of our considered opinion that the current situation and the outlook going forward have now become incompatible with the basic principles of fair trial, the rule of law and judicial independence. We have reached a stage in the investigations in Cases 003, 004 and 004/2 where we feel it is our duty under our oath of office to consider any and all options to ensure that the further development of the investigations before this Court is compliant with those basic principles and, if such compliance proves to be impossible, that all investigations are brought to an end within a reasonable time without a closing order, for the sole reason of insufficient funding support by the United Nations (“UN”), the donor countries, and the Royal Government of Cambodia (“RGC”). Before we take such a drastic step as a last resort, we must give the parties and the Office of Administration the opportunity to comment on our views, and in particular for the latter, to provide detailed information in writing about the budget process for 2017 and the outlook for the time beyond 2017.
2. The position the Court currently finds itself in is, simply put, the following. The Court’s budget proposal for 2017 was endorsed by all relevant actors. Endorsement of the budget means acceptance that the requested funds are necessary for the proper operation of the Court. However, funding was then not provided to the requested and endorsed level, neither by a UN subvention nor by voluntary contributions. The Court is now several millions of US-Dollars short of its endorsed budget and all judges have recently been orally informed by the Office of Administration that it is highly unlikely that more funding will be available for 2017 to comply with the endorsed budget, or that funding levels will increase in the time thereafter. This is an example of *venire contra factum proprium*, or inconsistent behaviour, which is classified as an example of violating the good faith requirement and recognised in international law.<sup>1</sup> The fact that the ECCC is not itself a party to the relations between the UN, the RGC and the donors is neither here nor there for the evaluation of the impact of such behaviour on the procedural rights of the parties and the independence of its judges.
3. We fully realise that the wider recent geopolitical events make heavy demands on the financial capacity of the UN, the RGC and the donor countries. Nonetheless, in the second and third recitals of the preamble to the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“UN-RGC Agreement”), the parties affirmed that the “*General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security*” and that “*the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible*”. The conduct of the parties to the UN-RGC Agreement must continue to reflect the severity of this

<sup>1</sup> See *Venire contra factum proprium*, in Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford Reference, online version, 2011 and the references in the context of arbitral awards at [https://www.trans-lex.org/907000/\\_prohibition-of-inconsistent-behavior/](https://www.trans-lex.org/907000/_prohibition-of-inconsistent-behavior/).



commitment. How the parties fulfil this commitment is, on the one hand, their prerogative but, on the other hand, also their responsibility.<sup>2</sup>

4. As judges, we are primarily concerned with justice and truth. We naturally accept that procedural efficiency is important and we make every effort to abide by its demands, but it is a second-order concern compared to the former, and the consequences of a conflict between them are a foregone conclusion. The symbol of our office are the scales of justice held by Justitia, in which the arguments for and against a party are balanced. Justitia does not weigh a person's freedom against available assets. Neither shall we.

## II. PROCEDURAL HISTORY

5. On 22 February 2017, we dismissed the case against Im Chaem in Case 004/1 for lack of personal jurisdiction.<sup>3</sup> The investigations in Cases 003 and 004/2 were closed on 16 December 2016 and 10 January 2017 respectively<sup>4</sup> and the parties filed several new investigative requests, annulment motions and appeals, some of which are still pending before the CIJs and the Pre-Trial Chamber ("PTC"), and the decisions on some of those may still result in further appeals.<sup>5</sup> The investigation in Case 004/2 has been closed again after some investigative action was taken<sup>6</sup>. Case 004 is currently nearing the final stages of investigation. The PTC's average time needed for disposing of any one appeal/annulment motion has in the past consistently been given as six months in the quarterly completion reports<sup>7</sup>.

<sup>2</sup> We permit ourselves, merely *colorandi causa*, the observation that the cost of one single modern F-35 Joint Strike Fighter aircraft would allow the funding of the entire ECCC for several years; see the FY 2016 Defense Budget request, at Figure 5-2, the cost for one of them is over US \$192 million; each MQ-9 Reaper drone costs over US \$27 million, more than the requested international budget for 2017; see: [dcmo.defense.gov/Portals/47/Documents/.../FY2016\\_Performance\\_Budget.pdf](http://dcmo.defense.gov/Portals/47/Documents/.../FY2016_Performance_Budget.pdf).

<sup>3</sup> Case File No. 004/1-D308, *Closing Order (Disposition)*, 22 February 2017.

<sup>4</sup> Case File No. 004-D334, *Notice of Conclusion of Judicial Investigation Against AO An*, 16 December 2016; Case File No. 003-D225, *Notice of Conclusion of Judicial Investigation Against MEAS Muth*, 10 January 2017.

<sup>5</sup> The number of requests, annulment motions and (notices of) appeals pending at any given time is obviously in constant flux. However, as of 4 May 2017, in Case 003, there were six requests pending before the CIJs. In Case 004/2, there was one annulment application pending before the PTC. In Case 004, there were two requests before the CIJs, and three annulment applications pending before the PTC. There are also three appeals pending before the PTC concerning the same decision which was issued across all open cases.

<sup>6</sup> Case File No. 004/2-D334/2, *Second Notice of Conclusion of Judicial Investigation against Ao An*, 29 March 2017.

<sup>7</sup> See for example: *ECCC Completion Plan—Revision 7*, 31 December 2015, para. 18, available from [https://www.eccc.gov.kh/sites/default/files/ECCC\\_Completion\\_Plan\\_Rev\\_7.pdf](https://www.eccc.gov.kh/sites/default/files/ECCC_Completion_Plan_Rev_7.pdf); *ECCC Completion Plan—Revision 8*, 31 March 2016, para. 20, available from <https://www.eccc.gov.kh/sites/default/files/ECCC%20Completion%20Plan%20-%20revision%208.pdf>; *ECCC Completion Plan—Revision 9*, 30 June 2016, para. 21, available from <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan-Final-Rev9%20.pdf>; *ECCC Completion Plan—Revision 10*, 30 September 2016, para. 21, available from <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan%20revision%2010.pdf>; *ECCC Completion Plan—Revision 11*, 31 December 2016, para. 18, <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan%20revision%2011.pdf>.



### III. DISCUSSION

#### A. The progress of funding the ECCC

6. From the early stages of the ECCC's inception, concerns were raised regarding its financial sustainability. Since the formalisation of the UN-RGC Agreement in 2003, the ECCC has continued to face significant financial challenges and insufficiencies, many of which continue to pose realistic concerns for the Court's future processes.
7. In its initial letter of 1997 requesting assistance from the UN, the RGC specifically expressed that it did not "*have the resources or expertise to conduct*" the very important procedure required of the tribunal.<sup>8</sup> As such, the RGC sought assistance from the UN, and discussions began on how to best structure the Court and its financial sources to ensure adequate sustainability.
8. Once arrangements for the establishment of the ECCC began, the problems of relying solely on voluntary contributions for the Court's funding were envisaged at an early stage by the Secretary-General. In his report to the 57<sup>th</sup> session of the UN General Assembly ("UNGA"), the Secretary-General stated that it was his view that a court of this nature would constitute an expense of the UN under Article 17 of the UN Charter<sup>9</sup> and should be funded from assessed contributions<sup>10</sup> as:

"[a] financial mechanism based on voluntary contributions would not provide the assured and continuous source of funding that would be needed to make it possible to appoint judges, the international co-prosecutor, the international co-investigating judge and the Deputy Director of Administration, to contract the services of administrative and support staff and to purchase the necessary equipment. Nor would it provide a secure basis for the conduct of investigations, prosecutions and trials.

[...] The operation of a court should not be left to the vagaries of voluntary contributions. It could well be said that courts, as a matter of constitutional principle, should be financed by taxation or, at the international level, through the analogous mechanism of assessed contributions."<sup>11</sup>

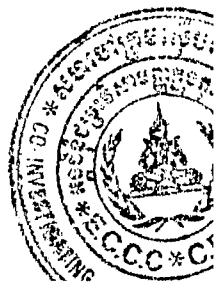
9. Notwithstanding the Secretary-General's report, on 22 May 2003, the UNGA went on to resolve that the expenses of the ECCC to be defrayed by the United Nations "*shall be borne by voluntary contributions from the international*

<sup>8</sup> General assembly, *Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council and Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General*, A/51/930, 24 June 1997, available from [http://www.unakrt-online.org/sites/default/files/documents/June\\_21\\_1997\\_letters\\_from\\_PMs-2-1.pdf](http://www.unakrt-online.org/sites/default/files/documents/June_21_1997_letters_from_PMs-2-1.pdf) (accessed 20 February 2017).

<sup>9</sup> Article 17 provides that: "(1) *The General Assembly shall consider and approve the budget of the Organisation. (2) The expenses of the Organisation shall be borne by the Members as apportioned by the General Assembly. (3) The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.*"

<sup>10</sup> Assessed contributions are the contributions made by each member state to pay for the expenses of the United Nations.

<sup>11</sup> UNGA Report of the Secretary-General on Khmer Rouge Trials, 31 March 2003, A/57/769, paras 74-75.



*community [...]*<sup>12</sup> This resolution was passed weeks before the signing of the UN-RGC Agreement on 6 June 2003.

i. The UN-RGC Agreement analysed

10. The UN-RGC Agreement and ECCC Law both set out provisions regarding the funding for the international staff and judges and prosecutor of the court.
11. The UN-RGC Agreement states that salaries and emoluments of international judges, the international co-investigating judge, and the international co-prosecutor “*shall be defrayed by the United Nations*”.<sup>13</sup>
12. Additionally, Article 17 of the UN-RGC Agreement states that the UN “*shall be responsible for*” remuneration of the international judges, the International CIJ, the International Co-Prosecutor, the Deputy Director of the Office of Administration and other international personnel, the costs for utilities and services as agreed separately between the UN and the RGC, as well as such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution, and the Extraordinary Chambers.
13. The RGC is responsible for the salaries of the national staff and for certain other expenses as set out in the UN-RGC Agreement.<sup>14</sup>
14. The UN has the right to cease providing financial assistance to the Court in the event that the RGC changes the structure or organisation of the Court or otherwise causes them to function in a manner that does not conform to the terms of the agreement.<sup>15</sup>
15. The ECCC Law – although not binding on the UN because, differently from the UN-RGC Agreement it is a Cambodian law and not a bilateral agreement– provides further specificity. Article 44 *new* of that law states that:
 

“the expenses and salaries of the Cambodian administrative officials and staff, judges and reserve judges, investigating judges and reserve investigating judges, prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;

the expenses of foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations **shall be borne by the United Nations**; and

the Extraordinary Chambers may receive **additional assistance for their expenses from other voluntary funds** contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceeding.” (emphasis added)
16. Consistently with the above-mentioned provisions, the Supplementary Agreement between the UN and the RGC also states that the UN is obliged to bear specific expenses regarding the operation of the ECCC.<sup>16</sup>

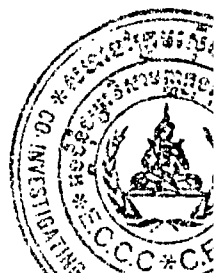
<sup>12</sup> UNGA 85<sup>th</sup> Plenary Meeting, 13 May 2003, *Resolution Adopted by the General Assembly*, A/RES/57/228 B, para. 3.

<sup>13</sup> Article 16 of the UN-RGC Agreement.

<sup>14</sup> Articles 14 and 15 provide that the RGC shall provide at its expense the premise for Court operations, as well as such utilities, facilities and other services necessary for their operation, in addition to the salaries and emoluments of Cambodian judges and other Cambodian personnel.

<sup>15</sup> UN-RGC Agreement, Article 28,

<sup>16</sup> See Supplementary Agreement between the United Nations and the Royal Government of Cambodia, p. 1.



17. The UN-RGC Agreement constitutes an international agreement, to be interpreted in accordance with the law of treaties, and principally, the Vienna Convention on the Law of Treaties (“VCLT”).<sup>17</sup> The general rules of treaty interpretation set forth in the VCLT require that treaties be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>18</sup> The context, for the purpose of interpreting a treaty includes in addition to the text, preamble, and annexes to the treaty: any agreement relating to the treaty which was made between all parties to the treaty, and any instrument made by the parties in connection with the conclusion of the treaty and accepted by all parties as an instrument related to the treaty.<sup>19</sup> Together with the context, it is also relevant to look at any subsequent agreement by the parties or subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>20</sup>
18. On a plain reading of the UN-RGC Agreement provisions cited above, when read in isolation from any other document, the UN may not plead lack of donor funding in failing to meet its expenses under the agreement and law.
19. The subsequently promulgated ECCC Law, to the text of which the UN has incidentally never voiced any objection or reservation, more explicitly distinguishes between expenses to be “*borne by the United Nations*”, and the receipt of additional assistance for expenses “*from other voluntary funds contributed by foreign governments [...]*”.<sup>21</sup> 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. This reading of the ECCC Law is consistent with the plain reading of the UN-RGC Agreement provisions as discussed in the preceding paragraph.
20. Additionally, it might be argued that if the UN had intended for its funding obligations under the UN-RGC Agreement to be conditional on the availability of voluntary donor funds, then such a conditional obligation is one that, it is reasonable to expect, should have been expressly agreed by the parties and reflected in the UN-RGC Agreement. Indeed, an express provision regarding the UN’s reliance on voluntary funds was made in its agreement with the Government of Sierra Leone in establishing the Special Court for Sierra Leone (“SCSL”).<sup>22</sup>
21. That said, an alternative interpretation of these provisions arises in the context of UNGA resolution 57/228, passed on 18 December 2002, i.e. weeks before the signing of the UN-RGC Agreement and a year before the promulgation of the ECCC Law. The recitals of the UN-RGC Agreement explicitly recall that resolution. While that resolution does not make any statement regarding the funding mechanism for the Court, the subsequent related resolution, 57/228B,

<sup>17</sup> UN-RGC Agreement, Article 2; *see also*, Report of the Secretary-General on Khmer Rouge Trials, 57<sup>th</sup> session of the General Assembly A/57/769, 31 March 2003, para. 25.

<sup>18</sup> VCLT, Article 31(1).

<sup>19</sup> VCLT, Article 31(2).

<sup>20</sup> VCLT, Article 31(3).

<sup>21</sup> ECCC Law Article 44 new.

<sup>22</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 6 states: “*The expenses of the Special Court shall be borne by voluntary contributions from the international community.*”



adopted without a vote on 22 May 2003,<sup>23</sup> states that that UN defrayments under the proposed funding mechanism for the Court “*shall be borne by voluntary contributions from the international community [...]*”<sup>24</sup> Resolution 57/228B is not referred to in the UN-RGC Agreement, nor is its pronouncement regarding voluntary contributions reflected anywhere in the UN-RGC Agreement. Resolution 57/228B in its footnote 1, however, states that Resolution 57/228 was re-designated the number 57/228A. We therefore read resolutions 57/228A and 57/228B together as comprising resolution 57/228.

22. Resolution 57/228 appears contextually relevant pursuant to Article 31 of the VCLT for the purposes of interpreting the UN-RGC Agreement, given that it is explicitly recalled in the recitals to the UN-RGC Agreement. We also consider relevant the fact that, as demonstrated below,<sup>25</sup> the practice of the UN to date, without any known objection by the RGC, has been to rely primarily, notwithstanding the recent UN subventions, on voluntary contributions to meet its funding obligations under the UN-RGC Agreement. This practice demonstrates the current consensus of the parties in understanding the UN-RGC Agreement, which is a relevant factor in interpreting the agreement.<sup>26</sup> In light of these factors, there is a reasonable argument to be made that the UN-RGC Agreement is to be interpreted as permitting the UN to rely on voluntary contributions to fund its obligations to the ECCC.
23. However, even this more expansive interpretation, which allows the UN to adduce resolution 57/228 *vis-à-vis* the RGC in order to avoid having to provide the funds directly from the UN budget in one form or another, would not change the picture as far as the obligations of both parties to that Agreement under the rule of law and principles of fair trial are concerned, as we set out below.

ii. The funding experience under the UN-RGC Agreement

24. Even after the finalisation of the UN-RGC Agreement, concerns regarding sufficient and sustainable funding continued to surface, first delaying its implementation,<sup>27</sup> and then resulting in concerns from the Secretary-General that the ECCC would be unable to meet its mandate because of identified “*significant shortfalls in staffing and the budget.*”<sup>28</sup> It also became clear that the original funding estimates for both the UN and the RGC were insufficient to meet the court’s requirements, and that funds had also been spent on unforeseen activities.

<sup>23</sup> A UNGA resolution adopted without a vote indicates that member states reached a consensus on the issues, thus obviating the need for a formal vote. See <http://www.un.org/en/ga/about/background.shtml> [last accessed 23 March 2017].

<sup>24</sup> UNGA 85<sup>th</sup> Plenary Meeting, 13 May 2003, *Resolution adopted by the General Assembly, A/RES/57/228 B*, para. 3.

<sup>25</sup> See *infra*, section II(A)(ii) of this Request, entitled “The Funding Experience under the UN-RGC Agreement”.

<sup>26</sup> Oliver Dörr and Kirsten Schmalenbach [Eds.], *Vienna Convention on the Law of Treaties: A Commentary*, 2012, Springer-Verlag Berlin Heidelberg, p. 523.

<sup>27</sup> UNGA Report from the Secretary-General on Khmer Rouge trials, 12 October 2004, A/59/432, para. 14(b); UNGA Report of the Secretary-General on Khmer Rouge trials, 29 November 2004, A/59/432/Add.1, para. 6.

<sup>28</sup> UNGA Report of the Secretary-General on the Khmer Rouge trials, 27 August 2007, A/62/304, para. 1.



These funding gaps in the original budget further brought into question the Court's ability to carry out its mandate.<sup>29</sup>

25. In a report in 2012, while the Secretary-General acknowledged the significant progress achieved by the ECCC, he also highlighted the most recent challenges, in particular the “*acute financial crisis that could jeopardize the future operations*” of the court.<sup>30</sup> This report further highlighted the “*acute financial shortfall*” facing the international component.<sup>31</sup> The report also stressed that the ability of the UN to meet its obligations under international law to finance certain aspects of the ECCC depended “*entirely on there being sufficient voluntary contributions from States.*”<sup>32</sup> These concerns followed the deficient funding period in 2011 and 2012 where contract extensions were issued only on a monthly basis and a recruitment freeze was implemented.<sup>33</sup>
26. The report emphasised that the inadequate financial situation resulted in public media attention shifting away from the achievements of the Court to issues of financial stability and internal morale, and that to “*put judicial proceedings before the Chambers in jeopardy for lack of funds would run counter to the message of “no impunity” perpetuated by the United Nations for nearly two decades.*”<sup>34</sup>
27. Ultimately, in 2013, these financial concerns led to the first of several subvention requests made to the UNGA.<sup>35</sup> The impact of these recurring financial challenges was such that funding was insufficient to pay national staff, resulting in staff walk-outs and strikes.<sup>36</sup> The RGC failed to pay national staff, and at times the Secretariat needed to encourage donors with outstanding pledges to the UN to redirect those pledges to the national component in order to secure the presence of national staff at the court.<sup>37</sup>
28. The October 2013 subvention request acknowledged that the 2014-2015 financial requirements would continue to pose significant financial challenges, and as such recommended the UNGA's approval for funding to supplement the financial resources of the ECCC, as well as the ability for the UN to use its discretion to provide reimbursable loans to the RGC.<sup>38</sup> The UNGA granted the subvention

<sup>29</sup> *Ibid.*, para. 42.

<sup>30</sup> UNGA Report of the Secretary-General, 19 September 2012, *Khmer Rouge trials*, A/67/380, p. 1.

<sup>31</sup> *Ibid.*, para. 56.

<sup>32</sup> *Ibid.*, para. 65.

<sup>33</sup> *Ibid.*, para. 62.

<sup>34</sup> *Ibid.*, para. 70.

<sup>35</sup> UNGA Report of the Secretary-General, 16 October 2013, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*. A/68/532; UNGA Thirteenth report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for the biennium 2014-2015, 4 December 2013, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/68/7/Add. 12; UNGA 81<sup>st</sup> Plenary Meeting, 9 April 2014, *Resolution adopted by the General Assembly*, A/RES/68/247 B; UNGA Report of the Secretary-General, 20 October 2014, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*. A/69/536; UNGA 84<sup>th</sup> Plenary Meeting, 2 April 2015, *Resolution adopted by the General Assembly*, A/RES/69/274; UNGA Report of the Secretary-General, 30 September 2015, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/70/403; UNGA Report of the Secretary-General, 16 August 2016, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*. A/71/338.

<sup>36</sup> UNGA Report of the Secretary-General, 16 October 2013, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/68/532, paras 3, 36.

<sup>37</sup> *Ibid.*, para. 34.

<sup>38</sup> *Ibid.*, paras 46-48.





request in April 2014, authorizing “*as an exceptional measure*” \$15.5 million to supplement the voluntary donations made to the international court for the period 1 January to 31 December 2014.<sup>39</sup> These funds, however, were never drawn upon because voluntary funding ultimately covered the international component’s 2014 obligations in full.<sup>40</sup>

29. In October 2014, a subsequent subvention request was made which further emphasized the increasingly difficult financial situation, highlighting that while the RGC was expected to meet its obligations under the UN-RGC Agreement, it would only be able to do so through a combination of funding arrangements, which would include “*allocations from its national budget and voluntary funding from the donor community.*”<sup>41</sup> Consequently, to avoid disrupting the judicial process, the Secretary-General continued to provide loans from the voluntary resources of the international component, which became increasingly more frequent and placed a “*considerable drain and burden on the resources of the international component.*”<sup>42</sup> Additionally, the RGC requested the UN to write off these loans, as there were “*insufficient funds mobilized for it to effect repayment.*”<sup>43</sup>
30. Financial challenges continued to persist and, in the case of the international component, worsened in the course of 2015. The Secretary-General’s September 2015 report urged that it remained “*critical for the international community to ensure that the Extraordinary Chambers have the financial means required to ensure full accountability...for the shocking scale of crimes perpetrated during the former Khmer Rouge regime*” and that “*financial failure of the Chambers would constitute a renewed tragedy in the quest for justice for the people of Cambodia*”.<sup>44</sup> As such, an additional subvention was requested, specifically for the international component.<sup>45</sup>
31. Despite intensified fundraising efforts, yet an additional subvention was requested as recently as August 2016.<sup>46</sup> With continued shortfalls in voluntary contributions, the Secretariat was unable to reinstate any reserve, and thus no funding mechanism existed to address unforeseen operational contingencies.<sup>47</sup> The subvention was requested to address the “*financial resources necessary to secure the operation of the Chambers*”.<sup>48</sup> The request further emphasized that a funding

<sup>39</sup> UNGA 81<sup>st</sup> Plenary Meeting, 9 April 2014, *Resolution Adopted by the General Assembly. A/RES/68/247 B*, para. 7; *UN General Assembly approves US\$ 15.5 million funding reserve, Extraordinary Chambers in the Courts of Cambodia* (last updated 26 May 2014), <https://www.eccc.gov.kh/en/articles/un-general-assembly-approves-us-155-million-funding-reserve>.

<sup>40</sup> UNGA Report of the Advisory Committee on Administrative and Budgetary Questions, 14 October 2016, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/71/550, para. 25.

<sup>41</sup> UNGA Report of the Secretary-General, 20 October 2014, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/69/536, para. 40.

<sup>42</sup> *Ibid.*, para. 43.

<sup>43</sup> *Ibid.*

<sup>44</sup> UNGA Report of the Secretary-General, 30 September 2015, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/70/403, para. 46.

<sup>45</sup> *Ibid.*, para. 47.

<sup>46</sup> UNGA Report of the Secretary-General, 16 August 2016, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/71/338, para. 30.

<sup>47</sup> *Ibid.*, para. 37.

<sup>48</sup> *Ibid.*, para. 38.



shortfall on either side was “*likely to seriously affect the activities of the Extraordinary Chambers as a whole.*”<sup>49</sup>

32. In October 2016, the Advisory Committee on Administrative and Budgetary Questions issued a report regarding the necessity of the August subvention request to cover the difference between the original and revised 2017 resource estimates, which arose due to “*extensions in the projected timeline for investigations and related judicial activity,*”<sup>50</sup> and stated that the requested subvention would allow the assurance of a “*reasonable duration of staff contracts should there be insufficient extrabudgetary funds available.*”<sup>51</sup> The Advisory Committee noted that the ECCC had been fully funded through voluntary contributions from 2005 to 2013 and, although several subvention requests were made to supplement voluntary financial resources, voluntary funding was eventually secured and these funds were never drawn upon.<sup>52</sup>
33. Additionally, the Advisory Committee noted that four consecutive requests no longer made the practice an exception,<sup>53</sup> and reaffirmed the view that “*a decision to appropriate an amount of the budget of the international component for 2017 would undermine the voluntary nature*” of the funding arrangements.<sup>54</sup> However, given the funding challenges faced by the ECCC, the Advisory Committee considered that the UN should provide “*support at a level consistent with the amount of actual drawdown of the commitment authorities,*”<sup>55</sup> but recommended that the UNGA request the Secretary-General to “*provide fuller and more detailed justification*” to better substantiate future subvention requests.<sup>56</sup> On 23 December 2016, the UNGA authorised the payment of a subvention to the ECCC not exceeding US \$11 million to supplement the international component’s financial resources for the period 1 January to 31 December 2017.<sup>57</sup>

iii. Observations on the use of Key Performance Indicators (“KPIs”) in the context of judicial proceedings

34. The Capacity Development Office of the UN Department of Economic and Social Affairs provides administrative and management support, including oversight of the Court’s management, administration of personnel and international judges, and management of financial resources such as budgetary submissions, donor coordination and financial reports.<sup>58</sup> Pursuant to a UNGA resolution of 2014, the ECCC prepares a completion strategy with a clear road-map that is updated on a

<sup>49</sup> *Ibid.*, para. 39.

<sup>50</sup> UNGA Report of the Advisory Committee on Administrative and Budgetary Questions, 14 October 2016, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/71/550, para. 20.

<sup>51</sup> *Ibid.*, para. 21.

<sup>52</sup> *Ibid.*, para. 25.

<sup>53</sup> *Ibid.*, para. 27.

<sup>54</sup> *Ibid.*, para. 28.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, para. 27.

<sup>57</sup> UNGA, 71<sup>st</sup> session, 23 December 2016, *Special subjects relating to the programme budget for the biennium 2016-2017*, A/C.5/71/L.19, II, paras 2, 4. We note with some astonishment that the UNGA under III para 4 expressed “serious concern over the adverse financial situation facing the Residual Special Court for Sierra Leone”, while omitting similar language under II regarding the ECCC.

<sup>58</sup> Capacity Development Office, Department of Economic and Social Affairs, United Nations: Cambodia Court, <https://www.un.org/development/desa/cdo/cambodia-court>, (last accessed 13 March 2017).



quarterly basis.<sup>59</sup> These completion plans, as well as past reports by the Secretary-General, include updates from the CIJs on the progress of each ongoing investigation, challenges faced in each investigation or factors that may delay progress, as well as the anticipated time and resources needed to complete the remaining work of the Office of the Co-Investigating Judges (“OCIJ”).<sup>60</sup> This information has also been utilised in subvention requests to emphasise the need for further funding.<sup>61</sup>

35. Although international court systems have increasingly relied on KPIs to monitor judicial success and progress, we consider it inappropriate to tie funding for judicial proceedings to KPIs. The success of the OCIJ cannot be measured by these specific quantifications as our proceedings are contingent on the nature and complexity of the cases, the motions and appeals the parties decide to file, the time it takes the PTC to decide appeals and annulment applications before it, unforeseeable staff turnover and the subsequent loss of institutional memory, among other factors. The work of the CIJs is dictated by judicial independence and fair trial principles rather than by external performance measurements.
36. The German Federal Constitutional Court in its seminal decision of 19 March 2013 on the introduction of plea bargaining into German criminal procedure<sup>62</sup> had already noted that the “*present system of evaluating judicial performance in no small measure is based on quantitative aspects and thus creates an additional incentive for disposing of cases as quickly as possible even at the risk of a loss of material quality*” and that the member states of the Federation had not duly discharged their responsibility arising from the increased caseload of the criminal courts when allocating the budget.<sup>63</sup> However, we note that this is precisely the sort of approach that appears to be relied on in the funding of the ECCC.
37. Concerns regarding the overemphasis on KPIs were also raised before the Council of Europe by the Consultative Council of European Judges (“CCJE”). The CCJE, following its survey of incidents affecting judicial independence amongst European member states, considered that underfunding and budget cuts might result in judicial systems overemphasising productivity, which, the CCJE rightly stated, could not be taken as a measure of the quality of justice delivered. The

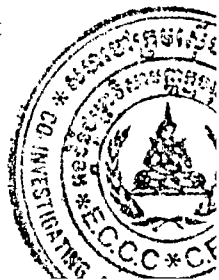
<sup>59</sup> UNGA 81<sup>st</sup> Plenary Meeting, 9 April 2014, *Resolution Adopted by the General Assembly*, A/RES/68/247 B, sec. 1 para. 10.

<sup>60</sup> See for example: *ECCC Completion Plan—Revision 7*, 31 December 2015, paras 16-27, available from [https://www.eccc.gov.kh/sites/default/files/ECCC\\_Completion\\_Plan\\_Rev\\_7.pdf](https://www.eccc.gov.kh/sites/default/files/ECCC_Completion_Plan_Rev_7.pdf); *ECCC Completion Plan—Revision 8*, 31 March 2016, paras 16-28, available from <https://www.eccc.gov.kh/sites/default/files/ECCC%20Completion%20Plan%20-%20revision%208.pdf>; *ECCC Completion Plan—Revision 9*, 30 June 2016, paras 16-36, available from <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan-Final-Rev9%20.pdf>; *ECCC Completion Plan—Revision 10*, 30 September 2016, paras 16-37, available from <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan%20revision%2010.pdf>; *ECCC Completion Plan—Revision 11*, 31 December 2016, paras 14-29, <https://www.eccc.gov.kh/sites/default/files/Completion%20Plan%20revision%2011.pdf>.

<sup>61</sup> UNGA Report of the Secretary-General, 20 October 2014, *Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/69/536; UNGA Report of the Secretary-General, 30 September 2015, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/70/403; UNGA Report of the Secretary-General, 16 August 2016, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/71/338.

<sup>62</sup> Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts, vol 133, 168 at 172.

<sup>63</sup> The Court recently repeated this criticism in its decision of 14 July 2016, docket no. 2 BvR 661/16, at para. 21, available online at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).



CCJE stated, “[t]he workload of both judges and prosecutors must allow that work is not only done quickly but also with high quality”.<sup>64</sup>

38. We would also wish to refer to the sage words of Judge David Hunt in his dissenting opinion of 21 October 2003 in the proceedings against Slobodan Milošević, where he said:

“[...] I recently stated [...] that the very proper endorsement by the Security Council “in the strongest terms” of the Completion Strategy of the Yugoslav Tribunal should not be interpreted as an encouragement by the Security Council to the Tribunal to conduct its trials so that they would be other than fair trials. It is necessary to repeat that statement in the present case in order to apply it directly to the Majority Appeals Chamber Decision. That Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore its previously carefully considered interpretations of the law or of the procedural rules, with a consequential destruction of the rights of the accused enshrined in the Tribunal’s Statute and in customary international law. The only reasonable explanation for these decisions appears to be a desire [...] to bring the Completion Strategy to a speedy conclusion. I have been unable to agree with those decisions because I do not believe that, in doing so, I would be performing my duties “honourably, faithfully, impartially and conscientiously” as the solemn declaration which I took when I became a judge of the Tribunal requires me to do.

The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused [...]. If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights.

This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal’s reputation.”<sup>65</sup>

We fully endorse these sentiments in the present context. They apply equally to the ECCC at all stages of the proceedings.

39. Much has been said by different stakeholders about the “legacy” which the ECCC is meant to leave for the Cambodian administration of justice and for society in the wider sense. We wish to stress that in our understanding any “legacy” in that sense cannot be artificially constructed, disassociated from and independent of the actual facts. The legacy we leave is the legacy we leave, in all its aspects, positive and negative. One legacy we feel any court should do its utmost to avoid leaving for posterity is that expediency overrides due process.
40. That said, a review of the key statistics and budget developments<sup>66</sup> of the international component of the OCIJ since the commencement of former International CIJ Mark Harmon’s tenure demonstrates that the international

<sup>64</sup> Consultative Council of European Judges, *Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe*, 24 March 2016, para. 25, available at [http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp#P19\\_102](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp#P19_102), last accessed 3 April 2017.

<sup>65</sup> *Prosecutor v Slobodan Milošević*, Dissenting Opinion of Judge David Hunt on admissibility of evidence in chief in the form of a written statement, (IT-02-54-AR73.4), 21 October 2003, paras 20-22.

<sup>66</sup> Budgetary materials provided by the UNAKRT Budget & Finance Section and are relied upon for the purposes of Annex B.



component since 2012 has significantly increased its pace of work in addressing procedural and legal matters,<sup>67</sup> and, more recently, has had to do so with less resources than it had budgeted for in order to achieve cost savings.<sup>68</sup> This has placed unacceptable demands on the OCIJ's international staff who frequently work over and above standard office hours, and has in some cases led to staff voluntarily coming to the office despite being ill.

41. From 26 October 2012 to 31 December 2016, Judges Harmon and Bohlander issued 403 decisions, orders, and instructions. Of those, 210 were issued since the start of Judge Bohlander's tenure on 1 August 2015. It must be emphasised that drafting decisions and orders represents the smaller part of the investigation effort: the majority of the working time and staff resources is consumed by field missions, in-house summonses and analysis of the material gathered. The drafting and analysis workload is only liable to increase<sup>69</sup> once the investigations move into the stage of final submissions and preparing the closing orders.
42. The national component of the OCIJ also faces considerable time and resource pressure under the current budget constraints. In 2016, the national component had six staff: one legal team leader, two legal officers, one associate legal officer, administrative assistant, an analyst team leader, in addition to two consultants. Further to one consultant leaving in April, from September 2017 the contracts of one legal team leader, one analyst team leader and one associate legal officer will not be extended due to budgetary restriction, based on the letter from the National Office of Administration dated 12 April 2017 which confirmed the above to the National CIJ. With such a limited number, each staff member is assigned to be in charge of each charged person in Cases 003, 004, 004/1, and 004/2. The volume of work for the national component will also increase with the preparation of the closing orders. With the cutting of staff this year, and the uncertainty regarding the coming year's budget, staff will be placed under even greater pressure, affecting work quality and lengthening the time taken to complete the investigations, and hence all judicial proceedings.
43. There appears to us then, not to put too fine a point on it, to be rather slim justification for reducing funding to the international component based on performance, particularly in light of these statistics. Such an approach also neglects the obvious fact that less funding means longer proceedings, with greater total expenditure in the long run.

**B. The current funding situation is endangering the fairness of the investigations**

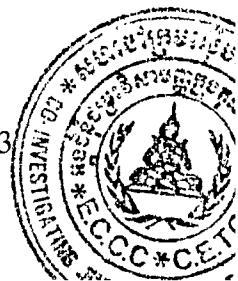
44. The Supreme Court Chamber ("SCC") held during an earlier funding crisis in 2013:

"The ECCC's funding crisis affects the judicial institution as a whole, and that crisis must be swiftly resolved - either by a firm and unwavering commitment by donor countries to provide their voluntary contributions or by a shift in the ECCC's funding process to the UN Regular Budget by way of assessed funds - in order to effectively complete the proceedings in Case 002 and the other matters properly before the court. If there is insufficient funding to guarantee a trial driven by law, all ECCC

<sup>67</sup> Annex A: *Table of Decisions, Orders, and Instructions Issued by the International Co-Investigating Judge since 26 October 2012.*

<sup>68</sup> Annex B: *OCIJ International Component Staff Numbers (Budgeted and Actual) 2012-2017.*

<sup>69</sup> It should be noted that this naturally also applies to the Defence and the Prosecution.



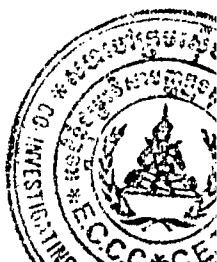
proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations".<sup>70</sup>

45. We believe that the current funding crisis has now reached a level that makes it necessary for us to consider the SCC's admonishment in earnest, because we feel it has gone largely unheeded by the donor community since it was made. We are seriously concerned whether the donors' drip-feed approach to the provision of funding will allow us to even finish the investigations in the remaining three cases to the point of issuing a closing order, and even more so, whether any closing order would still receive an appellate scrutiny by the PTC and, in the case of an indictment, whether it would allow for a trial and subsequent appeal in a manner that complies with the demands of the rule of law.
46. It is in this context useful and unhelpful at the same time to try drawing parallels to domestic tax-based court systems: the mere argument of lack of state funding based on taxes or any reference to budgetary crises can never impact on the fact that the law of the land provides for the *existence* of an administration of justice. In other words, domestic criminal justice systems do not face the same existential threat even in times of scarce resources; governments, as we explained above with the example of Germany, may then seek refuge in streamlining the procedures before the existing courts through law reform, provided such reforms do not violate the state's constitutional law and international human rights standards. They do not normally consider suspending or abolishing the courts altogether. In the case of international(ised) courts such as the ECCC, however, funding reductions almost invariably pose a risk to the very existence of the courts, not least because the staff employment framework is based on funding through the employing agency: in other words, once the funding for the international judges and staff runs out, their employment contracts are terminated and the international component disappears physically; the same applies for the national component. In a legal environment such as the ECCC which is based on a co-operation model at all levels of the court hierarchy, the one cannot operate without the other.<sup>71</sup>
47. While there may in principle not be an absolute right for the Defence to a trial hearing under human rights law, and while criminal proceedings may be discontinued before trial for reasons of criminal law policy,<sup>72</sup> the present scenario differs in that neither the UN, the RGC nor the donor community are at present insinuating that Cases 003, 004 and 004/2 should be discontinued on grounds of *legal* policy before or in the closing order.

<sup>70</sup> Case File No. 002-E284/4/8, *Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002*, 25 November 2013, para. 75.

<sup>71</sup> In theory, an argument might be made that all international judges at the ECCC might continue to serve even if they are no longer paid, because they are in reality Cambodian judges: they were approved by the Cambodian Supreme Council of the Magistracy and appointed by His Majesty the King, are merely paid by the UN, and are not UN judges. However, the same does not apply to their international support staff, meaning that it would be highly unlikely that the international judges would be able to serve without staff. In that sense, the end of the UN employment contract for international judges also means the end of the international component of that particular judicial section at least.

<sup>72</sup> Ben Emmerson, Andrew Ashworth, Alison Macdonald [Eds.], (2007) *Human Rights and Criminal Justice*, 2<sup>nd</sup> ed. London: Sweet & Maxwell, p. 492; Jeremy McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights* (Council of Europe Publishing, 2009), paras. 66-67; *ECommHR, X, Y and Z v Austria* (1980) 19 D.R. 213, pp. 217-8.



48. Nor is there an argument to be raised by referring to previous decisions of the PTC and their potential impact on the outcome of any appeals against closing orders. The fact that the national judges of the PTC have repeatedly stated that in their view the ECCC have no personal jurisdiction over Im Chaem, Meas Muth or Ao An may play a role in any appeal against a closing order related to those charged persons. Until that appeal is lodged and ruled upon, their views – which are not binding due to a lack of a supermajority on that issue, and which may in theory also change – are of no consequence for our decisions. The general institutional framework of the ECCC *foresees* and hence *must provide* for the very process of scrutiny before the PTC and the eventuality of the cases moving on to the Trial Chamber and SCC. Consequently, our concern must not only relate to the investigation stage but must adopt a longer perspective.
49. We recall the Secretary-General's criticism in his 2012 report regarding ECCC funding that to “*put judicial proceedings before the Chambers in jeopardy for lack of funds would run counter to the message of ‘no impunity’*” perpetuated by the United Nations for nearly two decades.<sup>73</sup> The UNGA has, in the past, demonstrated a commitment to accountability for war crimes and crimes against humanity by playing a role in accountability efforts since its inception, and through resolutions which proclaim the special need for international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity and which provide that states are to cooperate with one another and assist international judicial organs competent in the investigation and prosecution of violations.<sup>74</sup> To continue to place the ECCC in jeopardy of being unable to complete its mandate due to a lack of funds runs fundamentally counter to this commitment.
50. This incongruence is even more evident in relation to Cambodia, where the UNGA has acknowledged that the “*tragic history of Cambodia requires special measures to ensure the protection of the human rights of all people in Cambodia and the non-return to the policies and practices of the past [...]*” and has noted with concern the problems related to the rule of law and the functioning of the judiciary in the country.<sup>75</sup> An inability or unwillingness to commit funds to the remaining work of the ECCC would only serve to undermine the Court's capacity-building and legacy value in terms of strengthening the rule of law in the country.
51. It would also, against the background of its many previous and current efforts at providing judicial closure mechanisms in post-conflict scenarios, which as seen above had already been mentioned years ago by the Secretary-General, seem utterly spurious for the UN in particular, but no less for the RGC as the country which invited the UN to extend its support in dealing with its Khmer Rouge past, to advance the view that financial strictures of the order of magnitude involved in

<sup>73</sup> See *supra* para. 27.

<sup>74</sup> Beth van Schaack, 27 February 2017, *The General Assembly and Accountability for International Crimes*, Just Security, available from: <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/>; UNGA 2187<sup>th</sup>, 3 December 1973, *Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, Res 3074 (XXVIII); UNGA 60<sup>th</sup> session, 16 December 2005, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/Res/60/147, Annex para. 4.

<sup>75</sup> UNGA, 57<sup>th</sup> session, 26 February 2003, *Resolution adopted by the General Assembly: 52/225: Situation of human rights in Cambodia*, A/RE/57/225, preamble, para. II(2).



this context should be capable of overriding the demands of fair trial principles, judicial independence and the rule of law, as far as the rights of the Defence are concerned, but also to make the expectations of the victims of the Khmer Rouge regime into sudden maculature.

52. Our perspective as investigating judges cannot merely be focused on the timeline needed until the closing order as the end to our own mandate. Other than the chambers of the ECCC who are seised of a case only upon either an appeal or motion (PTC, SCC), or by an indictment (Trial Chamber), the work of the OCIJ is open-ended and involves the initial construction of a case, if there is any. Without decisions, including dismissals and indictments, from the CIJs none of the chambers will have any actual workload. Experience in Case 002/1 has shown that the trial of a case with relatively few crime bases until final judgement by the SCC lasted around three years. Case 002/2 is still at the trial stage with a judgement now likely to be expected in 2018. The overall expected time for Cases 003, 004 and 004/2 from this point onward is unclear, but it might be longer given the number of the remaining alleged crime bases even after the application of Internal Rule 66*bis*, as long as an indictment is ultimately transmitted to the Trial Chamber. This is regardless of any disagreements registered between or a possible difference in view on the outcome of the investigations by the CIJs. This means for us that the prospect of a gravely uncertain future funding basis for any procedural forum to be available *after* a closing order, be it dismissal or indictment, raises fundamental questions of fairness for the ongoing investigations, in particular with regard to the position of the Defence, bearing in mind the advanced age of the charged persons and the fact that two accused in Case 002 already died during the trial proceedings, but also with respect to the legitimate interests of the victims and the Prosecution.
53. In other words – and we will set out our legal reasoning around the security of funding in a judicial context, especially that of the ECCC, in more detail below – we find it unacceptable to either:
- a. continue with an investigation when it is unclear if there will be enough funds even to finish our own work in a proper manner to the stage of a closing order; or, even if the former was feasible,
  - b. to issue a closing order, particularly an indictment, if there is a highly uncertain prospect that there will be sufficient funds to provide for a direct appellate review of the closing order through the PTC and, by extension, serious doubt about the parties getting their day in court before the Trial Chamber (“TC”) and SCC.
54. It is in our understanding not compatible with the basic demands of the rule of law to let an unfinished investigation and, *a minore ad maius*, even an indictment hang over the charged person by simply ceasing the operations of the ECCC and locking the doors to the court because there is no more budget to pay for the staff and non-staff expenses of either the national or international components. This scenario as we will explain below, is not an adequate closure mechanism under the principles of fair trial, and judicial independence and the rule of law – it is not foreseen under the UN-RGC Agreement, either.
55. This concern is exacerbated by the fact, as we will set out in our forthcoming reasons for the Im Chaem closing order, that there is at this time no residual jurisdiction of the ordinary Cambodian courts for any cases that started under the





aeigis of the ECCC; nor is there at present any kind of negotiated exit strategy. There would be no forum to bring the pending proceedings to a close, even less so in a manner consistent with the spirit of the negotiations that brought about the existence of the ECCC as in essence a Cambodian court, but with an international support element.

### C. International and national standards, norms and jurisprudence regarding funding and judicial independence

#### i. Treaties, conventions and legislation

56. The view that the obligation of the UN and RGC to provide sufficient and secure funding for the ECCC is mandatory and not conditional on the availability of voluntary donor funds is consistent with international human rights standards and jurisprudence which emphasise the need for secured funding to achieve judicial independence and the effective administration of justice.
57. Adopted by the UNGA in 1966, the International Covenant on Civil and Political Rights (ICCPR) guarantees that everyone is entitled to a “*fair and public hearing by a competent, independent, and impartial tribunal established by law*”.<sup>76</sup>
58. In May 1981, the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers compiled the Draft Principles on the Independence of the Judiciary (“Siracusa Principles”) in the hopes that they would assist the then Special Rapporteur on the Study on the Independence of the Judiciary of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination.<sup>77</sup> The Siracusa Principles more explicitly connect financial stability to judicial independence, stressing that an “*independent judiciary is indispensable for the implementation*” of the right to a fair and public hearing by a competent, independent, and impartial tribunal as guaranteed by the Universal Declaration of Human Rights and ICCPR,<sup>78</sup> and that in order to ensure its independence, “*the judiciary should be provided with means and resources necessary for the proper fulfilment of its judicial functions.*”<sup>79</sup> Similarly, the International Bar Association (“IBA”) has outlined the Minimum Standards of Judicial Independence, stating that it is the “*duty of the State to provide adequate financial resources to allow for the due administration of justice.*”<sup>80</sup>
59. The UN Basic Principles on the Independence of the Judiciary (“Basic Principles”), adopted in 1985 and endorsed by UNGA resolutions,<sup>81</sup> elaborate

<sup>76</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, Article 14, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed 13 February 2017).

<sup>77</sup> Siracusa Principles, 25-29 May 1981, Articles 1, 24, <http://www.cristidanilet.ro/docs/Siracusa%20Principles.pdf> (accessed 13 February 2017) (The Special Rapporteur submitted the draft to the Sub-Commission as an annex to his progress report).

<sup>78</sup> Siracusa Principles, 25-29 May 1981, Articles 1, 24, <http://www.cristidanilet.ro/docs/Siracusa%20Principles.pdf> (accessed 13 February 2017).

<sup>79</sup> *Ibid.*, Article 24.

<sup>80</sup> *IBA Minimum Standards of Judicial Independence*, 1982, Article 10, <http://www.ibanet.org/Search/Search.aspx?query=minimum%20standards%20of%20judicial%20independence> (accessed 13 February 2017).

<sup>81</sup> Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, 13 December 1985, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (accessed 13



further, stating that the “*independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country*” and that it is “*the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*”<sup>82</sup> Article 2 of the Basic Principles provides that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” The Basic Principles also provide that, *inter alia*, the term of office for judges, their independence, and adequate remuneration be secured by law.<sup>83</sup> To that end, each member state is required to provide adequate resources to enable the judiciary to properly perform its functions.<sup>84</sup>

60. At the 6<sup>th</sup> Conference in 1995, Supreme Court Chief Justices from the Asia Pacific region and the Judicial Section of LAWASIA, the Law Association for Asia and the Pacific, met in Beijing and adopted a joint Statement of Principles on the Independence of the Judiciary.<sup>85</sup> The statement was later refined at the 7<sup>th</sup> Conference in 1997, and has now been signed by 32 Chief Justices throughout the Asia Pacific region, including Australia and Japan (Cambodia, however, is not currently a signatory).<sup>86</sup> The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region states that “*the maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions*” and that such independence should be “*guaranteed by the State and enshrined in the Constitution or the law.*”<sup>87</sup> It additionally details that it is “*essential that judges be provided with the resources necessary to enable them to perform their functions*” and that when judges consider that economic constraints make it difficult to perform their functions, the judiciary and the court ought to be accorded a high level of priority in the allocation of resources.<sup>88</sup>
61. In 2001, under the framework of the UN Global Programme Against Corruption, and in conjunction with the tenth UN Congress on the Prevention of Crime and Treatment of Offenders, the Judicial Group, consisting of Chief Justices and other senior judges from Asian and African countries, developed the draft code of judicial conduct, the Bangalore Principles of Judicial Conduct (“Bangalore Principles”).<sup>89</sup> The Bangalore Principles also emphasise that “*judicial*

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February 2017, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>82</sup>Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, 13 December 1985, Article 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (accessed 13 February 2017).

<sup>83</sup> *Ibid.*, Article 11.

<sup>84</sup> *Ibid.*, Article 7.

<sup>85</sup> *Conference of Chief Justices of the Asia and the Pacific Resources*, Asian legal Information Institute, <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> (accessed 17 February 2017).

<sup>86</sup> *Ibid.*

<sup>87</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 19 August 1995, para. 4, <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> (accessed 13 February 2017).

<sup>88</sup> *Ibid.*, paras 41-42.

<sup>89</sup> *Report of the Second Meeting of the Judicial Group on Strengthening Judicial Integrity*, 24-26 February 2001, <https://www.unodc.org/pdf/crime/gpacpublications/cicp5.pdf> (accessed 17 February 2017).



*independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial,*"<sup>90</sup> such that "effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions."<sup>91</sup>

62. In 2007, the Human Rights Committee noted in a General Comment that states were obligated to take specific measures to guarantee judicial independence, protecting judges from any form of political interference in their decision-making through the constitution or adoption of laws that provide for, *inter alia*, the remuneration of the judiciary.<sup>92</sup>
63. The above-mentioned international standards have been enshrined to various degrees in the constitutions of individual countries, demonstrating the fundamental importance of maintaining judicial independence through secured government funding. For example, the Constitution of Ukraine dictates that "the State shall ensure funding and proper conditions for the functioning of the courts and activity of judges," and that "expenditures for the maintenance of courts shall be allocated separately by the State Budget of Ukraine."<sup>93</sup>
64. The relevance of these standards in the context of domestic judicial proceedings was also raised before the Council of Europe by the CCJE. The CCJE surveyed a number of incidents occurring within the judicial systems of European member states which illustrated the risks inherent in chronic underfunding, such as cuts in staff which reduce the ability of courts to decide cases with the necessary quality and within a reasonable time and also affect the public's respect for the courts. The CCJE concluded that "chronic underfunding should be regarded by society as a whole as unacceptable. It undermines the foundations of a democratic society governed by the rule of law".<sup>94</sup>

## ii. Jurisprudence

65. International criminal law and human rights jurisprudence regarding the relationship between judicial independence and the government's duty to provide a secure budget also demonstrates the importance of securing the ECCC's budget to prevent financial considerations from influencing the course of the proceedings, and thus secure judicial independence.
66. The SCSL, similarly to the ECCC, was established by treaty between the United Nations and the Government of Sierra Leone ("SCSL Agreement"). Differently from the ECCC however, the SCSL Agreement expressly provides that "[t]he expenses of the Special Court shall be borne by voluntary contributions from the international community."<sup>95</sup>

<sup>90</sup> Bangalore Principles of Judicial Conduct, 2002, p. 1, [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (accessed 13 February 2-17).

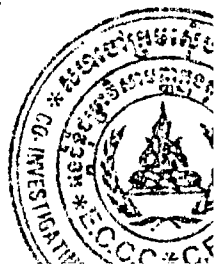
<sup>91</sup> *Ibid.*, p. 7.

<sup>92</sup> Human Rights Committee, *General Comment 32*, 2007.

<sup>93</sup> *Constitution of Ukraine*, 28 June 1996, Art. 130.

<sup>94</sup> Consultative Council of European Judges, *Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe*, 24 March 2016, para. 24, available at [http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp#P19\\_102](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp#P19_102), last accessed 3 April 2017.

<sup>95</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 6.



67. This provision was tested in *Prosecutor v. Sam Hinga Norman*, in which the accused filed a motion challenging the independence of the SCSL's judges on the basis the judiciary was prejudiced by the voluntary donation system.<sup>96</sup> It should be noted that there were also other provisions specific to the SCSL Agreement that render it different from the UN-RGC Agreement.<sup>97</sup> While the case is not directly analogous to the question of a lack of funding on judicial independence, which is the issue contemplated in this Request, the pronouncements of the Appeals Chamber on the broader topic of judicial independence are nonetheless pertinent.
68. For example, the Appeals Chamber stated, "*It has long been acknowledged that judicial independence rests on the twin pillars of security of tenure of the judge and guarantee of judicial remuneration and its protection from the whims and caprices of governments or bodies charged with the responsibility of funding the judiciary.*"<sup>98</sup>
69. Justice Geoffrey Robertson in particular stated in his separate opinion, "*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.*"<sup>99</sup> He went on to observe that funding for the Court as a whole, and not simply the judges, should be organised so as to ensure that fundamental defence rights are respected and that there are no incentives for a judge to decide any case in any particular way.<sup>100</sup>
70. The expenses of the ICTY and ICTR are more secure, given that they are expressly considered to be expenses of the UN and therefore funded primarily by assessed contributions,<sup>101</sup> however, these tribunals also accept voluntary contributions.<sup>102</sup>
71. The European Court of Human Rights ("ECtHR") has made pronouncements similar to the SCSL Appeals Chamber. In *Salov v. Ukraine* (cited by the ECCC's SCC), the ECtHR found in passing that, based on the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case, the applicant's doubts regarding the judge's impartiality may have been objectively justified.<sup>103</sup>
72. As certain scholars have opined, not only does funding based solely on voluntary contributions render courts and tribunals vulnerable to inappropriate influences and manipulation, which is incompatible with judicial independence, but further,

<sup>96</sup> *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), SCSL Appeals Chamber (SCSL-2004-14-AR72(E), 13 March 2004, para. 30.

<sup>97</sup> For example, Article 23 of that agreement provides that the Court can only be terminated upon the completion of judicial activities of the SCSL, and Article 6 provides that if voluntary contributions are insufficient, the Secretary-General shall explore alternate means of financing the Court.

<sup>98</sup> *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), SCSL Appeals Chamber (SCSL-2004-14-AR72(E), 13 March 2004, para. 26.

<sup>99</sup> *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), SCSL Appeals Chamber (SCSL-2004-14-AR72(E), 13 March 2004, separate Opinion of Justice Geoffrey Robertson, para. 22.

<sup>100</sup> *Ibid.*, paras 22-23.

<sup>101</sup> Assessed contributions are the contributions made by each member state to pay for the expenses of the United Nations.

<sup>102</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 2006, Cambridge University Press, New York, pp 622-623.

<sup>103</sup> ECtHR, *Salov v. Ukraine*, 6 September 2005, para. 86.



citizens must have a judiciary that is sufficiently resourced in order to administer justice in an orderly and efficient way.<sup>104</sup> As Schabas stated, “[n]either Prosecutor nor judges should be forced to contemplate the consequences for the Tribunal should they proceed with investigations and indictments that affect, even indirectly, the interests of a major donor State.”<sup>105</sup>

73. We wish to emphasise that we cite these references not out of a concern for our own remuneration, because we both have built successful professional careers outside the ECCC to which we can immediately return should the ECCC fail or when our mandate under Article 5 of the UN-RGC Agreement is terminated by fulfilment of our task. This is, incidentally, not the case for the vast number of our highly loyal and professionally excellent staff and that of the other sections of the ECCC, who will have to find a new career: the current funding crisis has unsurprisingly caused international staff in particular, for example, to actively seek new avenues of employment. It needs no explanation that staff attrition will lead to potentially dramatic loss of institutional memory and only cause more delays and hence, more costs. The experiences of earlier institutions such as the ICTY and ICTR should serve as potent examples of the consequences of lack of attention to these matters.
74. The aspect of remuneration is, however, one of many underpinning the concept of institutional judicial independence, which is under threat at the ECCC from the very funding mechanism as adopted by the UN and the RGC.

#### IV. CONCLUSION

75. The financial challenges and funding inadequacies that the court has faced throughout the past several years continue to be ever more present today, and pose significant and real barriers to the continued and future operation of the Court and its ability to meet international standards of judicial independence and thus, fair trial. The funding has progressed piecemeal on the basis of voluntary contributions, a fact which has placed the operation of both the national and international components in a persistently precarious state that has now reached crisis point. As the international and domestic standards outlined above demonstrate, this precariousness creates a level of uncertainty for the judiciary that could force certain outcomes of the proceedings which would be in violation of international standards of judicial independence and the effective administration of justice.
76. It is our task to prevent any course of events that would lead to an unacceptable state of affairs as described above. The time we have for such preventive action is determined by the end of the currently secure funding, i.e. at this stage by the end of June 2017.
77. Article 3(3) of the UN-RGC Agreement explicitly provides, and we both have sworn an oath to that effect, that judges “*shall be independent in the performance of their functions and shall not accept or seek instructions from any Government*

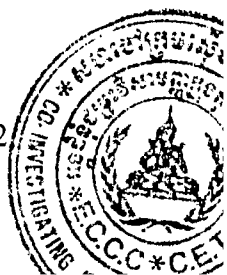
<sup>104</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 2006, Cambridge University Press, New York, p. 623; Jeffrey Jackson, “Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers”, *Maryland Law Review*, Vol. 52 (1993), p. 218.

<sup>105</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 2006, Cambridge University Press, New York, p. 623.



*or any other source*". This includes not only direct or covert instructions via oral or written communications, but also any other implied form of influencing the course of the proceedings, such as compliance with key performance indicators which are ill-suited to criminal proceedings, in order to trigger further funding.

78. The current approach by the UN, the RGC and donor countries to funding the ECCC displayed for the 2017 budget can realistically fall only into one of two scenarios, none of which are acceptable foundations for the relationship between the funders and the Court in our view:
- a. The funders are fully aware of the ECCC's current problems and strictures explained by the Court's sections and especially the judges in the quarterly completion plan updates and through other venues, and of the impact of budget cuts, but nonetheless choose to focus solely on prioritising the budgetary aspect and reducing their burden of contributing to the costs of the ECCC's operation, asking the Court in effect to adapt its operations to the available funds. They may possibly also do so on the basis of second-guessing the Court's insight into the required funding despite their endorsement of the budget; or
  - b. The funders, despite the explanations referred to in (a), still do not understand the problems the Court is facing and the impact of further budget cuts but are simply concerned with reducing their burden of contributing to the costs of its operation, asking the Court in effect to adapt its operations to the available funds. They may possibly also do so on the basis of second-guessing the Court's insight into the required funding despite their endorsement of the budget.
79. We are therefore currently – and very reluctantly – considering the order of a stay of all proceedings with full prejudice in Cases 003, 004 and 004/2 commencing no later than by the end of June 2017, unless we are provided with sufficiently specific and reliable information that the funding situation will improve drastically, and with a sufficiently specific and reliable pro-active planning outlook, which would provide us with the necessary assurance that:
- a. on the one hand we will be able to successfully complete our mandate in a timely and efficient manner until the issuance of a closing order in each case, and
  - b. on the other hand, that effective measures will be implemented to ensure sufficient funding for any appellate review of the closing orders and, should a trial ensue, for the trial and appeals process.
80. We choose to employ the term "stay with full prejudice" rather than "dismissal" because the applicable law before the ECCC, in particular Internal Rule 67(3), reserves the latter term for different enumerated scenarios. However, the use of a different term is just that – a matter of terminology. This stay order would be based on the sole reason of insufficiently secure funding, it would be permanent and prevent any re-opening of the investigations. It would in particular neither pronounce on the question of personal jurisdiction nor on the merits of the alleged crimes. All charged persons would continue to be presumed innocent and the case files would remain sealed.



81. Because of the exceptional nature and the enormous impact of such a decision, it would have to be made public, including any filings related to this request, which we prefer to file as confidential for the time being.
82. We will, however, exceptionally allow the Office of Administration to pass on – also in confidence – copies of this request to the relevant offices within the UN, the RGC, the governments of the relevant donor countries and the Secretary-General’s Special Expert David Scheffer, for the purpose of consultation in order to inform its response.

**WE THEREFORE:**

83. **INFORM** the parties in Cases 003, 004, and 004/2 (“Parties”) and the Office of Administration that we consider the current funding arrangements incompatible with the proper discharge of our judicial mandate as required by the fundamental principles of fair trial, judicial independence and the rule of law;
84. **INFORM** the Parties and the Office of Administration that we are considering a stay of proceedings with full prejudice across cases 003, 004 and 004/2 commencing – at this time – no later than 30 June 2017, and that such a stay order would be filed as public, re-classifying as public and attaching all relevant filings related to this request;
85. **INVITE** the Parties and the Office of Administration to submit any observations on the above issues no later than **within 30 days** from the date of notification of this request;
86. **PERMIT** the Office of Administration to pass on – also in confidence – copies of this request to the relevant offices within the UN, the RGC, the governments of the relevant donor countries, and the Secretary-General’s Special Expert David Scheffer;
87. **INVITE** the Office of Administration in particular, within **30 days** from the date of notification of this request, to explain in as much detail as possible:
- a. the development of the budget discussions and the related policies within the UN, the RGC and the relevant donor countries for the 2017 budget;
  - b. the funding forecast for 2017 and its impact on the resource management for both the national and international components of the ECCC for the remainder of 2017;
  - c. any budget plans and policies of the UN, the RGC and the relevant donor countries for 2018 and beyond, especially for the scenario of an indictment followed by pre-trial chamber appeal, trial and appeal to the SCC; and
  - d. any deliberations within the UN, the RGC and the relevant donor countries regarding an exit strategy;
88. **INFORM** the Parties and the Office of Administration that:
- a. the page limit for submissions is extended to a maximum of 25 pages;
  - b. submissions must be filed in both English and Khmer at the same time;






- c. requests for permission to file in one language only will not be granted; and that
  - d. responses and replies to other parties' and the Office of Administration's filings will not be permitted;
89. **INSTRUCT** the Greffier to place a copy of this request on Case Files 003 and 004.

Phnom Penh, 5 May 2017

**សហចៅក្រមស៊ើបអង្កេត**

Co-Investigating Judges

Co-juges d'instruction

**YOU Bunleag Michael BOHLANDER**