

Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia

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INTRODUCTION

Although the EC [Extraordinary Chambers] may be a less than perfect mechanism to achieve accountability, if it operates according to the principles upon which it was formed, it has the potential to herald a symbolic new beginning in Cambodian history, following which a process of education and reflection may lead to the hoped-for reconciliation. If, however, the process is de-railed by undue political influence, absence of procedural fairness, insufficiently and inappropriately-motivated personnel and/or lack of funds, the trials of the EC will fail both the

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Cambodian people and all those who seek accountability for crimes of international concern.

Alex Bates¹

Can the Extraordinary Chambers of the Courts of Cambodia (“ECCC”) be considered a success?² This question is particularly relevant at this time, when the ECCC has just begun prosecuting its largest case thus far. Four accused persons are currently jointly on trial, facing charges in relation to thousands of witnesses and hundreds of “crime bases” across Cambodia. This article seeks to weigh-in on the debate about the ECCC’s past successes and failures and to help articulate priorities and areas for improvement in the face of the current trials.

This article argues that the ECCC’s procedural protection of human rights is secondary to the broader objective of fostering positive social change within Cambodia’s post-conflict society. Despite the fact that the ECCC has failed to live up to international fair trial standards in certain areas, it should nonetheless be considered a “success” in terms of the far-reaching impacts it has had on Cambodian society. In particular, the ECCC is a success in its contributions to creating a common history, capacity building within the Cambodian judiciary, inspiring Cambodians’ confidence in their domestic judicial system, public outreach, and the involvement of victims and civil parties in the proceedings. These successes ultimately outweigh any procedural shortcomings.

The article is divided into five broad sections. The first section frames the debate concerning which standard should be used to judge the “success” or “failure” of international tribunals. Two different standards are presented, termed the “human rights perspective” and the “social perspective,” respectively. The ad hoc tribunals of Rwanda and the former Yugoslavia are presented as brief case studies of the tension between these two perspectives, noting that the second generation “hybrid” tribunals such as the ECCC emerged in large part as a reaction to the first generation tribunals’ failure to achieve any broad social impacts.

The second section provides an overview of the history of the Khmer Rouge regime, and the subsequent historical processes that led to the creation of the ECCC and the ECCC’s current procedures. This section outlines the various compromises that occurred during ECCC negotiations, which informs the subsequent discussion of the tribunal’s shortcomings and its successes.

¹ Alex Bates, *Cambodia’s Extraordinary Chamber: Is it the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge?*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE, AND CONTEXTUAL ASPECTS* 195 (Ralph Henham & Paul Behrens eds., 2007).

² The ECCC is also known as the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT”).

The third section describes the ECCC's shortcomings, highlighting concerns about the inadequate protection of international human rights, as well as recent allegations of political interference, bias, and corruption. It shall be noted that these shortcomings are primarily violations of internationally accepted fair trial rights, and as such, the tribunal is a clear "failure" when judged from a human rights perspective.

The fourth section of the article discusses the Court's "successes." In this section it is observed that despite the Court's manifold procedural failures, it nonetheless appears to be achieving some broader social goals, such as: creating a common history, ending impunity, capacity building, instilling faith in domestic institutions, involving the public through outreach, and allowing victims to participate directly as civil parties.

The final section draws conclusions and makes recommendations based on the foregoing analysis of successes and failures. While the ECCC is flawed in terms of certain procedural protections, it is nonetheless a valuable instrument due to its social legacy in the state of Cambodia. Although it is laudable for tribunals to aim to protect internationally accepted fair trial rights in all of their procedures, this article argues that the reality is that imperfect procedural systems are inevitable when working in developing countries such as Cambodia—and, as such, policymakers must accept the limitations of working under less-than-ideal social and political conditions. Despite the practical limitations of working with corrupt judiciaries and flawed legal systems, these are not grounds to write-off hybrid tribunals; because, despite their imperfect procedures, hybrid tribunals such as the ECCC are incredibly valuable in terms of their positive impacts on post-conflict societies. These positive impacts will lead to long-term social change, which is ultimately a more meaningful contribution to the international community than a perfect precedent of international justice that vindicates "human rights" but is meaningless for the victims and societies involved.

I. DEFINING A "SUCCESSFUL" TRIBUNAL: THE DEBATE

How does one define "success" with respect to international criminal tribunals? As noted by Mirjan Damaska, "the question of the goals international criminal courts should pursue . . . is important because forms of justice suitable for attaining some ends may not be suitable for attaining others. How can an institution's procedures be measured, without at least a rough understanding of its purposes?"³ It is for this reason that this paper begins with a discussion of the various possible goals and purposes which may underlie international tribunals, and which consequently ground one's understanding of a tribunal's success or failure.

³ Mirjan Damaska, *Problematic Features of International Criminal Procedure*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 175 (Antonio Cassese et al., eds., 2009).

International tribunals are often spoken of in lofty terms as if they are harbingers of salvation to post-conflict societies, and are expected to simultaneously bring justice, peace, reconciliation, the rule of law, and a plethora of other social-goods. Damaska observed that international criminal tribunals themselves have purported to fulfill numerous objectives, including: to produce reliable historical records of crimes committed, to satisfy victims, to promote a sense of accountability for gross human rights violations, to make advances in international criminal law, and to stop ongoing conflicts—an objective that is far removed from the normal concerns of national criminal justice systems.⁴ International courts have evidently aspired to do too much, and have necessarily been unable to make-good on all of their aspirations. As Damaska goes on to note “[t]he most obvious problem is that the courts’ resulting agenda is overly demanding.”⁵ Indeed, the problem seems self-evident: international tribunals cannot be everything to everyone.

A clearly defined standard of what tribunals can be reasonably expected to achieve must be established as a yardstick against which to measure their successes and failures.⁶ This will help the international community engage in constructive dialogue about the areas in which tribunals are doing well, and the areas in which they need improvement. Once such a yardstick is developed, it will be possible to manage expectations. This task is particularly important when dealing with victims, in order to stymie disenchantment and frustration. The victims should have a reasonable expectation of what a tribunal can or cannot achieve.

There are two general schools of thought concerning the primary purpose of international tribunals: tribunals as vindication of human rights, and tribunals as social healing. The former is primarily about the fair trial rights of accused persons, while the latter involves reconciliation, capacity building, and truth-telling. Each perspective will be discussed in turn.

A. *The Human Rights Perspective*

For many in the international human rights community, international human rights law is the standard against which international tribunals should be judged. Such advocates argue that human rights instruments are the result of political compromise and debate within international bodies such as the United Nations.⁷ As a result, human rights

⁴ *Id.* at 177.

⁵ *Id.* at 178.

⁶ Damaska argues that one goal should be selected as central, against which procedures of the tribunal would be compared. *Id.* at 183.

⁷ *See, e.g.*, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at

represent a general consensus across legal traditions as to what minimum standards should exist in any prosecution.⁸ These advocates argue that any prosecution that fails to meet international fair trial standards is itself violating international law, and that this does nothing to contribute to international justice efforts. As noted by human rights scholar Christopher Safferling, “[t]he aim of protecting human rights is itself limited. Human rights can only be protected through human rights. If human rights are to be protected via criminal prosecution, the applied system must itself be strictly compatible with human rights.”⁹ Through this logic, any international criminal tribunal that fails to uphold human rights is violating human rights. Therefore, an international criminal tribunal that fails to properly protect the rights of accused persons is part of the problem rather than the solution. As a result, by this view a tribunal’s success may be judged in terms of its ability to provide a fair trial according to international standards.

The argument that international tribunals should be judged according to the extent that they uphold human rights (particularly the rights of the accused) takes on particular significance when the United Nations (“U.N.”) is involved in prosecution. Many argue that the United Nations is, or should be, synonymous with the protection of human rights. It follows that any tribunal with which the U.N. is affiliated must uphold human rights or risk damaging the U.N.’s reputation.¹⁰ As noted by legal

<http://www.un.org/en/documents/udhr/history.shtml>. The Commission on Human Rights was made up of eighteen members from various political, cultural and religious backgrounds.

⁸ Here, a distinction should be made between “human rights” and “rights” as they relate to international criminal procedure. See Goran Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, 6 INT’L CRIM. L. REV. 605, 630 (2006). International human rights instruments, as a general body, are not prescriptive—they establish general principles, but do not go so far as to state precisely how those principles are to be applied in a given legal system (see generally CHRISTOPH J. M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* (Oxford University Press 2003)). Thus, it was left up to states to establish their own laws under their own legal systems, whether they be civil law or common law or otherwise, using international law as the measuring stick for the success or failure of these respective systems. However, international rules of procedure have gradually developed which represent a consensus of the international community concerning precisely how the guarantees contained in international human rights instruments are to be implemented in practice. Itself a blend of civil and common law traditions, international criminal procedure has developed as its own sui generis form of law (Kai Ambos, *International Criminal Procedure: “Adversarial,” “Inquisitorial,” or Mixed*, 3 INT’L CRIM. L. REV. 1, 35 (2003)). It is this body of sui generis international procedural law that is referred to when discussing the “human rights perspective,” as well as the substantive standards upon which it is based (i.e. the international human rights instruments themselves).

⁹ CHRISTOPH J. M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 46 (Oxford University Press 2003).

¹⁰ For example, Hans Corell, the chief U.N. negotiator during the creation of the

scholar Hakan Friman, it would be highly contradictory if judicial institutions created by, or with the assistance of, the United Nations transgressed the very international human rights standards that the U.N. has fought for with great difficulty over the years. He notes that one of the aims of the United Nations itself is to promote and encourage respect for human rights and fundamental freedoms for all, as stated in Article 1 of the U.N. Charter. This aim necessarily includes protection of the rights of accused persons. Consequently, Friman concludes that “the assumption is that criminal procedures that the United Nations promotes should be human rights centered.”¹¹

Indeed, in a 1993 report to the Security Council, then-U.N. Secretary General Kofi Annan reiterated this point, stating that “[i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”¹² The argument that the U.N. cannot be affiliated with a tribunal that is anything less than perfect in terms of securing human rights is strong. Some have even gone so far as to say that it would be better not to prosecute at all than to allow a flawed procedure to move forward with the U.N.’s name attached.¹³ Proponents of this view argue that it would be better to leave heinous crimes unpunished than to establish a kangaroo court under the auspices of the U.N., as this would taint the U.N.’s good name, making the U.N. itself a perpetrator of human rights abuses against accused persons.¹⁴ For these reasons, the scholars above persuasively argue that a criminal tribunal that is attempting to vindicate human rights through its prosecution must itself uphold and respect human rights in its procedures. Otherwise, it risks being a failure and blight on the face of international justice.

ECCC, recently stated: “I did not want . . . the U.N. emblem to be given to an entity that did not, shall we say, represent the highest international standards . . .” See Mike Eckel, *Cambodia’s Khmer Rouge Tribunal in Crisis*, ASSOCIATED PRESS, June 23, 2011, available at <http://www.washingtontimes.com/news/2011/jun/23/cambodias-khmer-rouge-tribunal-in-crisis/?page=all>.

¹¹ Hakan Friman, *Procedural Law of Internationalized Criminal Courts*, in *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 232-324 (Cesare P. R. Romano, Andre Nollkaemper, & Jann Kleffner, eds., 2004).

¹² U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993), noted in Sluiter, *supra* note 8, at 610.

¹³ See, e.g., STEVEN D. ROPER & LILIAN A. BARRIA, *DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS* 94 (2006).

¹⁴ See *supra* note 9, at 46-47.

B. *The Social Perspective*

However, international human rights law need not be the only basis by which to judge the success or failure of a particular tribunal. A tribunal can also be judged by its social impacts on the post-conflict society in question, and its enduring legacy in that society.¹⁵ According to Ethel Higonnet, a war crimes tribunal should seek to do more than simply prosecute and exit the country – it should also seek long-term improvement of the national justice system. She argues that tribunals should seek to create a culture of justice and accountability so it will leave a legacy long after it closes its doors.¹⁶ From Higonnet’s perspective, tribunals should be judged primarily in terms of their effectiveness in affecting broader social change that will leave a legacy after the tribunal is gone. A tribunal that “teaches people to fish” by engaging in capacity building and fostering a culture of the rule of law is successful by this standard. Other important social ends include ending impunity and corruption, and offering victims the emotional value of seeing those who committed mass atrocities brought to justice. This gives value and dignity to the many lives lost. The impact is even greater where victims themselves are enabled to participate in the proceedings directly, as this gives the individuals a sense of accomplishment and involvement in the work of the tribunal.

These socio-pedagogical goals are in fact the most important end result of international tribunals.¹⁷ A tribunal that has left a positive legacy in the country by way of affecting social change is ultimately worth more than a procedurally-perfect process that fails to achieve any social impact. For example, if by the time a tribunal closes its doors the victims feel that justice has been done, a common history has been created, and judicial institutions have the wherewithal to function, such a tribunal has been a greater success for the country than a procedurally perfect tribunal that no one in the society was aware of.

The reality is that a tribunal with limited time and funding cannot possibly achieve everything. This article argues that if we have to prioritize the most important objectives, the focus should be on creating long-term social change. This is not to suggest that such socio-pedagogical objectives should come at the expense of human rights. It simply recognizes the reality that some goals will have to be prioritized over others, and argues that direct local needs should be the priority over achieving international fair trial standards.

¹⁵ E. R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 358 (2006).

¹⁶ *Id.* at 359.

¹⁷ *See supra* note 3, at 184.

C. *Balancing Human Rights & Social Impacts*

The tension between the human rights and social perspectives may be clearly demonstrated through application to the ad hoc Rwanda and the former Yugoslavia tribunals, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) respectively. The ICTR and ICTY tribunals were initially considered to have been great successes. Created by the United Nations Security Council acting under Chapter VII of the U.N. Charter, these tribunals were completely independent of the states in which the crimes were committed. They were considered by many to be pure international tribunals, as they were (and still are) situated outside of the countries in which the offences were committed, and without national representation amongst the legal personnel or judges. As such, they were considered immune from the taint of local corruption and politics.¹⁸

However, the ad hoc tribunals were soon recognized not to be all that their proponents had hoped they would be. While these tribunals are free from the risk of domestic corruption and political interference, they are also completely divorced from the realities of the countries in which the offences occurred and from the lives of the survivors. Many survivors are not even aware of the existence of the tribunals, as they do not touch or affect the survivors’ lives in any significant way.¹⁹ As such, while international scholars initially lauded the ad hoc tribunals for their valuable precedent in protecting human rights and furthering international justice,²⁰ survivors had no knowledge of the impressive international legal precedents being established on the basis of their suffering.²¹ Thus, while the ad hoc tribunals are arguably successes from the perspective of upholding human rights (despite certain challenges to their procedures), they are clear failures in terms of their broader social impacts or creating any positive lasting legacy in the states in question.²² It was the failure of

¹⁸ Ellen Emilie Stensrud, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, 46:1 J. PEACE RES. 5, 5 (2009).

¹⁹ Stensrud notes that most people in Rwanda were not well informed about the Tribunal, and in both Rwanda and Yugoslavia empirical research showed that most people felt the tribunal was “distant and irrelevant to their lives.” Stensrud further notes studies which indicate that the tribunals did not foster reconciliation between the warring ethnic groups in either country, this being largely determined by pre-war friendships. *Id.* at 6-7.

²⁰ One of the main accomplishments of the ad hoc tribunals, which came to full maturity with the subsequent creation of the International Criminal Court, was the creation of a novel form of sui generis international criminal procedure that successfully blended civil and common-law traditions. *Id.* at 6.

²¹ *See id.*

²² Although there was initial praise concerning the precedent set, disenchantment with the ad hoc tribunals has since become widespread. The failure of the tribunals to affect local change, combined with the exorbitant cost (they comprised over ten percent

these tribunals to affect long-term social change (as well as their tremendous expense²³ and delay) which ultimately led to the creation of the new hybrid tribunals, such as in Cambodia and East Timor.²⁴ These hybrid tribunals can be understood as an attempt to rectify the legalism of the “first generation” tribunals by focusing more on social impacts, sacrificing certain international standards in favor of local participation.

II. DEVELOPMENT & STRUCTURE OF THE ECCC

Cambodia was a French colony until 1953,²⁵ in which year independence was proclaimed and subsequently recognized at the 1954 Geneva Conference.²⁶ This was followed by an independent “Kingdom of Cambodia” under King Sihanouk (1955-1970).²⁷ Sihanouk had been the King since 1941, first under French colonial rule and also after independence in 1953.²⁸ However, upon the departure of the French and with the rise of Cold War tensions between Communists and Capitalists, the United States was concerned that Cambodia would become a Communist state like its neighbor Vietnam. To prevent this, the U.S. backed a military government headed by General Lon Nol, known as the Khmer Republic (1970-1975), which overthrew governing Cambodian King Norodom Sihanouk in a coup in 1970.²⁹ After the 1970 coup, King Sihanouk made a treaty with the Khmer Rouge communist forces, who had been engaged in armed resistance for many years,³⁰ in order to regain

of the U.N. budget) and slow and inefficient processes have led many to reconsider the merits of this kind of purely international tribunal. It was the perceived failure of the ad hoc tribunals in these respects which led to the creation of the “second generation” hybrid tribunals in Sierra Leone, East Timor, and Cambodia. *See id.* at 8.

²³ The ECCC website states that the ICTY and ICTR each now cost “around \$150 million per year.” *Frequently Asked Questions, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (Jan. 8, 2008), http://old.eccc.gov.kh/english/faq.view.aspx?doc_id=71.

²⁴ *See supra* note 13, at 29; *see also* Suzannah Linton, *Cambodia, East Timor, Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185, 185 (2001).

²⁵ STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY* 334, note 57 (3rd ed. 2009).

²⁶ *OCIJ Closing Order D427* at para. 19, *EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (Sept. 15, 2010), <http://www.eccc.gov.kh/en/documents/court/closing-order> [hereinafter *Closing Order*].

²⁷ CLIFF ROBERSON & DILIP K. DAS, *AN INTRODUCTION TO COMPARATIVE LEGAL MODELS OF CRIMINAL JUSTICE* 192 (2008).

²⁸ Steven D. Roper & Lilian A. Barria, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, HUM. RTS. REV. 5, 11 (2005).

²⁹ *See supra* note 26, para. 25.

³⁰ *Id.* at para. 21. Note that Cambodians refer to themselves as “Khmer” (as their ethnicity) and “Rouge” (the French word for “red,” implying Communism).

power from Lon Nol.³¹ Cambodian people are fiercely loyal to their Royal Family, and were outraged at the American-backed Lon Nol government for ousting their beloved King.³² Moreover, Lon Nol was blatantly corrupt, and the people were unhappy with the state of affairs in their country.³³ With the takeover by General Lon Nol, the communist resistance groups which had been around since independence suddenly grew in popularity, as average Cambodian peasants took up arms in order to restore King Sihanouk and (what they perceived/hoped to be) Cambodian independence.³⁴ Civil war raged from 1970 to 1975, and by 1973, the communists, known as the “Khmer Rouge” in French (or “Red Khmers” in English)—with King Sihanouk as their figure head—had taken control of much of the country.³⁵ These largely uneducated and misinformed peasants who had fought for the return of their King would soon become the lower level cadres who would implement Khmer Rouge policies of exterminating “internal enemies.”³⁶

In April 1975, the Khmer Rouge seized control of Cambodia and began the drastic reorganization of Cambodian society that would, in the brief course of three years, eight months, and twenty days, leave approximately two million Cambodians—nearly a fifth of the population—dead from starvation, disease, overwork, armed conflict, and mass execution.³⁷ Following the American withdrawal of support for Lon Nol in January 1975,³⁸ the Khmer Rouge communists mounted their “final assault” on the capital Phnom Penh; and on April 1, 1975, the Khmer Rouge took the city and Lon Nol went into exile.³⁹ This marked day one of “year zero” in the Khmer Rouge revolutionary calendar, and the start of a four-year plan to achieve economic self-sufficiency by tripling the country’s rice production.⁴⁰

Therefore, the Khmer Rouge or “Red Khmers” may be translated into English as the “Communist Cambodians.”

³¹ See *supra* note 28, at 11.

³² HAING S. NGOR & ROGER WARNER, *SURVIVING THE KILLING FIELDS: A CAMBODIAN ODYSSEY OF HAING NGOR* (1987).

³³ *Id.* at 60-61, 74.

³⁴ *Id.*

³⁵ See *supra* note 31.

³⁶ See *supra* note 26, paras. 147, 183, 924, 1251.

³⁷ P.J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21:1 HARVARD HUMAN RIGHTS J. 143, 1 (2008).

³⁸ Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELBOURNE J. INT’L L. 462, 465 (2004).

³⁹ See *supra* note 26, para. 32.

⁴⁰ See *supra* note 38, at 464.

The Khmer Rouge had a pseudo Maoist style ideology based on achieving self-sufficiency from foreign powers through agrarian communism.⁴¹ In order to increase agricultural production, the regime created massive rural communes while emphasizing the virtues of the countryside and peasant life, and abolishing all social classes.⁴² Upon seizing control, the Khmer Rouge immediately went about establishing their new agrarian utopia by forcibly relocating the approximately two million residents of Phnom Penh to live in rural communes.⁴³ However, the people forced to do hard labour in these massive, ill-conceived agricultural communes were without proper food and medical supplies, and within four years an estimated one million were worked to death or died of starvation and disease.⁴⁴

In addition to this social and economic overhaul, the regime simultaneously sought to eliminate all societal elements suspected of being hostile to the new order through an aggressive killing campaign. This included waves of internal purges of Khmer Rouge cadre, including upper level leaders (who were often tortured to obtain names of other alleged conspirators), as well as through extermination of perceived “enemies” of the revolution which included members of the former Lon Nol government, ethnic minorities (including Cham Muslims, Chinese, and Vietnamese), religious groups such as Buddhist monks, and educated classes such as teachers and students.⁴⁵ A network of prisons across the country was established to assist with this goal, the most notorious of which was Tuol Sleng prison (code-named S-21) in Phnom Penh, where political prisoners from across the country were sent for interrogation, torture, and death.⁴⁶ An additional one million are believed to have died “violent deaths” as a result of such policies.⁴⁷ In total, an estimated 1.7 to two million Cambodians lost their lives in less than four years.⁴⁸

⁴¹ Horsington, *supra* note 38, at 464; Barria & Roper, *supra* note 28, at 10; Khan, *supra* note 103, at 23.

⁴² Barria & Roper, *supra* note 28, at 10; Glaspy, *supra* note 37, at 3.

⁴³ Horsington, *supra* note 38, at 464; Barria & Roper, Justice and Reconciliation, *supra* note 30 at p.11; Glaspy, Justice Delayed, *supra* note 37, at 3; Closing Order, *supra* note 28, at para. 226. The Closing Order states that the population of Phnom Penh at that time was likely between 1.5 to 2.6 million people.

⁴⁴ Barria & Roper, *supra* note 28, at 11; Glaspy, *supra* note 37, at 3.

⁴⁵ *Id.*; *see also supra* note 28, at 11.

⁴⁶ Glaspy, *supra* note 37, at 2-3.

⁴⁷ *See supra* note 13 at 12.

⁴⁸ *See supra* note 38 at 464.

The era of Democratic Kampuchea (the name of the Khmer Rouge state) ended in January 1979 when Vietnam launched an invasion of Cambodia following protracted border skirmishes, thereby ending the Khmer Rouge regime.⁴⁹ The Khmer Rouge retreated to the Thai border and established themselves as an anti-Vietnamese guerilla force, with the support of unlikely allies China, Thailand, and the United States,⁵⁰ while Vietnam occupied Cambodia from 1979 to 1989.⁵¹ This resulted in civil war between the Khmer Rouge and their allies, and the Vietnamese. In its capacity as a guerilla group, the Khmer Rouge continued to fight the Vietnamese and later the United Nations Transitional Authority (“UNTAC”) that entered the country after the Vietnamese withdrawal. UNTAC helped to establish a coalition government in 1993, headed by a young Khmer Rouge defector named Hun Sen. Hun Sen neutralized the Khmer Rouge as a military threat and finally brought a measure of peace to the ravaged country, in part by bringing many former Khmer Rouge into government.⁵² Hun Sen is Cambodia’s Prime Minister to this day. However, shortly after the regime was ousted and prior to the arrival of UNTAC, trials of Khmer Rouge leaders were held by the Vietnamese “liberators.”⁵³ In 1979, the ruling People’s Republic of Kampuchea (“PRK”), a protégé regime installed by the Vietnamese after they invaded Cambodia, convened a “People’s Revolutionary Tribunal” to try Pol Pot (“Brother Number One,” the highest ranking leader of the Khmer Rouge) and Iang Sary (the Khmer Rouge’s Foreign Minister) in absentia for genocide and crimes against humanity.⁵⁴ The trials were conducted “in the well-established tradition of show trials within communist states,” with defence counsel instructed that their role was not to defend their clients but rather to “present a picture of the regime’s horrendous character” and to focus on the Chinese government’s role in supporting it.⁵⁵ At the end of

⁴⁹ *Id.* at 465, Barria and Roper, *supra* note 13 at p.11-12.

⁵⁰ *See supra* note 37, at 3.

⁵¹ *See supra* note 13, at 12.

⁵² *See supra* note 50.

⁵³ The term “liberators” is in quotations because the status of the Vietnamese as either “liberators” or “invaders” is subjective; opinions amongst Cambodians differ widely on this issue.

⁵⁴ Horsington, *supra* note 38 at 467. In fact, it was the Vietnamese who first exerted pressure on the Sen government to try Pol Pot and other members of the regime for genocide. *See* Barria and Roper, *supra* note 13 at 15).

⁵⁵ The atmosphere of the trial’s proceedings is well captured in the statement to the court by an American lawyer, Hope Stevens, who (acting supposedly on behalf of the defendants) condemned the “manipulators of world imperialism, the profiteers of neocolonialism, the fascist philosophers, the hegemonists, who are supporting Zionism, racism, apartheid and reactionary regimes in the world,” and after denouncing the “false socialist leaders of Fascist China,” concluded that “[i]t is now clear to all that Pol Pot and

the five-day trial, the two absent defendants were declared guilty and sentenced to death.⁵⁶

Notably, in September 1996, Prince Sihanouk of Cambodia granted amnesty to those prosecuted in the 1979 trials. This confirms that these were simply “show trials,”⁵⁷ as well as providing additional support to the view held by many that the government has many links to the Khmer Rouge. In response to the amnesties, the United Nations Human Rights Commission passed a resolution in April 1997, requesting the Secretary General to consider creating a war crimes tribunal in Cambodia; thereby initiating what would prove to be a lengthy and tortuous process of negotiation and international involvement that led to the eventual creation of the ECCC.⁵⁸ The details of this long process need not be recounted here in full; suffice it to say that the negotiations lasted ten years, and that the U.N. pulled out twice before the ECCC was finally up and running in 2007.⁵⁹ The ECCC was created in order to create a fair tribunal that would not simply replicate the show trials of 1979.

However, one of the legacies of the Khmer Rouge period is a dearth of Cambodian law and capable Cambodian lawyers – a condition that continues to stifle Cambodia’s legal development. While Cambodia gained independence from France in 1953,⁶⁰ the French left their imprint on Cambodia in the form of civil law system, including the French-styled Cambodian Criminal Code of 1956,⁶¹ which was promulgated under the independent Kingdom of Cambodia (1955-1970, under King Sihanouk). The Code remained in force during the subsequent Khmer Republic (1970-1975), as well as under the Khmer Rouge who ruled from 1975 to

leng Sary were criminally insane monsters.” Milton Osborne, *The Khmer Rouge Tribunal: An Ambiguous Good News Story*, LOWY INST. FOR INT’L POL’Y., Aug. 2007, at 5.

⁵⁶ *Id.*

⁵⁷ Horsington, *supra* note 38, at 467.

⁵⁸ *Id.* See also Rupert Skilbeck, *Defending the Khmer Rouge*, 8 INT’L CRIM. L. REV. 423, 424 (2008).

⁵⁹ For detailed histories of the negotiation process, see JOHN R. W. D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 33-34 (Transnational Publishers, Inc., 3rd ed. 2003); Glaspy *supra* note 37; UNITED NATIONS OFFICE OF LEGAL AFFAIRS, HISTORY ON NEGOTIATION OF THE KHMER ROUGE TRIBUNAL BETWEEN THE UNITED NATIONS AND CAMBODIA (Feb. 8, 2002) <http://www.embassy.org/cambodia/press/historyTHEnegotiation.pdf>.

⁶⁰ Ratner, *supra* note 25.

⁶¹ Roberson, *supra* note 27; CODE DE PROCEDURE PENALE (1956) (French version), http://cambodia.ohchr.org/KLC_pages/KLC_files/section_011/section11_013_2007_fr.pdf.

1979.⁶² One interesting feature of the French civil law system is that criminal investigations are done not by police, as in the adversarial system, but by Investigating Judges. These judges travel to crime scenes and interview witnesses, and then produce a “Closing Order” (something like a lengthy indictment). The Closing Order outlines the judge’s findings and beliefs about what happened, and which crimes may be made out on the basis of these findings, and it either commits the person for trial for these crimes or discharges them. In the report that led to the creation of the ECCC, the U.N. “Group of Experts” stated that due to the principle of *nullum crimen sine lege* – the general principle of law prohibiting the assigning of guilt for acts not considered to be crimes when committed – negotiators would have to look to the international and domestic law in force in 1975, at the start of the Khmer Rouge’s rule, in order to determine which acts were criminal at the time and which were not.⁶³ The application of the 1956 Code at the ECCC required expertise in Cambodian law as it was in 1975, which was a problem, as under the Khmer Rouge, there was no law, no lawmaking, and no courts.⁶⁴ The judiciary (along with the entire educated and professional class), was perceived to have been an enemy of the revolution, so members of the legal profession were systematically executed, leaving very few trained lawyers in the country.⁶⁵ Moreover, following the civil war, and with the beginning of UNTAC transitioning power back to the Cambodian people in 1993, the judiciary was largely replaced by political appointees, many of whom had little formal education, and little or no knowledge of the law. As such, the current Cambodian judicial system is considered by many to be flawed and characterized by incompetence, corruption and political bias.⁶⁶

In the late 1980s, Cambodia adopted a new Code, the Code of

⁶² In fact, there was a subsequent Criminal Procedure Code of Cambodia adopted in 1962 that followed the 1956 French model, *see* MINISTRY OF JUSTICE, KINGDOM OF CAMBODIA, *GUIDE TO CAMBODIAN CRIMINAL LAW: PRE-TRIAL PHASE 1* (2005). However, for the purposes of the ECCC the U.N. decided to apply the crimes as found in the 1956 Code rather than this later version.

⁶³ REPORT OF THE GROUP OF EXPERTS FOR CAMBODIA ESTABLISHED PURSUANT TO GENERAL ASSEMBLY RESOLUTION, 52/135, GA 53/850, SC 1999/231, UN GAOR, 53rd Sess., at para. 60 (Mar. 16, 1999), <http://www.unakrt-online.org/Docs/Other/1999-02-18%20Experts%20Report.pdf>.

⁶⁴ Jorg Menzel, *Kambodscha und der Kampf ums Recht. Eine Fallstudie zu “Recht und Entwicklung” [Cambodia and the Fight for Law: A Case Study in Law and Development]* 387 41:3 *VERFASSUNG UND RECHT IN UBERSEE, LAW AND POLITICS IN AFRICA, ASIA, LATIN AMERICA* (2008).

⁶⁵ Konstantinos D. Magliveras, *Difficulties and Status of Efforts to Create an International Criminal Court in Cambodia* 110 3:2 *ASIA-PAC. J. H. R. L.* (2002).

⁶⁶ Roberson, *supra* note 27 at 192.

Criminal Procedure of the Kingdom of Cambodia.⁶⁷ Yet, despite the introduction of contemporary laws, there still remain many loopholes in much of the legislation, and the quality of Cambodian law often falls below international standards as it does not provide sufficient protections for human rights. Moreover, although a legal education system has been re-established, the current system still suffers from the lack of a culture of the rule of law or any real jurisprudence.⁶⁸ While eager young Cambodian law students are beginning to fill the ranks of the formerly decimated judiciary, change is slow to come, and the older generation of incompetent and corrupt political appointees continues to dominate the Cambodian legal system.⁶⁹ The current culture of bribery and corruption, combined with a lack of coherent legislation and trained legal professionals, has left Cambodia in a state of legal flux, from which the country has not yet recovered.⁷⁰

Another important consideration is the widespread and all-encompassing nature of the Khmer Rouge rule, which implicates large sections of Cambodian society. This has made prosecution of the lower level cadre a daunting task. Many members of the present government were once active mid-level (if not senior) members of the Khmer Rouge regime.⁷¹ In fact, current Prime Minister Hun Sen was himself a member of the Khmer Rouge administration before defecting to Vietnam in 1977.⁷² Similarly, the current “King Father” Norodom Sihanouk (his official title, as translated into English) was nominally head of state of during the Khmer Rouge rule, before being discarded from that role and living as

⁶⁷ At first, there were the United Nations Transitional Authority in Cambodia (“UNTAC”) Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period in 1992. UNTAC, PROVISIONS RELATING TO THE JUDICIARY AND CRIMINAL LAW AND PROCEDURE APPLICABLE IN CAMBODIA DURING THE TRANSITIONAL PERIOD (1992), <http://www.cdpcambodia.org/untac.asp>. This was eventually followed by the Code of Criminal Procedure of the Kingdom of Cambodia in 2007. CODE OF CRIMINAL PROCEDURE OF THE KINGDOM OF CAMBODIA (2007) [hereinafter *2007 Code*], http://cambodia.ohchr.org/KLC_pages/KLC_files/section_011/S11_CriminalProcedureCode2007E.pdf.

⁶⁸ Roberson, *supra* note 27, at 192.

⁶⁹ TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS at pp.183-84 (Cambridge University Press, 2007).

⁷⁰ See *supra* note 68.

⁷¹ In the difficult months following the 1979 Vietnamese victory, the new Cambodian regime decided that it had little choice but to employ many of those who had worked in the Khmer Rouge administration, particularly in the provinces. While not all are presumed to have committed crimes against humanity, many undoubtedly did. Having remained in Cambodia after their leaders fled, they transferred their allegiance to the new regime. Osborne, *supra* note 55 at 7.

⁷² *Id.* at 5.

prisoner under house arrest between 1976 and 1979.⁷³ He was also the head of the Coalition of the Government of Democratic Kampuchea – the name that the Khmer Rouge went by during the Civil War – for much of the 1980s, and so again was closely linked with the forces of the Khmer Rouge, and he reportedly continues to employ many former members of the Khmer Rouge on his personal staff.⁷⁴

Given the number of former Khmer Rouge purported to be in Government, during negotiations to create the tribunal, the Cambodian Government expressed concern that if a tribunal was created with too broad a mandate it could potentially expose many Cambodians to prosecution, which the Government argued could result in another civil war. This fear led the Cambodian Government to push for a limited number of trials,⁷⁵ as well as endorsing an official policy that the past is better left forgotten.⁷⁶ This concern is the reason that the court's jurisdiction is limited to the prosecution of "those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979."⁷⁷

The desire of the Government to limit the reach of the Court continues to be a problem, as the Government seeks to limit prosecutions in case files 003 and 004 through political interference in judicial processes, arguing that people will panic and it will lead to civil war.⁷⁸ This interference is discussed further in section III.

Aside from the issue of narrowing the scope of the tribunal's mandate, the main point of contention in the negotiations between the U.N. and the Royal Government of Cambodia was the fact that while

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 7-8.

⁷⁵ The recent statements of Prime Minister Hun Sen suggest that no more than five people will be indicted. See Cheang Sokha & James O'Toole, *Hun Sen Shoots From the Lip*, PHNOM PENH POST (Oct. 28, 2010); see also Douglas Gillison, *Hun Sen's Tribunal Remarks Spark Talks*, THE CAMBODIA DAILY (Oct. 29, 2010).

⁷⁶ Skilbeck, *supra* note 58 at 434.

⁷⁷ 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, RGC-UN, Oct. 4, 2004 (ratified by the Cambodian National Assembly) [hereinafter Agreement]; Khmer Rouge Trials, GA Res 57/228 B, U.N. GAOR, 57th Sess., 85th Plen. Mtg., Agenda Item 109(b), Annex, U.N. Doc. A/RES/57/228B, art. 1 (2003).

⁷⁸ Tim Johnson, *PM Seeks to Limit Khmer Rouge Trials*, FINANCIALTIMES.COM, (Oct. 27, 2010), http://www.ft.com/cms/s/a9822468-e1de-11df-b18d-00144feabdc0,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2Fa9822468-e1de-11df-b18d00144feabdc0.html&_i_referer=#axzz1goVW94tY

Cambodia recognized the need for international help in its prosecutions,⁷⁹ it nonetheless sought a wholly Cambodian tribunal. That is, the Cambodian Government wanted the trials to take place in Cambodia, under Cambodian law, and with a majority of Cambodian judges. While the U.N. sought a U.N.-run tribunal, located outside of Cambodia, with a U.N. prosecutor and a majority of U.N.-appointed judges. The Royal Cambodian Government viewed this tension as a matter of state sovereignty because the conflict was over Cambodia's history of genocide, and from their perspective, Cambodians were in the best position to judge crimes against their own people.⁸⁰ For the U.N., there were concerns that a Cambodian-run tribunal would not live up to international fair trial standards. In response to this problem, a U.N. "Group of Experts" travelled to Cambodia in 1999 to assess the situation and make recommendations.⁸¹ Their report ultimately recommended the creation of an ad hoc tribunal modeled after the ICTY and ICTR,⁸² such that it would be created under Chapter VII of the U.N. Charter in cooperation with the Cambodian Government, but ultimately staffed and run by the U.N., and "established in a State in the Asia-Pacific region" (but not in Cambodia), so as to ensure transparency and freedom from political interference.⁸³

⁷⁹ Youk Chhang, *The Thief of History — Cambodia and the Special Court*, 1:1 INT'L J. TRANSITIONAL JUSTICE 157, 167 (2007).

⁸⁰ Hun Sen provided a colorful metaphor for what the Cambodian side desired, stating, "[i]f they [the U.N. legal experts] go on about nominations and a majority of judges and so on, they are not participants. I do not wish a foreign woman to come to Cambodia and dress up in a Khmer dress. I want a Khmer woman to dress in a Khmer dress and for foreigners to come and help put on the make-up." *Id.* at 167.

⁸¹ Barria & Roper, *supra* note 28, at 16. After receiving a request from the Cambodian government to consider the creation of a tribunal, the Secretary-General convened a three-member "group of [un-named] experts" pursuant to General Assembly Resolution 52/135 to examine the available evidence and determine whether there were grounds for the creation of a tribunal. In March 1999, the experts concluded that while there were sufficient grounds to warrant the creation of an international tribunal, there were serious concerns about the state of the Cambodian judiciary (*see* Group of Experts, *supra* note 63 at 1 & 39, para. 131).

⁸² The Report of the Group of Experts was written before the international community had the benefit of long years of experience at the ICTR and the ICTY. *Id.* The statements were made before international donors and prosecutors had "hit the wall" and become disillusioned with the feasibility of ad hoc Tribunals established under Chapter VII of the United Nations Charter. In 1999, when the Group of Experts wrote their report, ad hoc Tribunals still seemed to be an exciting and viable option. As discussed in section I, C above entitled "Balancing Human Rights and Social Impacts," in the years since then, and before the ECCC came into existence in 2003, the problems with ad hoc tribunals became apparent, and the international community was more willing to consider the feasibility of a Cambodian-led, if not run, hybrid tribunal, in contrast to the recommendations of the Report.

⁸³ *Id.* para. 139. *See also* Ratner, *supra* note 27, at chapters 13 and 14.

Cambodia rejected this proposal.⁸⁴ Indeed, throughout the process each side remained steadfast in its position: Kofi Annan (then Secretary General of the U.N.) maintained that the U.N. would only participate in a joint tribunal that was “international in nature” and met minimum standards of justice, while Hun Sen stated that he would abandon the joint efforts if the U.N. would not accept a minor role in the tribunal.⁸⁵

The debate was eventually resolved in favor of Cambodia, when Cambodia unilaterally passed a law declaring the creation of a tribunal in Cambodia, under Cambodian law, and with a majority of Cambodian judges.⁸⁶ This law (“Extraordinary Chambers Law”), passed in 2001, settled several of the legal and political controversies between the Secretary General of the U.N. and the Cambodian government in favor of the Cambodian government.⁸⁷

In response to Cambodia’s unilateral action, the U.N. withdrew from negotiations.⁸⁸ It took a resolution from the General Assembly mandating the negotiations to continue and several more years of negotiation before a final agreement was reached.⁸⁹ Notwithstanding the recommendations of the U.N. Group of Experts, the agreement reached was based on the Extraordinary Chambers Law—creating a tribunal within the existing Cambodian legal system. The debate about the judges was resolved by a proposal from the United States that there be a majority

⁸⁴ In September 1999, Prime Minister Hun Sen presented the U.N. with the ultimatum that they could either: (1) provide a legal team to help Cambodian lawyers draft laws and to assign judges and prosecutors in Cambodia’s existing courts; (2) provide only a legal team and not participate in a trial; or (3) withdraw completely from the proposed trial. George Chigas, *The Politics of Defining Justice After the Cambodian Genocide*, 2:2 J. GENOCIDE RESEARCH 245, 257 (2000). See also Barria & Roper, *supra* note 28, at 16; Horsington, *supra* note 38, at 468.

⁸⁵ Horsington, *supra* note 38, at 260.

⁸⁶ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, Law NS/RKM/0801/12, adopted in its final version by the National Assembly on July 11, 2001, approved by the Senate on July 23, 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBTh ch on Aug. 7, 2001, and signed by the Cambodian King on Aug. 10, 2001, available at <http://csf.colorado.edu/bcas/main-cas/camb-law.htm/> [hereinafter *ECCC Law*].

⁸⁷ INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 208 (Cesare P. R. Romano, Andre Nollkaemper & Jann Kleffner, eds., Oxford University Press, 2004).

⁸⁸ On February 8, 2002, the U.N. advised Cambodia that it was no longer in a position to negotiate. UNITED NATIONS OFFICE OF LEGAL AFFAIRS, HISTORY OF THE NEGOTIATIONS OF THE KHMER ROUGE TRIBUNAL BETWEEN THE UNITED NATIONS AND CAMBODIA: A CHRONOLOGY 3 (Feb. 8, 2002.), available at <http://www.embassy.org/cambodia/press/historyTHEnegotiation.pdf>.

⁸⁹ Horsington, *supra* note 38, at 469.

Cambodian judges (three of five judges in the Trial Chamber), but that a super-majority of four judges would be required for any decision, such that at least one of the U.N. judge's consent would be required for any decision.⁹⁰ Additionally, the agreement mandated two co-prosecutors (one Cambodian and one non-Cambodian), both of whom are required to consent to any indictments.

Under the terms of the final agreement, the ECCC is technically a domestic court.⁹¹ It is established pursuant to Cambodian law, and operates within the pre-existing Cambodian judicial framework, yet maintains an international component with half of the judges, staff, and counsel appointed by the U.N.⁹² Given that the ECCC forms part of the domestic justice system,⁹³ the trials are to be conducted "in accordance with existing procedures in force," meaning Cambodian procedural law.⁹⁴ However, article 35 of the Extraordinary Chambers Law includes a provision which allows the ECCC to look to "procedural rules established at the international level" for guidance "if necessary," but only in certain circumstances, "if there are any lacunae in the existing procedures."⁹⁵

The agreement further expands the possibility of resorting to international procedural rules by providing that this may be done "[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards,"⁹⁶ or "where domestic procedures

⁹⁰ Kathleen Claussen, *Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253, 258 (2008).

⁹¹ Bates, *supra* note 1, at 187.

⁹² *Id.*

⁹³ Law on the Establishment, *supra* note 86, art. 2.

⁹⁴ *Id.* See also Romano, *supra* note 87, at 322. This is interesting, as the legal principle of *nullem crimen sine lege* which required application of 1975 Cambodian criminal law only applies to substantive offences, and not to the choice of the procedural law under which the offences are prosecuted. Thus, while the ECCC was obliged to try accused persons for offences found in the 1956 Penal Code, it was free to adopt any procedural system to do so. The ultimate decision to adopt the French civil law system was due to pressure from the Cambodian Government, which insisted on using its existing procedural system as expressed in the Code of Criminal Procedure of The Kingdom of Cambodia. Cambodia was insistent that the ECCC should form part of the domestic court system, and that it should use Cambodian procedural law. While the U.N. would have preferred an adversarial system, like that at the ICTY and ICTR, this was less of a concern than other issues such as the location of the court.

⁹⁵ Law on the Establishment, *supra* note 86, art. 33; Agreement Between the UN, *supra* note 54, art. 12.1, cited in Romano, *supra* note 10, at 322, 327. This essentially reiterates article 14.3 of the ICCPR.

⁹⁶ Agreement Between the United Nations, *supra* note 77, at art 12.1.

do not deal with a particular matter, or where there is uncertainty regarding their interpretation or application, or if there is a question about consistency with international standards, but it is silent as to whether international standards should prevail.”⁹⁷ The agreement also seeks to remedy some of the potential shortcomings of Cambodian law by providing certain guarantees that the criminal proceedings being must be conducted in accordance with “international standards of justice, fairness, and due process of law, as set out in Articles 14 and 15 of the [ICCPR].”⁹⁸ Together, the agreement and the Extraordinary Chambers Law provide a patchwork of Cambodian and international law, which are intended to provide the foundation for the tribunal. This jumble of domestic and international law has attracted some criticism, as discussed in section III.

This article refers to the atrocities that took place during the Khmer Rouge regime as “crimes against humanity” and not as “genocide,” in accordance with the legal principles utilized by the co-investigating judges of the ECCC.⁹⁹ The definition of “genocide” comes from Article II in the Geneva Convention on Genocide, which defines genocide as “the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.”¹⁰⁰ However, as explained in the Closing Order, Cambodian persecution was generally not based on national, ethnic, racial or religious grounds, but rather on the grounds of political affiliation. Political affiliation is not an enumerated ground in the Genocide Convention; therefore, legally speaking, these offences may be classified as “crimes against humanity” and “grave breaches” of the Geneva Conventions, but not as “genocide.” The co-investigating judges have, however, identified two groups within Cambodia as targets of genocide: Cham Muslims (a religious and ethnic group)¹⁰¹ and Vietnamese (a national and ethnic group).¹⁰² Aside from these two minority groups, the majority of victims were Khmers killed for political reasons. For these reasons, this article shall refer to the Cambodian atrocities as “crimes against humanity” and not “genocide”.

⁹⁷ Akbar Khan, *Race Against Time*, 61:10 THE WORLD TODAY 23, 24 (2005). However, many argue that this provision only adds confusion, since it is not clear as to when Cambodian law will be so deficient as to trigger the application of international law, nor what international legal “standards” judges should look to, or what international sources will be taken as authoritative. *See* Claussen, *supra* note 96, at 257).

⁹⁸ Agreement Between the United Nations, *supra* note 77, at arts. 12.2 and 13.

⁹⁹ Closing Order, *supra* note 28.

¹⁰⁰ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Dec. 9, 1948) (adopted via Resolution 260 (III) A). This was acceded to by Cambodia upon joining the French Union in 1949; *see* Closing Order, *supra* note 28 at para. 1310.

¹⁰¹ *Id.* at paras. 1336-42.

¹⁰² *Id.* at paras. 1343-49.

The ECCC has publicly named five suspects for prosecution: (1) Nuon Chea, who is alleged to have been the Deputy Secretary of Central Committee;¹⁰³ (2) Ieng Sary, who is alleged to have been a full rights member of both the Central Committee and the Standing Committee;¹⁰⁴ (3) Ieng Thirith, the wife of Ieng Sary,¹⁰⁵ who is alleged to have been the Minister of Social Affairs;¹⁰⁶ (4) Khieu Samphan, who is also alleged to have been a full rights member of the Standing Committee;¹⁰⁷ (5) Kiang Guek Eav (also known as “Duch”), who was the Chairman of Political Prison S-21 in Phnom Penh.¹⁰⁸ As shall be discussed further in section III, five additional unnamed suspects have been put forward for investigation by the international co-prosecutor in what are referred to as cases 003 and case 004; however, it remains to be seen whether there will be any further prosecutions after case 002 due to political interference by the Cambodian Government.

Given that the allegations concerning Duch were related to a single prison, as opposed to being national in scope, Duch’s case was prosecuted separately from the others in case 001. The other four accused were charged with crimes that were national in scope and are therefore being tried together in case 002. Duch’s trial has already concluded, and on July 26, 2011 he was found guilty of:

crime[s] against humanity of persecution (extermination
(encompassing murder), enslavement, imprisonment,

¹⁰³ *Id.* at para. 869. The Central Committee was the highest governing level of the Khmer Rouge. Nuon Chea is alleged to have been a member of this committee throughout the khmer Rouge era, as well as a full rights member of smaller committees including the Standing Committee (*Id.* at para. 871), and the Military Committee, which was responsible for national defence and purging internal enemies. Closing Order para. 873. He is alleged to have been the second highest in command after Pol Pot (known as “Brother Number One”), and was referred to as “Brother Number Two” – he was allegedly responsible for implementing Pol Pot’s decisions. *Id.* at para. 870.

¹⁰⁴ Ieng Sary is alleged to have been a member of the Standing Committee through the Khmer Rouge era, and as such would have taken part in high level decision making regarding all matters. *Id.* at para. 1001. Ieng Sary is also alleged to have been the Deputy Minister of Foreign Affairs. *Id.* at para. 1008.

¹⁰⁵ Closing Order, *supra* note 28, at para. 1202.

¹⁰⁶ *Id.* at para. 1213. In this capacity it is alleged that she sat on the Council of Ministers, where Party guidelines were issued for the Ministers to implement. *Id.* at para. 1214. Unlike the other Charged Persons, she is not alleged to have been a member of either the Standing Committee or the Central Committee. *Id.* at para. 1207.

¹⁰⁷ *Id.* at para. 1131. He is also alleged to have been appointed head of state, taking over this position from King Sihanouk (*Id.* at para. 1135), and in which position he represented Cambodia internationally. *Id.* at para. 1137.

¹⁰⁸ Judgment in Case 001 (July 26, 2010) at para. 130, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

torture (including one instance of rape) and other inhumane acts) as well as for grave breaches of the Geneva Conventions of 1949 (wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian).¹⁰⁹

Duch was sentenced to thirty-five years imprisonment,¹¹⁰ which was then reduced to nineteen years due to a five year deduction for illegal imprisonment, plus eleven years for time-served.¹¹¹

While case 001 dealt with only one accused and one crime base (the notorious S-21 prison), case 002 involves four accused (Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan) and alleged crimes that range across the entire country, as well as investigations of twenty specific crime bases, including six worksites and co-operatives, and fourteen security centers and execution sites.¹¹² Case 002 is the largest and most complex trial of the ECCC to date. The trial in case 002 began on November 21, 2011.¹¹³

III. SHORTCOMINGS OF THE ECCC

The ECCC is a creature of compromise, as clearly demonstrated by the history of tense and protracted negotiations that led to its eventual creation. Indeed, many in the international community feel that the U.N. compromised too much in allowing itself to be affiliated with the ECCC in its present form.¹¹⁴ For example, Human Rights Watch argued that nation states pressured the U.N. to capitulate and make unprincipled concessions on the basis that this was the last chance to bring the Khmer Rouge leaders to justice, and that consequently, “politics and expediency appear to have won out over Principles.”¹¹⁵ From the outset, critics have had concerns about the ECCC based on perceived inadequacies in the Court’s founding

¹⁰⁹ *Id.* at para. 567.

¹¹⁰ *Id.* at Annex I: Procedural History, at 256, para. 28.

¹¹¹ *Id.* at paras. 680-81.

¹¹² ECCC Press Release, *Co-Investigating Judges Issue Closing Order in Case* (Sept. 16, 2010), [http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_PR_16_Sep_2010\(En\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_PR_16_Sep_2010(En).pdf); *See also* Closing Order, *supra* note 28.

¹¹³ ECCC Press Release, *Trial Chamber Announces Date for the Opening of the Substantive Hearing in Case 002* (Oct. 18, 2011), <http://www.eccc.gov.kh/sites/default/files/media/ECCC%2018%20Oct%202011-Eng.pdf>.

¹¹⁴ Horsington, *supra* note 38, at 478.

¹¹⁵ *Id.*

documents – such as insufficient reference to international law and overly limited jurisdiction.¹¹⁶ Additional concerns have also arisen recently after evidence of political interference, bias, and corruption emerged.¹¹⁷ This section shall address first the more theoretical concerns about the Court's mandate and founding documents, followed by recent examples of problems that have plagued the court and undermined its legitimacy.

A. *Insufficient Legal Protections*

From the outset, many human rights organizations expressed concern over the fact that the ECCC is based on Cambodian law, with only minimal reference to international law in its founding documents.¹¹⁸ According to the agreement, the ECCC is bound to apply “Cambodian law;”¹¹⁹ which is an uncertain body of law that has not been meaningfully applied since the French left the country in 1953.¹²⁰ In addition, there is the practical problem that the legal profession was almost entirely wiped out by the Khmer Rouge, such that there are few lawyers left in the country with any understanding of Cambodian law.¹²¹ While talented new young lawyers are emerging, and many excellent Cambodian lawyers work at the ECCC, there remains a distinct lack of institutional knowledge about Cambodian law and procedure due to the loss of so many legal professionals. Moreover, there are questions about exactly what constitutes “Cambodian law;” such as whether it includes the law drafted

¹¹⁶ Skilbeck, *supra* note 58 at 434; NADINE STAMMEL ET AL., BERLIN CENTER FOR THE TREATMENT OF TORTURE VICTIMS, THE SURVIVOR'S VOICES: ATTITUDES ON THE ECCC, THE FORMER KHMER ROUGE AND EXPERIENCES WITH CIVIL PARTY PARTICIPATION 6 (2010) [originally named “Behandlungszentrum für Folteropfer e.V.” or “BZFO,” hereinafter BZFO REPORT].

¹¹⁷ See e.g. *Salvaging Judicial Independence: The Need for a Principled Completion Plan for the Extraordinary Chambers of the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE, 4 (Nov. 2010), http://www.soros.org/initiatives/justice/articles_publications/publications/khmer-rouge-tribunal-20101110 [hereinafter OSJI 2010]; see also Cheang, *supra* note 35.

¹¹⁸ *Supra* note 81, at art 12.2. The Agreement states that “[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.”

¹¹⁹ *Id.* art. 12.1.

¹²⁰ Roberson, *supra* note 27, at 192.

¹²¹ Horsington, *supra* note 38, at 480.

by UNTAC,¹²² or refers only to laws drafted under the French administration before Cambodia gained independence.¹²³

Additionally, given that Cambodia has not substantially re-drafted its laws since the French administration (or applied them in any coherent manner),¹²⁴ Cambodian law is said to have many gaps and loopholes such that it fails to meet international human rights standards.¹²⁵ Friman notes that the procedural provisions laid down in the Law on the Extraordinary Chambers, being based on the Cambodian Criminal Procedure Code, suffers from shortcomings regarding access to evidence and court files, access to counsel, right to confront the accusers, and the right to cross-examine witnesses, as well as failing to ensure the independence of judges and prosecutors, adequate protection of witnesses, and the right to (international) counsel.¹²⁶ Thus, there were concerns from the outset that the Cambodian procedural law would not provide sufficient safeguards for the rights of the accused. This fear has proven to be justified, as demonstrated by the inability of the Trial Chamber to remove or discipline Cambodian judges due to a lack of provisions within Cambodian law.

B. *Limited Jurisdiction*

Another criticism that was leveled against the ECCC at its inception was the Court's limited mandate to try only those "most responsible" for the crimes of the Khmer Rouge era.¹²⁷ Many feel that the limited scope of personal jurisdiction at the ECCC fails to adequately address the widespread crimes committed by Khmer Rouge cadre of all levels. Pursuant to the Law on Establishment of the ECCC¹²⁸ and Cambodia-U.N. agreement, there are two qualifying categories for personal jurisdiction: that suspects are either "senior leaders of

¹²² UNTAC, *supra* note 70. This was adopted by the Supreme National Council, a body constituted under UNTAC in Cambodia in 1992-1993.

¹²³ 2007 Code, *supra* note 67; Code de Procedure Penale (1956), *supra* note 34; Constitution of the Kingdom of Cambodia. Adopted by the Constitutional Assembly on Sept. 21, 1993, at its 2nd Plenary Session. Cambodia, <http://www.embassy.org/cambodia/cambodia/constitu.htm> [hereinafter *1956 Code*].

¹²⁴ Horsington, *supra* note 38, at 476.

¹²⁵ Romano, *supra* note 87, at 327-28.

¹²⁶ *Id.*

¹²⁷ Agreement Between the United Nations, *supra* note 54, at art. 1.

¹²⁸ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, Law NS/RKM/0801/12, adopted in its final version by the National Assembly on July 11, 2001, approved by the Senate on July 23, 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBTh ch on August 7, 2001, and signed by the Cambodian King on August 10, 2001, available at <http://csf.colorado.edu/bcas/main-cas/camb-law.html/>.

Democratic Kampuchea” or “those most responsible” for the serious crimes committed.¹²⁹ Limiting the ECCC’s jurisdictions to only trying those in these two categories necessarily means that the thousands, or possibly tens of thousands, of lower-ranking Khmer Rouge cadre will not face any form of criminal justice for crimes they have committed.¹³⁰ Human rights advocates assert that this limited mandate is unfair, arguing that the widespread nature of the crimes requires that more than five elderly people be held to account.¹³¹ These advocates maintain that scapegoating the “Pol Pot-Iang Sary Clique” prevents a true picture of the widespread nature of the attacks from emerging.¹³² Moreover, the limited scope of personal jurisdiction leaves victims of the regime in a difficult situation: former perpetrators may live among them in their villages, and may even hold positions of power, yet these perpetrators who actually dealt the death blows will never face prosecution at the ECCC or in domestic courts.¹³³

In response to this argument, it should be noted that the U.N. Group of Experts was in accordance with the Cambodian government on this point, and recommended at the outset of negotiations that the jurisdiction of the court be limited to “those most responsible for the serious violations of human rights committed during the era of Democratic Kampuchea”, and that temporal jurisdiction should be limited to the period of Khmer Rouge rule, from April 17, 1975 to January 7, 1979.¹³⁴ The U.N. agreed with Cambodia on this point out of concern that wide-

¹²⁹ Law on the Establishment, *supra* note 91 at arts. 1, 2; *supra* note 81 at arts. 1, 2.1, 5.3, 6.3.

¹³⁰ Bates, *supra* note 1, at 188.

¹³¹ Notably, other international tribunals have also had limited jurisdiction, and have therefore been somewhat limited in the number of prosecutions that they were able to pursue. These other tribunals nonetheless indicted over 100 people each, as well as having domestic justice mechanisms fill the gap in order to try the thousands of others that escaped the jurisdiction of the tribunal. For example, Skilbeck notes that the ICTY has tried approximately 150 individuals out of the 13,000 named individuals against whom there is a complaint for having committed atrocities during the war; and the Rwanda tribunal has tried approximately 100 individuals. However, the domestic Rwandan court is expected to try approximately 10,000 for genocide, and an additional 90,000 using traditional “gacaca” justice. Sierra Leone and East Timor supplemented the tribunals with domestic Truth Commissions in order to ensure a fuller explanation of events. See Skilbeck, *supra* note 58, at 434.

¹³² *Id.*

¹³³ BZFO Report, *supra* note 116 at 6. Notably, there is a limitation date in Cambodia’s Criminal Procedure Code, such that crimes committed during the Khmer Rouge era are time-barred from prosecution in Cambodia’s domestic courts. See 2007 Code, *supra* note 67.

¹³⁴ Horsington, *supra* note 38, at 468

ranging prosecutions might create civil unrest in Cambodia.¹³⁵ The U.N.'s fear of instigating unrest was arguably an unreasonable notion fostered by the Cambodian government court. Although it is worth considering that a broader mandate may well have created a sense of panic in Cambodian society and led to renewed tensions in a country that had only recently ended its civil war.¹³⁶ Thus, while some consider the ECCC's limited jurisdiction to be a shortcoming, as with many successes or failures at the ECCC, the line between the two is often blurry.

C. *Political Interference & Lack of Judicial Independence*

Aside from the more academic concerns described above regarding the law underpinning the Court, there have also been concerns about the actual independence of Cambodian courts, and the ability of Cambodian judges to provide fair and independent trials, free from political interference. Indeed, these concerns were what prompted the U.N. appointed Group of Experts to reject the idea of a domestic court in the first place, stating that: "the level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials,"¹³⁷ and concluding that "it would be difficult to find a judge free of the appearance of bias or prejudice."¹³⁸ International human rights organizations likewise expressed concern about of the ability of the Court to live up to international fair trial standards, due not only to concerns about incompetence of Cambodian judges, but also due to concern that Cambodian judges would be susceptible to government influence and control.¹³⁹ Concerns about the lack of judicial independence were also expressed by former U.N.-Secretary General Kofi Annan on March 31, 2003, who stated his concern "that there are continued problems relating to the rule of law and functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary," such that he "would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges."¹⁴⁰

These early concerns about the lack of judicial independence of Cambodian ECCC judges from the Cambodian executive branch have

¹³⁵ Experts, *supra* note 86, at 58, recommendation 2.

¹³⁶ While the Khmer Rouge regime ended with the invasion of Vietnam in 1979, civil war raged in Cambodia until 1998. See Barria, & Roper, *supra* note 28, at 16.

¹³⁷ Experts, *supra* note 86, at para 133.

¹³⁸ *Id.* at para 127; Skilbeck, *supra* note 60, at 425.

¹³⁹ Stensrud, *supra* note 18, at 11.

¹⁴⁰ Horsington, *supra* note 38, at 481.

unfortunately proven to be legitimate in recent months, with a storm of controversy arising over investigations in case files 003 and 004. During current U.N.-Secretary General Ban Ki Moon's visit to the ECCC in November 2010, Prime Minister Hun Sen publicly announced that he was against any further trials taking place after case 002.¹⁴¹ This was widely criticized by the defence,¹⁴² Non-Governmental Organization ("NGOs"),¹⁴³ and other states¹⁴⁴ as constituting undue political interference in the autonomy of the court to conduct investigations and to reach its own conclusions about whether or not more trials are necessary. As noted by the independent ECCC monitoring group Open Society Justice Initiative ("OSJI"): "An ECCC official who bows to this political interference violates the Law of the Extraordinary Chambers, which requires that judges and prosecutors "shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source."¹⁴⁵ OSJI's comments are clearly intended to remind ECCC officials that they should remain unswayed by pronouncements from the Cambodia's political wing.

At every stage of the process, Cambodian ECCC staff have acquiesced to Hun Sen's wish that no further trials take place. Ban Ki Moon's visit was not the first time that Hun Sen had expressed disapproval of future trials after case file 002,¹⁴⁶ and the national staff at the ECCC

¹⁴¹ Khouth Sophak Chakya & Cheang Sokha, *Ban Ends Eventful Visit*, PHNOM PENH POST (Oct. 29 2010); Chhang, *supra* note 79; *Cambodia rebuffs UN chief on Khmer Rouge Trials*, THE ASSOCIATED PRESS (Oct. 27, 2010), http://www.breitbart.com/article.php?id=D9J3UEI00&show_article=1.

¹⁴² Julia Wallace & Clancy McGilligan, *Hun Sen's Remarks Trouble Tribunal Defense*, THE CAMBODIA DAILY (Nov. 2, 2010).

¹⁴³ Organizations who condemned the comments included the Open Society Justice Institute ("OSJI"). See OSJI 2010, *supra* note 117, at 4. Other NGOs reportedly criticized the comments. See Chhang, *supra* note 79; Cambodian War Crimes Trial Monitor Warns of 'Legacy of Impunity' MONSTERS AND CRITICS (Nov. 10, 2010), *available at* http://www.monstersandcritics.com/news/asiapacific/news/article_1597862.php/Cambodian-war-crimes-trial-monitor-warns-of-legacy-of-impunity.

¹⁴⁴ U.S. Secretary of State Hillary Clinton criticized Hun Sen's statement, stating that the issue is "something that we in the international community should consult closely with the Cambodian government on. . . ." See James O'Toole & Cheang Sokha, *Clinton Talks Rights, KR Trial*, PHNOM PENH POST, Nov. 5, 2010.

¹⁴⁵ OSJI 2010, *supra* note 117 at 4, *citing ECCC Law*, *supra* note 86, arts. 10 & 19.

¹⁴⁶ For information on public comments made by senior government officials and evidence of a lack of Cambodian cooperation in the investigation of the cases, refer to Open Society Justice Initiative. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, (Mar. 2010), *available at* http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/

appear to have been toeing the party line on this issue for quite a while. The first instant of acquiescence was when Cambodian Co-Prosecutor Chea Leang refused to sign new Introductory Submissions placing new suspects before the Investigating Judges, as is the job of the Prosecutor.¹⁴⁷ Her refusal to submit new suspects for investigation prompted (then) international Co-Prosecutor Robert Petit to issue a public “Statement of Disagreement” to the Pre-Trial Chamber (“PTC”), in order to determine whether the Introductory Submission could be filed by only one of the Co-Prosecutors (that is, whether the U.N. Prosecutor could request investigations without the approval of the Cambodian Prosecutor).¹⁴⁸

The Cambodian Judges of PTC followed Prosecutor Chea’s lead, and the Chamber was split along national and international lines as to whether the investigation should be allowed to continue.¹⁴⁹ However, because of a clause that U.N. negotiators successfully managed to insert during negotiations to establish the Court, the agreement provides that where a Chamber is split, the proposed action may go ahead.¹⁵⁰ Thus, despite the split between the national and international prosecutors, and subsequently between the national and international Pre-Trial Chamber judges, the Introductory Submission was provided to the Office of the Co-Investigating Judges (“OCIJ”) to investigate.

The Co-Investigating Judges Office was likewise wracked with internal strife. Not surprisingly, Cambodian Co-Investigating Judge You Bunleng followed in the footsteps of the national staff before him, and refused to sign a Rogatory Letter allowing for field investigations.¹⁵¹

publications/cambodia-20100324; OSJI 2010, *supra* note 117, at 4.

¹⁴⁷ Brendan Brady, *No More KR Suspects: Cambodian Prosecutor*, PHNOM PENH POST, Jan. 6, 2009.

¹⁴⁸ *Id.*

¹⁴⁹ MICHAEL SALIBA, CENTER FOR INTERNATIONAL HUMAN RIGHTS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, SUMMARY OF PRE-TRIAL CHAMBER RULING REGARDING NEW INVESTIGATIONS OF FORMER KHMER ROUGE LEADERS (Sept. 3, 2009), *available at* http://www.genocidewatch.org/images/Cambodia_09_09_03_Summary_of_Pre-Trial_Chamber_Ruling_Regarding_New_Investigations_of_Former_Khmer_Rouge_Leaders.pdf.

¹⁵⁰ Agreement, *supra* note 77, art. 7.4. The agreement provides that: “If there is no majority, as required for a decision, the investigation or prosecution shall proceed.” *Id.*

¹⁵¹ Sam Rith & James O’Toole, *Cambodian KRT Judge at Work on New Cases* PHNOM PENH POST, Feb. 1, 2011. A Rogatory Letter is a letter from the Investigating Judges mandating investigators to conduct investigations on behalf of the judges themselves. Without a Rogatory Letter there cannot be any investigation by ECCC staff. ECCC, Internal Rules, Rev. 8 (Aug. 3, 2011), r. 14.5, 55.9 & 62, *available at* [http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20\(Rev.8\)%20English.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf).

Further, he unsigned the Rogatory that he had previously signed,¹⁵² thereby causing a further split between the national and international Investigating Judges. Once again, due to the clause in the agreement, the investigation was allowed to go ahead despite this split in the OCIJ.¹⁵³ However, the Cambodian Government got its way when newly appointed U.N. Co-Investigating Judge Seigfrid Blunk, together with his Cambodian counterpart, suddenly and shockingly announced on April 29, 2011, that there would be no further investigations in case file 003.¹⁵⁴ In one line, the judges pronounced that they “consider that the investigation has been concluded,”¹⁵⁵ despite not having done any field investigations or interviewed any witnesses due to not having signed a Rogatory Letter.¹⁵⁶ Moreover, the OCIJ did not write a Closing Order summarizing the investigation and explaining why there was insufficient evidence to go to trial. It was simply dismissed in one line: that they “consider that the investigation has been concluded.”¹⁵⁷

The decision to close investigations in case file 003 created a maelstrom of controversy. Shortly before and after the decision to close case 003 was released, at least five of the U.N. legal team at the OCIJ resigned in protest.¹⁵⁸ Steven Heder, a well-known historian and scholar

¹⁵² *Id.*

¹⁵³ Agreement, *supra* note 77, art. 7.4.

¹⁵⁴ D13, Case No. 003, OCIJ, Notice of Conclusion of Judicial Investigation (ECCC Apr. 29 2011), available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D13_EN.pdf. See also ECCC-OCIJ, STATEMENT OF THE CO-INVESTIGATING JUDGES (Apr. 29, 2011), available at <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20%2029%20Apr%202011%28Eng%29.pdf> (stating that “[t]he Co-Investigating Judges today in a public decision concluded the investigations in Case 003 (the Case File containing more than 2000 pieces of evidence, comprising more than 48,000 pages), and have notified the parties according to Rule 66.1”).

¹⁵⁵ *Id.* at 2.

¹⁵⁶ “The investigating judges concluded their investigation into [C]ase 003 without notifying the suspects, interviewing key witnesses, or conducting crime site investigations. This would be shocking for an ordinary crime, but it’s unbelievable when it involves some of the 20th century’s worst atrocities. The Cambodian people have no hope of seeing justice for mass murder as long as these judges are involved.” *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign*, HUMAN RIGHTS WATCH, Oct. 3, 2011, <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (quoting Brad Adams, Human Rights Watch Asia Director).

¹⁵⁷ D13, *supra* note 154, at 2. Compare this with the over 700 page Closing Order in case file 002, explaining the investigation and their conclusions about which charges had been made out, which had not, and why. See Closing Order, *supra* note 26.

¹⁵⁸ At least five U.N. OCIJ legal staff left between April and June 2011. See Koeng Sothanarith, *With Staff Exodus, Possible Woes for Tribunal Investigators*, VOICE OF AMERICA KHMER, Jun. 14 2011, <http://www.voanews.com/khmer-english/news/With->

on Cambodia, was among those that resigned. In a scathing letter which Heder provided to the media, he chastised the Investigating Judges for what he described as closing case 003 “effectively without investigation.”¹⁵⁹ Several human rights organizations likewise decried the closure of case file 003, stating that the OCIJ had failed to properly investigate, contravening their mandate as Investigating Judges due to political interference.¹⁶⁰ This sentiment was reiterated by the International Co-Prosecutor Andrew Cayley whose predecessor had fought his Cambodian counterpart tooth and nail to get the Introductory Submissions before the OCIJ, and was evidently furious that the OCIJ had simply bowed to Cambodian pressure not to go ahead with further investigations. Co-Prosecutor Cayley filed a “Statement by the International Co-Prosecutor Regarding Case File 003,”¹⁶¹ in which he declared that he would request additional investigative actions because he was “of the view that the crimes alleged in the Introductory Submission have not been fully investigated.”¹⁶² On May 18, 2011, the Co-Investigating Judges

Staff-Exodus-Possible-Woes-for-Tribunal-Investigators--123840919.html.

¹⁵⁹ Mike Eckel, *Cambodia’s Khmer Rouge Tribunal in Crisis*, THE WASHINGTON TIMES, June 23, 2011, <http://www.washingtontimes.com/news/2011/jun/23/cambodias-khmer-rouge-tribunal-in-crisis/?page=all> (quoting Stephen Heder, former panel employee).

¹⁶⁰ Human Rights Watch stated in their report that the investigating judges “have egregiously violated their legal and judicial duties and should resign” and that they “have failed to conduct genuine, impartial, and effective investigations into ECCC cases 003 and 004. It appears likely that both cases will be dropped without a serious investigation having taken place.” HUMAN RIGHTS WATCH, *supra* note 156; OPEN SOCIETY JUSTICE INITIATIVE [OSJI], RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: JUNE 2011 UPDATE, *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf [hereinafter OSJI JUNE 2011 REPORT]; the Cambodian Center for Human Rights (“CCHR”) stated that: “According to the ECCC’s own interpretation, which can be deduced from its conviction of prison chief Kaing Guek Eav in Case 001, its jurisdiction is not limited to a handful of leaders that are alleged to have occupied senior political positions within the Khmer Rouge and the government of the Democratic Republic of Kampuchea. A decision to close the ECCC with the conclusion of Case 002 is not therefore based in law but rather it is a political one.” Press Release, Cambodian Center for Human Rights, Judge Blunk’s resignation leaves little doubt as to RGC interference in Khmer Rouge Tribunal (Oct. 10, 2011), *available at* http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=press_detail.php&prid=198&id=5.

¹⁶¹ Press Release, ECCC, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011), *available at* http://www.eccc.gov.kh/sites/default/files/media/ECCC%20INT-OCP%209%20May%202011%20ENG_0.pdf.

¹⁶² As shall be explained below, this original Statement is no longer public due to an Order of the Pre-Trial Chamber upholding an Order of the OCIJ that the International Co-Prosecutor retract his statement. However, these quotes from the

responded to this allegation by issuing an Order demanding that the International Co-Prosecutor publish a retraction. The next day, Co-Prosecutor Cayley filed a Notice of Appeal against the OCIJ's Retraction Order.¹⁶³

In their decision on the Appeal, the PTC split along national and international lines.¹⁶⁴ All of the PTC judges agreed that the Co-Prosecutor does not have a basis in law to publish his opinions on judicial processes.¹⁶⁵ However, the three Cambodian PTC Judges found that “the public statement made by the International Co-Prosecutor has disclosed confidential information of the ongoing investigation, which constitutes a misconduct of the International Co-Prosecutor,”¹⁶⁶ and thereby upheld the OCIJ's Retraction Order. In contrast, the two international PTC Judges found that despite the Co-Prosecutor's Statement having been improper, enforcement of the Retraction Order would have no practical effect, and so would have allowed Co-Prosecutor Cayley's appeal in part.¹⁶⁷ Given that the required majority of at least four affirmative votes of was not achieved by the Chamber, pursuant to Internal Rule 77(13), the Retraction Order of the Co-Investigating Judges was allowed to stand and Co-Prosecutor Cayley was forced to retract his condemnation of the OCIJ.¹⁶⁸ In his statement officially retracting the impugned comments, Co-Prosecutor Cayley restated the complaints that he was “retracting,”¹⁶⁹ thereby managing to circumvent the Order while simultaneously obeying it.

original Statement may be found in the decision of the PTC at D14/1/3. D14/1/3, Case No. 003, Pre-Trial Chamber Decision [PTC Decision], Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003, para. 5 (ECCC Oct. 24, 2011), *available at* <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-international-co-prosecutor039s-appeal-aga>.

¹⁶³ D14/1, Case No. 003, Co-Prosecutor's Notice of Appeal of the Co-Investigating Judges' “Order on International Co-Prosecutor's Public Statement Regarding Case File 003” Pursuant to ECCC Internal Rule 74(2) and 75(1) (ECCC May 19, 2011), *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_1_EN.PDF.

¹⁶⁴ D14/1/3, *supra* note 162, at 13.

¹⁶⁵ *Id.* at 12, para. 31.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.* at 16, para. 1. They held that as the information contained in the Co-Prosecutor's Statement is already in the public domain and cannot be removed, and further that the OCIJ themselves have publically repeated major parts of the confidential information directed by them to be retracted, “their order is, substantially, without any practical effect,” and they would thereby direct that the Appeal be allowed in part and that the Order need not be enforced.

¹⁶⁸ *Id.* at 13, para. 34.

¹⁶⁹ Press Release, ECCC, Statement by the International Co-Prosecutor

Despite having been chastised for his comments about the insufficiency of the investigation in case 003, the International Co-Prosecutor was not deterred in his quest to circumvent the OCIJ's decision to close investigations, and on May 18, 2011, he filed three submissions to the OCIJ requesting that case 003 be reopened.¹⁷⁰ When the OCIJ refused to accede to his requests to re-open investigations, instead of appealing those decisions, he both refiled the requests to investigate and appealed the OCIJ's original decision to close investigations to the Pre-Trial Chamber.¹⁷¹ The result of this appeal remains unknown at the time of publication; however, if recent history is any indication, the most likely outcome is that the PTC will once again be split along Cambodian and U.N. lines, with the three Cambodian Judges upholding the OCIJ's decision to close investigations, and the two U.N. judges finding that the decision to close investigations was improper.

In a shocking twist in this ongoing saga, on October 8, 2011 international Co-Investigating Judge Seigfried Blunk submitted his resignation to U.N. Secretary General Ban Ki Moon, citing "political interference."¹⁷² In a U.N. press release, Judge Blunk referred to a statement made by Cambodian Prime Minister Hun Sen saying that case files 003 and 004 "will not be allowed," and to statements by the Minister of Information that "[i]f they want to go into Case 003 and 004, they should just pack their bags and leave," and further that "[o]n the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue This issue must be decided by Cambodia."¹⁷³ The press release concluded that "[b]ecause of these repeated statements, which will be perceived as attempted interference by Government officials with Cases 003 and 004, the International Co-Investigating Judge has submitted his resignation to the Secretary-General as of 9 October 2011."¹⁷⁴ Thus, despite having

Regarding the Co-Investigating Judges' Retraction Order In Case 003" (Oct. 27, 2011), available at <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-co-investigating-judges%E2%80%99-retraction-order-c>.

¹⁷⁰ These submissions are apparently confidential, as they do not appear on the ECCC's public website, but are referenced in D26. D26, Case No. 003, OCIJ Decision, Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003, para. 1 (ECCC July 27, 2011), available at <http://www.eccc.gov.kh/en/document/court/decision-international-co-prosecutors-refiling-three-investigative-requests-case-003>.

¹⁷¹ *Id.* para. 5.

¹⁷² Press Release, ECCC, Statement by the International Co-Investigating Judge (Oct. 10, 2011), available at <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>.

¹⁷³ *Id.*

¹⁷⁴ *Id.* In response to Judge Blunk's resignation, his Cambodian counterpart, Judge You Bunleng, responded that he was "surprised" by the resignation and asserted that "judicial investigation acts have been conducted by the Office of the Co-

repeatedly capitulated to Cambodian government pressure not to investigate in case 003,¹⁷⁵ it seems that Judge Blunk has finally had enough of playing the Cambodian government's puppet and refused to take commands from them. This acknowledgement of political interference by a U.N. judge is conclusory proof that the U.N.'s initial fears that a tribunal located in Cambodia would be subject to political interference have unfortunately proven to be correct. The obvious existence of strong links between the government and national staff at the Court could undermine public and international trust in the ECCC.¹⁷⁶

D. *Bias*

Along with allegations of political interference in the work of national staff and judges, there have also been allegations of bias made against various judges.¹⁷⁷ According to a public decision released by the PTC in 2008, the defence team for Nuon Chea made allegations of bias against one of the Chamber's own members – Judge Ney Thol.¹⁷⁸ The defence team made two main allegations of bias, submitting that:

- (i) Judge Ney's position as an officer in the RCAF [Royal Cambodian Armed Forces] amounts to an "association which objectively might affect his[...] impartiality" and (ii) his demonstrated willingness to inappropriately employ his judicial power at the behest of the CPP [Hun Sen's political

Investigation judges independently without any obstacle." See Press Release, ECCC, Statement from National Co-Investigating Judge (Oct. 12, 2011), *available at* <http://www.eccc.gov.kh/en/articles/statement-national-co-investigating-judge>.

¹⁷⁵ As per his earlier decision to close investigations in Case 003 (D13, *supra* note 154), and his subsequent refusal to re-open the investigation (D26, *supra* note 170).

¹⁷⁶ Stensrud, *supra* note 18, at 6; Glaspy, *supra* note 37, at 153.

¹⁷⁷ One such application was made recently. E54, Case No. 001, Urgent Application for the Disqualification of the Trial Chamber Judges (ECCC Feb. 24, 2011), *available at* <http://www.eccc.gov.kh/en/documents/court/urgent-application-disqualification-trial-chamber-judges>. This is an application by Nuon Chea to disqualify all of the Judges of the TC on the basis that some of their factual findings in the Case 001 Judgment relate to Mr. Nuon, and therefore that the judges had already made up their minds regarding his guilt in certain offences relating to S-21 and his role in the CPK (at para. 26). While this application deserves mention, being a new development in the court relating to bias, given that it relates to allegations of bias due to previous factual findings and not due to undue political influence, it is not directly relevant to the present discussion. Other allegations of bias are discussed further in this paragraph.

¹⁷⁸ C11/29, Case No. 002, Pre-Trial Chamber Decision, Public Decision on the Co-Lawyer's Urgent Application for Dismissal of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, para. 14 (ECCC Feb. 4, 2008), *available at* <http://www.eccc.gov.kh/en/documents/court/public-decision-co-lawyers-urgent-application-disqualification-judge-ney-thol>.

party] “objectively give[s] rise to the appearance of bias”. In other words, Judge Ney’s position as a serving military officer and his participation in highly questionable judicial decisions “would lead a reasonable observer, properly informed, to reasonably apprehend bias” against Mr. Nuon and the Khmer Rouge and in favor of the CPP.¹⁷⁹

The defence submitted that “as a serving RCAF officer, Judge Ney “remain[s] subject to military discipline and assessment” and “belongs to the army which in turn takes its orders from the executive,” in this case the CPP Prime Minister [Hun Sen].”¹⁸⁰ The defence further submitted that Judge Ney is a member of the CPP (the ruling Cambodian political party of Prime Minister Hun Sen), and had been involved in three “political cases” which were allegedly unfair. They alleged that: “Judge Ney has shown a seeming willingness to improperly utilize his judicial power in the service of the CPP’s agenda. His role in three particular cases demonstrates the ostensible ease with which he appears to freely subjugate fundamental legal norms to considerations of political expediency.”¹⁸¹

The PTC rejected the defence’s application to disqualify Judge Ney.¹⁸² First, they rejected the defence’s characterization of Judge Ney’s position, stating that he “does not occupy his position as a PTC judge of the ECCC in the capacity of an RCAF officer, but in his personal capacity.”¹⁸³ The PTC Chamber similarly rejected the argument concerning Judge Ney’s political involvement, finding that he had resigned as a member of the Central Committee of the CPP upon his assignment as a Judge,¹⁸⁴ further holding that: “the mere fact that a Judge was a member of a political party does not lead to the inference that his decisions are politically motivated or influenced.”¹⁸⁵

While the PTC’s legal reasoning was sound, the strong links between an ECCC Judge and Hun Sen’s CPP party are nonetheless disconcerting. The PTC was correct that we must assume that judges are capable of separating their personal beliefs from their work, just as we assume in national systems such as Canada, where judges are politically appointed.¹⁸⁶ However, these links raise particular concern in a country effectively ruled by a Prime-Minister-for-life, with no aversion to blatantly using his position to achieve

¹⁷⁹ *Id.* (citing the [Confidential] Defence Application for Disqualification, para. 24 [hereinafter Defence Application]).

¹⁸⁰ *Id.* para. 23 (quoting the Defence Application, para. 25).

¹⁸¹ *Id.* para. 27 (quoting from Defence Application, para. 28).

¹⁸² *Id.* at 9.

¹⁸³ *Id.* para. 24.

¹⁸⁴ *Id.* para. 29.

¹⁸⁵ *Id.* para. 28.

¹⁸⁶ Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3 (S.C.C.), para. 130.

his own personal goals, as demonstrated by his repeated interference at the ECCC. While the allegations of bias in favor of the CPP may not be sufficient to satisfy the high threshold required to disqualify an ECCC judge, the facts underlying this claim are certainly sufficient to cause some concern about the independence of the tribunal from the executive.

E. *Corruption*

Related to concerns about judicial independence and bias are concerns about corruption. The ECCC has already seen two major scandals involving claims of corruption: one involving claims of “institutional corruption” in the form of kickbacks being paid by staff,¹⁸⁷ and another involving an allegation of bribes having been accepted by a particular judge.¹⁸⁸

The scandal involving kickbacks came to light through an internal audit done by the Court in January 2007. The audit revealed that funding donated by the UNDP was being “siphoned off as kick-backs,” with Cambodian employees suspected of paying back part of their salaries to superiors.¹⁸⁹ The allegation was that senior Government officials connected to the ECCC were receiving large kickbacks—in the order of forty percent of the salaries of Cambodian personnel, judges and ancillary staff working at the tribunal¹⁹⁰—as a form of pay back to the Government officials who gave the Cambodian staff their jobs.

Investigations into the kickback allegations were scheduled to be conducted by Cambodian Municipal Court prosecutors in February 2009.¹⁹¹ However, the Prosecutor abruptly announced a halt to the investigation after only two days for unspecified reasons. After having called only one witness, the Prosecutor simply stated that: “the result of these investigations didn’t show there was corruption.”¹⁹² Nuon Chea’s defence team appealed this decision to the Cambodian Prosecutor General, and simultaneously submitted a Request for Investigative Action to the Co-Investigating judges, asking them to look into the alleged “institutional corruption,”¹⁹³ which they claimed could affect Mr. Nuon’s right to a fair

¹⁸⁷ Claussen, *supra* note 90, at 257; Glaspy, *supra* note 37, at 154.

¹⁸⁸ E5/3, Case No. 001, Trial Chamber, Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, para. 1 (ECCC Jan. 28, 2011), available at <http://www.eccc.gov.kh/en/documents/court/decision-ieng-sarysquot-application-disqualify-judge-nil-nonn-and-related-requests>.

¹⁸⁹ Claussen, *supra* note 90, at 257; Glaspy, *supra* note 37, at 154.

¹⁹⁰ Osborne, *supra* note 55, at 14.

¹⁹¹ Phann Ana & Douglas Gillison, *Witnesses Summoned in City’s ECCC Kickback Investigation*, THE CAMBODIA DAILY, Feb. 4, 2009.

¹⁹² Prak Chan Thul & Douglas Gillison, *KR Tribunal Chief Sole Witness in Closed Probe*, THE CAMBODIA DAILY, Feb. 11, 2009.

¹⁹³ D158/5/4/14, Case No. 002, Pre-Trial Chamber, Public Decision on the

and impartial trial.¹⁹⁴ The initial request was denied by the OCII, as they held that it was outside the scope of their limited jurisdiction, which they stated only allows them to investigate the specific allegations contained in Introductory Submissions.¹⁹⁵ The defence team appealed to the PTC. They submitted that the rejection of their request for investigation by the Royal Prosecutor in Phnom Penh demonstrated that local institutions are incapable of providing any meaningful remedy – and as such, the matter fell to the tribunal to investigate.¹⁹⁶ The PTC rejected these arguments, holding that where no reasons for a decision have been provided by local authorities, and the local appellate level remains seized of the matter, “it cannot be concluded, in the absence of stated facts, that local institutions do not possess the required capacity of impartiality to deal with the matter.”¹⁹⁷

The PTC ultimately held that remedies were available under Cambodian law, and as such the matter was not properly before the Chamber.¹⁹⁸ Notably, however, neither the OCII nor the PTC decision stated that kickbacks were not being paid, but rather the PTC concluded that possible bribes being paid by staff “cannot lead to the conclusion that these staff members can influence the Judges to manipulate the outcome of the procedure.”¹⁹⁹

Despite the ultimate decision of the PTC to not investigate, the kickback allegations were nonetheless taken very seriously by other organs within the ECCC and the United Nations. In March 2009, the kickback allegations were discussed at the ECCC Plenary session; a move which was welcomed by the head of the Defence Support Section as being “a comfort to all those who fear that the administration within the ECCC may fall prey to political compromise.”²⁰⁰ Similarly, a United Nations

Appeal of the Charged Person Against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action, para. 25 (ECCC Aug. 25, 2009), available at <http://www.eccc.gov.kh/en/documents/court/decision-appeal-charged-person-against-co-investigating-judges39-order-nuon-chea39s-> [hereinafter Public Decision on Appeal].

¹⁹⁴ *Id.* paras. 1 & 33.

¹⁹⁵ D158/5, Case No. 002, OCII, Order on Request for Investigative Action, paras. 8 & 10 (ECCC Apr. 3, 2009), available at <http://www.eccc.gov.kh/en/documents/court/order-nuon-cheas-lawyers-11th-request-investigative-actions>.

¹⁹⁶ Public Decision on Appeal, *supra* note 193, paras. 43 & 44.

¹⁹⁷ *Id.* para. 42.

¹⁹⁸ *Id.* para. 46.

¹⁹⁹ *Id.* para. 52.

²⁰⁰ Press Release, ECCC, Plenary Session of Judges of the ECCC, 2-6 March 2009, Defence Support Section: Press Statement (Mar. 6, 2009), available at http://www.eccc.gov.kh/sites/default/files/media/press_statement_DSS_EN.pdf.

audit of the ECCC's finances undertaken following the allegations was completed in May 2007. However, the findings of the audit were not released—a fact that attracted great criticism from the Open Society Justice Initiative.²⁰¹ Indeed, according to a press report, the audit had found that the ECCC was not immune to Cambodia's widespread corruption, and referred to a U.N. spokesperson's conclusion that “[i]t was a leap of faith to ever assume we could [be].”²⁰²

The possibility of bribes being paid caused no surprise amongst Cambodians, who recognize that the culture of corruption as a fact of life that reaches to the highest levels of the administration.²⁰³ More than two years later, and as the result of the allegations, an ECCC anticorruption package was finally reached between the United Nations and the Cambodian Government in August 2009.²⁰⁴ However, the Open Society Justice Institute (“OSJI”), an active NGO which monitors the Court, reported that significant structural gaps remained in the anti-corruption package that need to be addressed before it can be effective, including effective protection for whistleblowers.²⁰⁵ Indeed, as perverse thanks to the whistleblowers who risked their jobs to step forward and report the misconduct, all of the over 250 Cambodian staff went unpaid for several months while a U.N. oversight body in New York reviewed the allegations.²⁰⁶

Interestingly, despite the obvious negative aspect of kickbacks, the allegations resulted in praise of the Court from some NGOs. In a Joint Statement to the media, eleven NGOs put their support behind the Court and in particular behind the whistleblowers, stating that:

Staff of the ECCC who have come forward to give an account of such practices display courage and risk their personal and professional security and perhaps that of their family members. Without their courage, corruption cannot be addressed. They provide hope that the ECCC can serve

²⁰¹ Osborne, *supra* note 55, at 14.

²⁰² The *Phnom Penh Post* quoted a UN spokesman associated with the tribunal as having made this statement at the time the audit was completed. *Id.*, quoting Cat Barton, *UN private audit draws public ire*, PHNOM PENH POST, June 14, 2007.

²⁰³ *Id.* at 15.

²⁰⁴ OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: AUGUST 2009 [hereinafter OSJI 2009], available at http://www.soros.org/initiatives/justice/articles_publications/publications/eccc_2009112;D158.73 “Joint Statement” RGC-UN (29 February 2009).

²⁰⁵ *Id.*

²⁰⁶ Douglas Gillison, *ECCC Funding Delayed Over Graft Claims*, THE CAMBODIA DAILY, Aug. 6, 2008.

to prove real progress can be made to eliminate corruption from judicial institutions in Cambodia.²⁰⁷

Thus, despite the seriousness of the allegations, the NGOs concluded in their Joint Statement that “while the allegations of corruption are discouraging, we continue to believe that the ECCC can succeed in its goal of providing some justice for the people of Cambodia.”²⁰⁸

No sooner had the scandal over kickbacks receded than another scandal emerged, this time involving allegations of corruption against a judge. In January 2011, the Ieng Sary defence team sought the dismissal of a Trial Chamber Judge due to allegations of corruption, as the judge had allegedly acknowledged taking bribes or “cash gratuities from grateful litigants” in the past, in his former capacity as a judge in a local Battambang court.²⁰⁹

The Trial Chamber noted that despite provisions in Cambodian law regarding the ethical obligations of judges, such provisions have only recently been adopted in Cambodia and take time to implement. The Chamber went on to state that such shortcomings in ethical norms “should be viewed in the context of the various systemic weaknesses which have been observed within the Cambodian judiciary dating from the [Khmer Rouge] period, many of which have proved enduring. These weaknesses were well-known at the time of the ECCC’s creation and were among the reasons for its establishment in the first place.”²¹⁰

Having noted the existence of such “systemic weaknesses”, the Chamber went on to note that: “the ECCC Agreement and Law confer no mechanism upon the ECCC to directly appoint, discipline or remove Cambodian judges.”²¹¹ The Chamber concluded that “[a]lthough for the above reasons the ECCC cannot confront general questions of judicial independence and integrity directly, it can ensure that Accused in proceedings before it benefit from proceedings that are fair and conducted in accordance with international standards.”²¹² This conclusion is disheartening, as it appears that the Chamber is acknowledging that some of the Cambodian judges may be corrupt, but that they lack the power to do anything about it. At most, the Chamber can only try their best to counterbalance this corruption, and hope that the accused get a fair trial. The implications of this are particularly dire when assessing the Court

²⁰⁷ *Joint Statement, Address Graft Charges or Jeopardize the KR Tribunal*, PHNOM PENH POST, Sept. 10, 2008.

²⁰⁸ *Id.*

²⁰⁹ E5/3, *supra* note 188, para. 1.

²¹⁰ *Id.* para. 13.

²¹¹ *Id.* para. 14. Note however that the Chamber has the power to disqualify international judges, pursuant to Internal Rule 34. Internal Rules, *supra* note 151.

²¹² E5/3, *supra* note 188, para. 15.

from a human rights perspective. It seems that any hope of living up to international fair trial standards goes out the window with the tacit admission that Cambodian judges may not only lack independence, and be biased in favor of Hun Sen and the CPP, but may also be corrupt – and that the international judges have their hands tied.

All of the above criticisms of the Court, and the numerous scandals, have caused some human rights advocates to conclude that their worst fears about the ECCC were accurate, and that the U.N. truly compromised too much, by involving itself with a Court that has failed to uphold the rights of accused persons. From this perspective, the Court is a resounding “failure.”

IV. SUCCESSES OF THE ECCC

Notwithstanding the many critiques of the Court described above, the ECCC has facilitated many laudable achievements within Cambodian society. Namely, the ECCC has played a valuable role in the creation of a common history; ending impunity; capacity building amongst the Cambodian judiciary; rebuilding Cambodian faith in domestic institutions through extensive outreach about the court; and also allowing victim participation in the proceedings as civil parties. Based on a “social perspective,” the Court may ultimately be considered a “success” despite the aforementioned critiques.

A. *Creation of a Common History*

The ECCC serves an important function in creating a common history for the Cambodian people, which acknowledges the horror of what happened in the hopes that it will never be repeated. As noted by then-U.N. Secretary General Kofi Annan, tribunals “can help victim societies emerge from periods of conflict by establishing an official history of what happened and why.”²¹³ While knowledge of the Khmer Rouge regime and its atrocities may be common outside of Cambodia, much of the research about this period was conducted by non-Cambodian researchers in the English language, and is not widely accessible to Cambodians themselves.²¹⁴ Due to the inaccessibility of such scholarly research for the many (often illiterate) rural Cambodians, many Cambodians continue to struggle to understand what happened under the Khmer Rouge regime and why.²¹⁵ Moreover, the lack of knowledge about what actually took place

²¹³ Khan, *supra* note 97, at 24.

²¹⁴ Melanie Klinkner, *Forensic Science for Cambodian Justice*, 2 INT’L J. TRANSNAT’L JUST. 227, 238 (2008).

²¹⁵ From the author’s experience in Cambodia, very few Cambodians (even amongst the educated) have much understanding of what happened under the Khmer Rouge, and the commonly held belief seems to be that whatever happened was somehow the fault of the Vietnamese.

under the Khmer Rouge is a policy which has been actively and intentionally fostered by the Cambodian Government, which has adopted the official position that the past is best forgotten. The clearest example of this policy may be found in the infamous statement by Prime Minister Hun Sen that the time has come for Cambodia “to dig a hole and bury the past.”²¹⁶ This position serves the interests of the present Government which, as described above, is largely composed of former Khmer Rouge cadre.²¹⁷

Sadly, many Cambodian school children find it difficult to accept that such atrocities could occur in their country, and reportedly believe that their parents are simply exaggerating.²¹⁸ This is largely due to the fact that since 1999, Khmer Rouge history has not been part of the curriculum taught in Cambodian schools²¹⁹ due to political controversy over the way it is described.²²⁰ In fact, it was only in 2007 that the Cambodian Government finally sanctioned the use in schools of a book which, in a limited manner, described the actions and nature of the Khmer Rougeregime.²²¹ As a result of this amnesiac government policy, many victims of the Khmer Rouge continue to have unanswered questions about the regime. As queried by one victim: “Why did it happen? Why did we have to suffer this much? Why did our children destroy this country? What were they thinking?”²²² The interviewee continued that “[i]f we explain these crimes it will go part of the way towards answering those questions. And that is what many, many people really want.”²²³ This desire for an official accounting is a common theme among victims. According to a 2004 study by Suzanne Linton, many Cambodians (73.9 percent of those interviewed) hoped that the trials could provide some sort of agreed-upon truth.²²⁴ One of the ECCC’s primary objectives should be to answer such questions for the Cambodian public. The Court represents an important opportunity to dispel myths about the Khmer Rouge regime

²¹⁶ Osborne, *supra* note 55, at 11; *see also* Chhang, *supra* note 79, at 163.

²¹⁷ *Id.*, at 7-8; *see also* Stensrud, *supra* note 18, at 11.

²¹⁸ Skilbeck, *supra* note 58, at 444.

²¹⁹ Bates *in* Henham, *supra* note 1, at 187.

²²⁰ Skilbeck, *supra* note 58, at 444.

²²¹ The book was prepared by Khamboly Dy, under the sponsorship of the Documentation Center of Cambodia, and was published in 2007. The book will not be used as a formal text in Cambodian schools, although there is a suggestion that it may eventually gain that status. Osborne, *supra* note 55, at 9.

²²² Klinkner, *supra* note 214, at 237 (from a personal interview with Khmer Rouge victim).

²²³ *Id.*

²²⁴ Stensrud, *supra* note 18, at 11.

and create an accurate history about what happened, so that Cambodians—and indeed the entire global community—can learn from the experience in order that such a tragedy is never repeated again.

The Tribunal is so far living up to the expectation of creating a common history. For instance, during each day of Duch's trial, nearly 500 Cambodians packed the courtroom to listen and hear truths revealed.²²⁵ The trial was also broadcasted on a local television station—an important media in a country with an approximate sixty-five percent literacy rate.²²⁶ Most Cambodians watched the live television coverage or followed the trial through daily newspaper and radio coverage.²²⁷ Duch's trial in case 001 provided vivid testimony about what happened under the Khmer Rouge regime, including detailed explanations from Duch and others about why and how the atrocities were committed.²²⁸ In fact, in the civil law system adopted by the Court, Duch had many opportunities—which he took full advantage of—to speak directly to the court in order to explain himself and/or the testimony of witnesses.²²⁹ In this way, the trial has led to a much fuller understanding among both the Cambodian public and the academic community about the nature and reasoning behind the atrocities.²³⁰ While it is true that a court's version of history will inevitably be insufficient and fragmentary from a historian's perspective—due to the limitations placed on judges to only refer to facts that are legally relevant,²³¹ it is nonetheless an important start in a country which lacks an authoritative assessment that stands as Cambodia's domestic account of what happened.²³² At the very least, the trials may provide the impetus for Cambodians to create such an authoritative domestic history themselves.

B. *Ending Impunity*

Notwithstanding complaints about the ECCC's limited jurisdiction to try perpetrators, the trials are very important in ending the culture of impunity which had become pervasive in Cambodia. Like building a common history, accountability is also important to the victims of the offences. Chhang noted that when Cambodians were asked about their

²²⁵ OSJI 2009, *supra* note 204, at 2.

²²⁶ Chhang, *supra* note 79, at 171.

²²⁷ OSJI 2009, *supra* note 204, at 2.

²²⁸ *Id.*

²²⁹ *Id.* Notably, Duch has not denied the facts of what happened; rather, he claims that he was acting under duress and a superior's orders. Glaspy, *supra* note 37, at 149.

²³⁰ *Id.*

²³¹ Damaska, *supra* note 3, at 180.

²³² Bates *in Henham*, *supra* note 1, at 187.

feelings concerning trials, and whether the leaders of the Khmer Rouge should be brought to justice, three major themes surfaced: “(1) the lack of justice Cambodians have long felt, not only in terms of the crimes committed by the Khmer Rouge but also the lack of justice in their society as a whole; (2) their overwhelming desire for accountability; and (3) their need to participate in their own legal system.”²³³ Interviews conducted by the Documentation Centre of Cambodia (“DC-Cam”) over the past ten years have likewise revealed that many victims (fifty-seven percent) desire a legal accounting that only trials can bring.²³⁴ Clearly, the Cambodian public wants someone to be held responsible for what happened.

However, only five people have been indicted so far, and the vast majority of those who actually committed the crimes have been allowed to go free. While some assert that any indictment is better than none, the fact that lower level perpetrators will never be brought to account is frustrating: as one judge put it: “[y]ou may know who killed your father or sister and still see that person walking around. They will not be prosecuted.”²³⁵ After enjoying thirty years of impunity, the arrest, detention, and eventual trial of those who planned and instigated the entire operation should be embraced as the last chance to take the step of ending an enduring impunity for offenders,²³⁶ even if the step is a limited one. The fact that top leaders have been indicted demonstrates that even those in the upper echelons are not exempt from punishment—a fact which is not a given in Cambodia. The trials represent progress, however minimal, in fostering a culture of accountability and ending the impunity that Cambodia’s leaders have enjoyed thus far.

C. Capacity Building

One of the most commonly cited benefits of the ECCC is its role in capacity building amongst the Cambodian judiciary. By giving local lawyers and judges the opportunity to work within the international legal system, ostensibly free from corruption and subject to the rule of law, it is hoped that a culture of the rule of law may be fostered in Cambodia.²³⁷

²³³ Chhang, *supra* note 79, at 169.

²³⁴ *Id.* at 170.

²³⁵ Claussen, *supra* note 90, at 258.

²³⁶ Glaspy, *supra* note 37, at 154. Indeed, it must be kept in mind that time is running out; the Khmer Rouge leaders are elderly, and many of the highest-ranking officials (including Pol Pot and Ta Mok) have already died without being held accountable. If the impunity was to be ended, then the trials had to go forward while there was still time.

²³⁷ It is true that this argument is open to the criticism any “capacity-building” is ineffective if it is simply teaching local judges a system that violates the rights of the accused and does not meet internationally accepted fair trial standards. However, as shall be described, the legal system need not be perfect for there to be benefits that accrue—and simply teaching judges and lawyers to work within a legal system at all is progress

Given the depth of the corruption problems in the country, and the sheer lack of infrastructure and adequate legal training, many NGOs do not believe that it is a realistic hope for the ECCC to reform Cambodia's legal culture—as previous law reform efforts have been attempted and have failed.²³⁸ However, the ECCC has done much in terms of educating the national staff and judges who work at the Court, providing them with practical experience and hands on training.²³⁹

Critics argue that the ECCC has not done enough to build local capacities beyond the lucky few nationals who happen to work at the tribunal, arguing that “[b]y working concertedly with the legal profession, students, and the general public, the ECCC could make a greater contribution to promoting a positive legacy of respect for rule of law.”²⁴⁰ Notwithstanding the criticism that it could do more, it is important to note that the ECCC's presence does in fact do more than simply enrich its own staff; rather, as a by-product of the Court, other projects and NGOs have come to Cambodia in order to train lawyers. To name just one, Yale University's Cambodian Genocide Project has conducted many legal training courses in Cambodia.²⁴¹ Moreover, the ECCC's efforts at training its own Cambodian staff should not be belittled, as the existence of even a small cadre of Cambodian lawyers and judges trained in Cambodian domestic law to an acceptable international standard is significant.²⁴² Such legal professionals may then train others, thereby raising the bar of legal professionalism in Cambodia.²⁴³ The contribution of the ECCC to a culture of the rule of law within its own staff, as well as amongst Cambodian lawyers generally, is an important achievement that will be a lasting legacy of the ECCC's presence long after its doors have closed.

D. *Instilling Faith in Domestic Institutions*

Another contribution of the ECCC to Cambodian society is the tribunal's potential to “give Cambodians faith in their government and their future by guaranteeing that they will be treated equally before the law.”²⁴⁴ It is hoped that the Court's proximity to the affected population and the involvement of national judges will lead to a sense of local

compared to the situation before.

²³⁸ Stensrud, *supra* note 18, at 11; Bates *in* Henham, *supra* note 1, at 94.

²³⁹ Horsington, *supra* note 38, at 480.

²⁴⁰ OSJI 2009, *supra* note 204, at 11.

²⁴¹ Horsington, *supra* note 38, at 480.

²⁴² *Id.*

²⁴³ This is certainly more than can be said for the ad hoc tribunals, which were entirely UN-staffed and did not involve nationals at all, as described in Section II.

²⁴⁴ Chhang, *supra* note 79, at 158.

legitimacy and ownership,²⁴⁵ creating within Cambodians the pride and assurance that their own country is capable of providing justice and a fair trial. As stated by Higonnet:

For many in post-conflict states, seeing the local judicial system at least partially involved in important trials may be critical to rebuilding a sense of faith in the courts A hybrid tribunal demonstrates to local populations that local members of the judiciary can mete out justice. By contrast, marginalizing local institutions and actors undermines their authority and casts aspersions on their capabilities.²⁴⁶

Horsington similarly noted that:

[The suggestion] that Cambodian judges and officials cannot be trusted to conduct quality proceedings worthy of the losses sustained by the Cambodian people is an unconstructive attitude [and] . . . risks being perceived as a hegemonic and neo-imperialist It is important that the Cambodian people have the opportunity to see that their legal system, judiciary and government have the capacity to deliver real justice . . . the future of the Cambodian legal system ultimately lies in the hands of domestic Cambodian judges and court personnel. Any opportunity to train them to an international standard, and therefore increase their legitimacy in the eyes of the Cambodian people and the international public, must be welcomed.²⁴⁷

As a hybrid court with local staff, the ECCC has great potential to create a sense of legitimacy and to mobilize popular support, as well as fostering an appreciation amongst the Cambodian public that their own legal system can function fairly and impartially.²⁴⁸

However, the location of the trials in Cambodia's capital, Phnom Penh, has led to increased concerns about judicial independence. The location of the ECCC in Phnom Penh, the seat of the Cambodian Government, means that the Court is potentially susceptible to government manipulation. On the other hand, the physical proximity of the Court can go a long way in establishing legitimacy in the eyes of the people, as well as providing cultural accessibility. Indeed, the location of the Court has allowed for Cambodian staff, lawyers, and judges to mete out justice in Cambodia, under the watchful eye of Cambodians themselves, thereby

²⁴⁵ Stensrud, *supra* note 18, at 10.

²⁴⁶ Higonnet, *supra* note 15, at 362.

²⁴⁷ Horsington, *supra* note 38, at 481.

²⁴⁸ Higonnet, *supra* note 15, at 362.

contributing to a sense of local ownership and pride in the tribunal.²⁴⁹ The location of the Court facilities public and victim attendance and participation, which is incredibly valuable. As noted by Higonnet, “[f]or impoverished victims of atrocities in developing countries who wish to observe perpetrators being tried, or who just want to see how the tribunal functions, physical distance from the place where trials are conducted presents an insurmountable barrier.”²⁵⁰ The victims of mass atrocities, on whose behalf such internationalized tribunals purport to be working, should be able to take part in—or at least observe—the trials that are taking place ostensibly on their behalf.

Furthermore, the simple fact that the trials are conducted in a language that the local population can understand goes a long way towards creating legitimacy. Because of shared commonalities in language and culture, local investigators, litigators, judges, and administrators are likely to have a much easier time than their foreign counterparts understanding local concerns and criticisms, and responding strategically.²⁵¹ Moreover, working hand-in-hand with local colleagues provides international staff with the opportunity to gain greater sensitivity and insight into local issues, culture, and approaches to justice,²⁵² which will also further assist the tribunal in gaining legitimacy in the eyes of the people. However, none of these benefits can accrue to the local population unless they are aware of the tribunal and its accessible features. For this reason, outreach is of paramount importance.

E. *Outreach*

The ECCC has done a significant amount of outreach in order to educate the Cambodian public about the trials, convey that Cambodia is governed by the rule of law, and that the Cambodian judiciary is capable of delivering justice. Indeed, an oft-quoted justification for tribunals is that they create a culture of accountability and foster the rule of law.²⁵³ However, this can only occur if the bulk of the concerned population accepts the Court, or at a minimum refrains from actively undermining it.²⁵⁴ Outreach is an important part of this effort.

Learning from the failures of the ad hoc tribunals in this respect, as well as from the experience in Sierra Leone, the drafters of the ECCC decided to create a “public affairs” (“PA”) branch of the court with staff specifically dedicated to public outreach and disseminating information

²⁴⁹ ROBERSON & DAS, *supra* note 27, at 187.

²⁵⁰ Higonnet, *supra* note 15, at 363.

²⁵¹ *Id.* at 362.

²⁵² *Id.* at 363.

²⁵³ *Id.* at 359.

²⁵⁴ *Id.*

about the court.²⁵⁵ The PA has thus far created a base of materials and messages which include: a booklet entitled “[a]n Introduction to Khmer Rouge Trials,” a monthly newsletter, a series of four posters, stickers, and a website with audio clips of the trial.²⁵⁶ The PA also regularly sends representatives to NGO-sponsored forums, provides briefings and tours of the Court to visitors brought by NGOs, and interacts with local and international media.²⁵⁷

Initially, due to its limited budget, both the Public Affairs Section and the Victim’s Unit relied heavily on local NGOs to conduct the bulk of their outreach activities to the local population, a fact for which the ECCC was criticized.²⁵⁸ However, the Court appears to have learned from its mistakes in case file 001, and has come to see the need for a single, coherent outreach strategy rather than relying primarily on NGOs.²⁵⁹ As a result of new funding and lessons learned from the first case, the ECCC has done a much better job at outreach in 2010, and in a Press Release issued at the end of 2010, Public Affairs announced that a staggering 32,633 people had visited the ECCC in 2010.²⁶⁰ This included four hearing days during which the ECCC bussed in local people, as well as eighty-five outreach “Study Tour” group visits. These one-day group visits consisted of the ECCC providing free transportation to students, teachers and villagers from all across Cambodia to visit the ECCC courtroom and the Toul Sleng Genocide Museum. The purpose of the Study Tour program is to “foster understanding and awareness of the ECCC proceedings among regular Cambodians, and to increase the public interest in the proceedings.”²⁶¹ The Study Tour is currently offered twice per week for groups of 300-450 people on each day; so far, visitors from all twenty-four provinces and municipalities in Cambodia have participated. The Study Tour program continued in 2011 until the start of

²⁵⁵ Norman Henry Pentelovitch, *Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals*, GEO. J. INT’L L. 445, 465 (2009). The PA “conducts all forms of public communications, and is only informally divided into media relations, outreach, and public information sections.” *Id.*

²⁵⁶ *Id.* at 465.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 469. *See also* BZFO REPORT, *supra* note 116, at 20.

²⁵⁹ In Case 001, civil parties appeared in four groups represented by different NGOs, depending on which NGO had done outreach and recruited them. This led to confusion and delay in the proceedings, with 8 civil party lawyers appearing (2 co-lawyers for each of the groups). *See* BZFO REPORT, *supra* note 116.

²⁶⁰ Press Release, ECCC, 32,633 Persons Visited ECCC in 2010 (Dec. 30, 2010), *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC_30_Dec_2010\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_30_Dec_2010(Eng).pdf).

²⁶¹ *Id.*

the substantive hearing in case 002,²⁶² further contributing to the knowledge of the Court and (hopefully) developing faith in domestic institutions.

Aside from the Court's own impressive outreach activities, there are also between ten and twenty NGOs that engage primarily in outreach on behalf of the ECCC, thereby further contributing to general knowledge of the court among Cambodians. NGOs conduct similar activities to those of Public Affairs, such as bringing thousands of villagers from throughout the country to visit the Tuol Sleng Genocide Museum in Phnom Penh and the nearby Choeung Ek killing fields, and ending the tour at the ECCC itself, where villagers can ask questions to ECCC officials about the court and its procedures.²⁶³ Other programs are also being run by NGOs, such as more in depth "train the trainer" programs, whereby local people who are respected in their communities are taught extensively about the Khmer Rouge and the Court, in the hope that they will pass on what they have learned to other villagers.²⁶⁴ While it is true that the ECCC cannot take credit for such programs, it cannot be denied that the support of the PA section and their willingness to participate in such NGO-led activities further contributes to overall knowledge building in the country. As a combined result of the extensive ECCC and NGO programs, "[o]utreach activities aimed at informing people throughout the country about the existence of the ECCC have ensured that it is embedded in the conscience of the Cambodian population."²⁶⁵ Such "embedded"-ness is precisely the point of any international tribunal and is one of the most worthwhile and positive contributions possible for both Cambodia and the international community.

F. *Victim/Civil Party Participation*

Another important way in which the ECCC is reaching out to the local population is through victim participation as "civil parties" in the trials. The ECCC is the first internationalized tribunal to provide an active role for victims as civil parties in criminal proceedings.²⁶⁶ Not only can

²⁶² *Id.*

²⁶³ Chhang, *supra* note 79, at 171-72. See OSJI 2009, *supra* note 204, at 10. Open Society Justice Initiative has criticized the ECCC for failing to engage in sufficient outreach, arguing that the PA section's reliance on local NGOs is unacceptable and that the PA should adopt a more focused strategy of its own; while Pentelovitch argues that the PA relies on local NGOs yet simultaneously fails to take the critiques and suggestions of these groups to heart in any coherent manner in order to improve service provision represents a major weakness. Pentelovitch, *supra* note 255, at 469.

²⁶⁴ Chhang, *supra* note 79, at 172.

²⁶⁵ BZFO REPORT, *supra* note 116, at 61.

²⁶⁶ Press Release, ECCC, Statement from the Co-Investigating Judges: The Co-Investigating Judges Release the First decisions on Admissibility of Civil Parties in Case No. 002 1 (Aug. 30, 2010), *available at*

civil parties participate in all aspects of the trial, being entitled to substantially the same rights as the other parties (the defence and the prosecution),²⁶⁷ but they may also receive compensation in the form of “collective and moral reparations” if the accused are found guilty.²⁶⁸ While the model of victim’s participation at the ECCC was based on the French civil party system, the present civil party system at the ECCC is novel in the world, granting much more extensive rights to civil parties than even France does, due to the fact that the scope of the crimes are much broader than anything envisioned under domestic law.

Not only do the civil parties have enhanced procedural rights as compared to usual civil law systems, but the ECCC is also novel in terms of the sheer number of civil parties. In case 001 regarding S-21 Security Center alone, the Trial Chamber found fifty-eight applicants to be admissible as civil parties.²⁶⁹ In case 002, which covers crime bases across the country, there were 3988 civil party applications,²⁷⁰ along with more than 4000 “complaints” naming specific perpetrators.²⁷¹ While not all of the civil party applicants were accepted,²⁷² and many rejected

[http://www.eccc.gov.kh/sites/default/files/media/OCIJ-ECCC30Aug2010\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/OCIJ-ECCC30Aug2010(Eng).pdf).

²⁶⁷ Some of the more significant rights of civil parties, which are parallel to those of the other parties, include: the ability to propose amendments to the Internal Rules (r. 3.1); the Lead Co-Lawyers for the civil parties can create their own administrative regulations (r. 4.1); civil parties have the right to a lawyer, including free representation if they are indigent (r. 22 & r. 23 ter.); civil parties may apply to appoint experts (r. 31.10); they are entitled to protective measures (r. 29); the Civil Party Lead Co-Lawyers are entitled to notification of orders (r. 46.4), including issuance of a Closing Order (r. 67.5); during the pre-trial investigative stage civil parties may request investigative action (r. 55.10); they have full access to the case file (r. 69.3); they may appeal against certain orders of the OCIJ (r. 74.4); they may summon witnesses at trial (r. 80); and the Lead Co-lawyers may make Closing Statements and Rebuttal statements at Trial (r. 94). Internal Rules, *supra* note 151.

²⁶⁸ *Id.* r. 23 quinquies; *see also* Pentelovitch, *supra* note 255, at 468.

²⁶⁹ E188, Case No. 001, Trial Court, Judgment (ECCC July 26, 2010), *available at* <http://www.eccc.gov.kh/en/documents/court/judgement-case-001>. Four applicants were found to be civil parties as direct survivors of S-21 (*Id.* para. 645), and 54 applicants were accepted as parties on the basis of kinship to someone who died at S-21 (*Id.* para. 650).

²⁷⁰ Statement from the Co-Investigating Judges, *supra* note 266, at 1.

²⁷¹ *Id.*

²⁷² As a result of the narrow definition of a “civil party,” which requires victims to “show that they have suffered personal injury directly connected to one of the specific facts that the Co-Prosecutors have sent for investigation in their introductory and supplementary submissions,” some applications were declared to be inadmissible despite being clear ‘victims’ of the Khmer Rouge. *Id.* *See also* Internal Rules, *supra* note 151, at r. 23 bis. This was primarily because the allegations did not address one of the specific factual circumstances under investigation. *See e.g.* D418, OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province (ECCC Sept. 14, 2010); D414, OCIJ, Order on the Admissibility of Civil Party

applicants are currently appealing their rejection,²⁷³ the massive number of parties accepted to date remains impressive – particularly if you consider that no other internationalized tribunal has ever allowed a role for victims as civil parties.

Involving civil parties in the proceedings not only facilitates direct participation of the local population in the trials, but has also been found to have positive effects on the participants themselves. Participation as a civil party or witness provides a much-needed outlet for victims to tell their stories and for truth to emerge—much in the manner of a Truth Commission.²⁷⁴ Moreover, in one extensive study of civil party applicants in case 001, nearly half of the sample indicated that “the trial had a positive impact on their [personal] readiness to reconcile.”²⁷⁵ This was notably the case despite the fact that the Duch verdict was criticized by many as being too lenient. Among the civil party applicants surveyed, 36.7 percent stated that Duch’s sentence was “neither lenient nor severe,” and 20.9 percent were of the opinion that it was “severe” or “very severe” (7.6 percent), which indicates that the prison term was thought to be appropriate by many of the civil party applicants surveyed.²⁷⁶ Moreover, eighty-five percent stated that, with the knowledge they have today, they would still have applied as a civil party.²⁷⁷ Indeed, the study concluded that all in all, civil party applicants were “satisfied with their participation

Applicants from Current Residents of Kratie Province (ECCC Sept. 9, 2010); D411, OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Speu Province (ECCC Sept. 9, 2010); D403, OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Kandal Province (ECCC Sept. 6, 2010). However, the OCIJ stressed that a finding of inadmissibility as a civil party “should in no way bring into question the recognition that the applicants are victims.” Statement from the Co-Investigating Judges, *supra* note 266, at 2).

²⁷³ See e.g. D406/4, Appeal Register of Civil Party Lawyers against the Order on Admissibility of Civil Party Applicants from Current Residents of Phnom Penh (ECCC Oct. 27, 2010); D409/5, Appeal Register of Civil Party Lawyers against the Order on Admissibility of Civil Party Applicants from Current Residents of Svay Rieng Province (ECCC Oct. 27, 2010); D410/7, Appeal Register of Civil Party Lawyers against the Order on Admissibility of Civil Party Applicants from Current Residents of Prey Veng Province (ECCC Oct. 27, 2010); D419/11, Appeal Register of Civil Party Lawyers against the Order on Admissibility of Civil Party Applicants from Current Residents of Kampot Province (ECCC Oct. 27, 2010); D415/7, Appeal Register of Civil Party Lawyers against the Order on Admissibility of Civil Party Applicants from Current Residents of Battambang Province (ECCC Oct., 19, 2010).

²⁷⁴ Skilbeck, *supra* note 58, at 444.

²⁷⁵ In this study, surveys were conducted on more than 200 civil party applicants in Case 001, and it compared their responses in 2008 with their responses in a follow-up survey done in 2010. See BZFO REPORT, *supra* note 123, at 66.

²⁷⁶ *Id.* at 49.

²⁷⁷ *Id.* at 65.

at the ECCC,²⁷⁸ and 92.1 percent of respondents indicated that they appreciated the Khmer Rouge Tribunal.²⁷⁹ These findings indicate that participation as a civil party has, so far, been a positive step for applicants for which they have been grateful.

In all of the above ways, the ECCC is taking novel steps to engage in broader forms of social outreach that will leave a legacy of the rule of law long after the Court is finished.

V. CONCLUSIONS & ANALYSIS

It has been demonstrated that the ECCC is far from procedurally perfect: its record for corruption and political interference, as well as its limited procedural protections, mean that there are real concerns about the Court's ability to meet international fair trial standards. As such, the ECCC may be considered a "failure" if judged from a human rights perspective. However, the tribunal has met with success in other areas, laying the groundwork for lasting social change in Cambodia and its judicial system through such means as the creation of a common history, capacity building, ending impunity, building faith in the local judicial system, outreach, and allowing victims to participate as civil parties. From the author's perspective, these social goods are more valuable than procedural perfection, and the ECCC should be considered a success notwithstanding its flaws.

It may well be the case that the human rights standard is the wrong standard to apply in the case of Cambodia—as local understandings of "justice" may require something different than that which is proscribed by international criminal procedure. To argue that every country requires trials in the manner proscribed by international law, thereby mandating a one-size-fits all model for international criminal prosecutions, is to take the highly paternalistic view that "we know better than you what your country needs." Who is to say what Cambodia needs, or what system will work best in that country? As noted by Bates:

Cambodia is still today almost exclusively a Buddhist country. To understand Cambodian attitudes towards justice, accountability and reconciliation, the historical and religious context must therefore be appreciated. Skepticism of the international dimension of the trials, a desire to ground accountability in Buddhist principles, and an urge to seek reconciliation rather than retribution provide an alternative perspective on the EC. ...Such concepts of reconciliation can seem challenging to the tradition of prosecuting crimes of mass atrocity, but where such

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 54.

prosecutions are to be as limited as they are in Cambodia, this vast wealth of indigenous cultural and religious practice may be an extremely useful means of achieving society-wide understanding.²⁸⁰

Bates' observation underlines the fact that what constitutes "justice" according to the human rights perspective may not accord with Cambodian's notions of justice. Cambodia may not require the same degree of procedural formality that is required in other countries with longstanding legal traditions. Classen noted that the need to fit the ECCC into the Cambodian legal culture "may require stepping outside of the bounds of traditional transnational legal norms."²⁸¹ Similarly stated by Horsington: "[i]n order to provide a meaningful process of accountability, responses to atrocities such as those committed by the Khmer Rouge must reflect the peculiar social, cultural and historical culture of the country in which they occurred."²⁸² The ECCC does this by focusing more on reconciliation, truth-telling, and victim participation than on ensuring that the full panoply of procedural rights for accused persons required in Western trials are achieved. While some see this informality as a shortcoming, it may conversely be considered a success in adapting "justice" to meet local needs and expectations.

Additionally, the harsh reality is that many post-conflict societies (including Cambodia) are simply not in a position to provide a perfectly functioning judiciary that could live up to notions of the "fair trial" under international human rights law. As discussed above, Cambodia has been essentially lawless since the French left in 1953. With over fifty years of lawlessness, and the complete decimation of the legal profession under the Khmer Rouge, it is simply not realistic to expect Cambodia to produce the levels of procedural justice that could be attained in a functioning society with a longstanding culture of the rule of law. Moreover, such an expectation overlooks the fact that the civil—and common-law systems of developed countries, which scholars laud as protecting fair trial rights—themselves took many years to develop. It was only by going through the slow process of gradually developing fair and functional legal systems that "developed" states laid the foundation for the rule of law that they now enjoy. To expect a state like Cambodia to go from complete lawlessness to a perfectly functioning judiciary overnight is simply unrealistic, and

²⁸⁰ Bates *in* Henham, *supra* note 1, at 190-91.

²⁸¹ Claussen, *supra* note 90, at 258. However, he goes on to note that, pragmatically-speaking, while this may meet the demands of the Cambodian people, "will it suit the international community that holds the ECCC's purse strings?" *Id.* To date, it appears that the international community is content to keep funding the tribunal, notwithstanding that it does not meet certain international human rights standards. Though the question of the sustainability of the project is a good one.

²⁸² Horsington, *supra* note 38, at 478.

would deny Cambodia the benefit of gradual evolution which the developed states' legal systems have enjoyed. The incredible progress that Cambodia's judiciary has made in recent years should be celebrated, rather than dismissing the tribunal for its apparent failure to maintain minimum fair trial standards—a feat which took developed countries hundreds of years to achieve. This is not to say that we should not encourage further development of Cambodia's judiciary, but simply to put Cambodia's progress into historical context.

This argument is susceptible to the critique that it is patronizing to allow less developed countries (“LDCs”) such as Cambodia to exercise a lower standard of human rights in their trials, alluding that LDC populations consist of second-class citizens, undeserving of the full rights and legal protections enjoyed by citizens in “developed” states. This argument could be criticized as belittling because international human rights should apply universally, notwithstanding the fact that a country has a legacy of civil war and violating human rights. Proponents of the human rights view argue that the Court should be judged against a universal standard, and claim that justice should not be redefined to the point that it violating international human rights standards—as that cannot be justice.²⁸³ Minimum standards must be maintained in order to equally protect human rights everywhere.²⁸⁴

This article is not seeking to downplay the importance of human rights, or to argue that a double standard should apply to LDCs such as Cambodia. Rather, a pragmatic approach must be adopted; tribunals in LDCs should strive for procedural perfection that upholds the rights of accused. However, it must be recognized that even an imperfect system may nonetheless serve important social functions which should not be overlooked. The protection of human rights is desirable, but should not be the final goal; rather, the final goal should be to create lasting change in the society in question. While procedural perfection for all trials in every country is desirable, the fact remains that Cambodia simply does not have the training or the resources to live up to Western standards of a fair trial. If the ultimatum is that tribunals should function perfectly or else the U.N. will pull out, then it would mean that a country such as Cambodia—whose people desperately desire justice—could not have any trials at all, by any standards of justice.²⁸⁵ This would do a disservice to the population and

²⁸³ AMNESTY INTERNATIONAL, KINGDOM OF CAMBODIA: AMNESTY INTERNATIONAL'S POSITION AND CONCERNS REGARDING THE PROPOSED “KHMER ROUGE” TRIBUNAL 3 (Apr. 2003), *available at* <http://www.amnesty.org/en/library/asset/ASA23/005/2003/en/d48659f1-d6fc-11dd-b0cc-1f0860013475/asa230052003en.pdf>.

²⁸⁴ *Id.* at 4.

²⁸⁵ As discussed in the history section, Cambodia flat out rejected the U.N. proposal that the tribunal be located outside of Cambodia, giving the United Nations the ultimatum that the trials were to be run in Cambodia and under Cambodian law, or not at

the victims, as well as representing a missed opportunity for the international community to lay positive and lasting foundations of peace and the rule of law.

While it may be patronizing to say “it’s good enough for Cambodia,” it is equally patronizing to suggest that the international community does not believe the country capable of running fair trials, and so the U.N. should run trials on Cambodia’s behalf, outside of the country, and without its participation. The latter approach was taken in Rwanda and the former Yugoslavia, and while these tribunals were debatably “successes” in terms of living up to standards of international justice, they failed miserably in creating a lasting impact on the societies in question. Hybrid tribunals such as the ECCC were created in large part in reaction to these failures by the ad hoc tribunals. International criticism of the failures of the ICTY and ICTR demonstrates that achieving human rights standards alone is not enough; tribunals must prioritize outreach and social change, even if this comes at the cost of a procedurally perfect system. While the ECCC may not be procedurally perfect, it is nonetheless an improvement over the top-down implementation of international law that was practiced at the ad hoc tribunals, as it serves the important functions of addressing the needs of local constituents by such mechanisms as truth-telling, outreach, and capacity building. These are all valuable functions which serve the tribunal’s “primary audience”—the local population.²⁸⁶ Ultimately, when given a choice between attaining procedural perfection that is divorced from people’s daily lives (as occurred at the ad hoc tribunals), and a tribunal that is on the ground (getting into the nitty-gritty of the population’s lives) but procedurally-imperfect as a result, the latter is the better choice. It is the choice most likely to create an enduring impact that will create positive change in the post-conflict society rather than simply being a legal precedent on paper.

In conclusion, the ECCC has many shortcomings, but that is the price that the international community must pay for working hand-in-hand in developing countries whose practices may fall short of the international ideal. This grassroots type of work—on the ground in post-conflict societies—may get the U.N.’s shoes muddy, but it ultimately plants seeds for the rule of law and reconciliation directly into the thirsty ground of such parched societies. Cambodia has shown that it is willing to try to live up to international fair trial standards, if the U.N. is willing to come off of its lofty pedestal and get its hands dirty by tackling the messy issues of corruption and political influence. Far from tainting the U.N.’s good name, this exercise of creating a hybrid tribunal adds to the U.N.’s legitimacy as it strives to make real improvements in the legal systems of developing countries such as Cambodia. The ECCC certainly has

all.

²⁸⁶ Stensrud, *supra* note 18, at 13 (citing Kritz).

shortcomings when judged against the human rights yardstick, but when viewed in terms of its broader social impacts and contributions to Cambodian society, the ECCC may nonetheless be considered a “success” story.