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## A House Divided Against Itself Cannot Stand: The Case for Ending the Extraordinary Chambers in the Courts of Cambodia

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## COMMENT

# A HOUSE DIVIDED AGAINST ITSELF CANNOT STAND:<sup>1</sup> THE CASE FOR ENDING THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

AMANDA MORTWEDT OH\*

### INTRODUCTION

#### A. *A Brief Overview of the Khmer Rouge in the 1970s*

“Keav, why are the soldiers so mean to us?” I ask, clinging even more tightly to her. “Shhh. They are called Khmer Rouge. They are the Communists.” . . . Keav tells me the soldiers claim to love Cambodia and its people very much.<sup>2</sup>

Author Loung Ung’s personal narrative in *First They Killed My Father*, about one of the most tragic stories of our lifetime, recounts her personal experience of survival during the Khmer Rouge regime in Cambodia.

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1. Abraham Lincoln, A House Divided, Speech at Springfield, Illinois, (June 16, 1858) in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461–89 (Roy P. Basler ed., 1953).

\* LL.M., 2013, The Fletcher School of Law and Diplomacy, Tufts University; J.D., 2012, University of St. Thomas School of Law, Minneapolis, Minnesota. I would like to thank former U.S. ambassador-at-large for war crimes issues and current Special Expert to United Nations Assistance to the Khmer Rouge Trials (UNAKRT), David Scheffer, for his thoughtful presentation at the University of Minnesota Human Rights Center on February 8, 2012. Special Expert Scheffer gave me much to think about during the presentation and after briefly speaking to him. I would like to thank Rupert Abbott of Amnesty International for his contribution to this note by way of a Skype interview from Cambodia. Mr. Abbott was my supervisor at the UNAKRT in the summer of 2011. Mr. Abbott is now Amnesty International’s Asia Researcher on Cambodia, Laos and Viet Nam. In addition, I am grateful to my other colleagues at the Extraordinary Chambers in the Courts of Cambodia (ECCC), whom I met in the summer of 2011 in Cambodia. I am forever inspired by your dedication and passion to international justice. I would also like to thank my Fletcher colleague, Mike Eckel, for his insightful feedback based on his experiences as an ECCC writer and trial monitor. Finally, I would like to thank Professor Delahunty and my husband, Amos Oh, for their continual support.

2. LOUNG UNG, *FIRST THEY KILLED MY FATHER: A DAUGHTER OF CAMBODIA REMEMBERS* 22 (Harper Perennial 2006).

Sadly, she explains that her story “mirrors that of millions of Cambodians”<sup>3</sup> from 1975 to 1979. Loung states, “[i]f you had been living in Cambodia during this period, this would be your story too.”<sup>4</sup> Her memory of her sixteen-year-old neighbor’s sexual abduction by Khmer Rouge soldiers gives merely a sliver of the overall reality that so many endured:

[T]he soldiers grabbed Davi by her arms and pulled her from her mother’s shaking hug.

. . . .

The soldiers do not stop with Davi. They come many more nights and take many other girls. . . . It is her duty, they say, to marry soldiers and bear sons for the Angkar. . . . If they do not fulfill their duty, they are worthless and . . . [m]ight as well die so their food rations can go to those who contribute to rebuilding the country. There is nothing the parents can do to stop the abduction of these young girls because the soldiers are all-powerful. They have the power of judge, jury, police, and army. They have the rifles. Many girls choose to escape from their abductors by committing suicide.<sup>5</sup>

Although Cambodia is an incredible country, with a rich, fascinating history and culture, it is unmistakably marred by one of the worst stories of human violence in the last century. During Cambodia’s civil war in the 1970s, a communist party named the Khmer Rouge, officially known as the Communist Party of Kampuchea (CPK),<sup>6</sup> came into power on April 17, 1975<sup>7</sup> and established Democratic Kampuchea, the formal name for Cambodia under Pol Pot’s rule.<sup>8</sup> Under the Khmer Rouge regime between April 1975 and January 1979, approximately 1.7 million Cambodians died as a result of the regime’s policies. As the Khmer Rouge came to power, their “first word was a lie wrapped around a deep anger and hatred of the kind of society they felt Cambodia was becoming.”<sup>9</sup> One of the lies the Khmer Rouge told Cambodians was that America would bomb their cities.<sup>10</sup>

Simply stated, the Khmer Rouge wished to create a pure, self-reliant, sovereign Khmer nation.<sup>11</sup> In order to develop a “clean social system,” Pol Pot’s Khmer Rouge transformed the economic and social systems of the

3. *Id.* at xi.

4. *Id.*

5. *Id.* at 70–72.

6. *Chronology of Modern Cambodian History: Timeline of the Khmer Rouge’s Rise and Fall from Power*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/history/chronology-khmer-rouge-movement> (last visited Oct. 14, 2012) [hereinafter *Chronology of Modern Cambodian History*].

7. *Id.*

8. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 307 (3d ed. 2009).

9. Teeda Butt Mam, *Worms from Our Skin*, in CHILDREN OF CAMBODIA’S KILLING FIELDS: MEMOIRS BY SURVIVORS 11, 11 (Kim DePaul Dith Pran comp., 1997).

10. *Id.*

11. RATNER ET AL., *supra* note 8, at 306.

country by forcibly moving thousands of urban people to the countryside.<sup>12</sup> Many Cambodians felt they “were less than a grain of rice in a large pile,” and that their lives meant nothing to the “great Communist nation.”<sup>13</sup> The Khmer Rouge proclaimed, in fact, “[t]o keep you is no benefit, to destroy you is no loss.”<sup>14</sup> With that, the Khmer Rouge forced “millions of residents of Phnom Penh and other cities out of their homes,”<sup>15</sup> which resulted in what are called the “Killing Fields.”<sup>16</sup>

The regime’s “‘Four-Year Plan’ . . . called for the collectivization of all private property and placed high national priority on the cultivation of rice.”<sup>17</sup> This required Cambodians to work “more than [twelve] hours a day,” every day, “without adequate rest or food.”<sup>18</sup> Tragically, approximately one in every five Cambodians perished in less than four years’ time,<sup>19</sup> not only from intentional killings, but also from “[s]tarvation, disease, and physical exhaustion caused by inadequate food, medicine, and sanitation, and oppressive work requirements . . . .”<sup>20</sup> “Witnesses reported that the Khmer Rouge overseers routinely killed many thousands who refused or could no longer work, often murdering their family members as well.”<sup>21</sup>

The forced movement and systematic killings of almost two million people happened in less than four years. By the beginning of 1979, Vietnamese troops captured Phnom Penh and Khmer Rouge leaders fled to the Cambodia-Thai border.<sup>22</sup> Ironically, “[t]he United Nations recognized the Khmer Rouge as the only legitimate representative” during this time.<sup>23</sup> Nevertheless, Vietnam created a new government and did not withdraw its troops until 1990.<sup>24</sup> Shortly thereafter, Cambodian parties signed a peace agreement in Paris on October 23, 1991.<sup>25</sup> The Khmer Rouge, however,

12. *Id.* at 307.

13. Mam, *supra* note 9, at 12–13.

14. *Id.* at 13.

15. RATNER ET AL., *supra* note 8, at 308–09.

16. The “Killing Fields” are mass gravesites where the bodies of victims of the Khmer Rouge were left to disintegrate. “The best-known site of mass graves, littered with bones and pieces of ripped clothing, is Choeung Ek, about 10 miles south of Phnom Penh.” Andrew Buncombe, *Tears and Prayers as Khmer Rouge ‘Torturer’ is Taken Back to the Killing Fields*, THE INDEPENDENT, Feb. 27, 2008, <http://www.independent.co.uk/news/world/asia/tears-and-prayers-as-khmer-rouge-torturer-is-taken-back-to-the-killing-fields-787929.html>.

17. *Chronology of Modern Cambodian History*, *supra* note 6.

18. *Id.*

19. RATNER ET AL., *supra* note 8, at 313–14.

20. *Id.* at 342.

21. *Id.* (footnote omitted).

22. *Chronology of Modern Cambodian History*, *supra* note 6.

23. *Id.*

24. *Id.*

25. *Id.*

continued to exist until 1999—although it no longer controlled the government—when the last surviving leader, Ta Mok, was captured.<sup>26</sup>

### B. *Was There a Response to the Khmer Rouge Killings?*

In 2001, a “hybrid”<sup>27</sup> tribunal called the Extraordinary Chambers in the Courts of Cambodia (hereinafter “ECCC” or “Court”) was established to respond to the “atrocities crimes”<sup>28</sup> allegedly committed by the Khmer Rouge from April 17, 1975 to January 6, 1979. The creation of this court raised an important question: if a hybrid or ad hoc tribunal is established in a country without an independent judiciary and a rule of law, can it properly function and carry out its mandate while striving to bring about justice and leave a legacy? In the instance of the tribunal in Cambodia, the answer at this time appears to be “no.”

This Comment takes the position that unless the Cambodian government agrees to ensure that Case 002, the next case on the ECCC’s docket, is held to the highest of international standards, the United Nations (“UN”) should mandate the ECCC’s dismantlement immediately. This article explores the decreased credibility of this hybrid tribunal and discusses the obstacles that the ECCC faces from an outward, Western perspective; namely, my experience as an intern at the Court during the summer of 2011. Section I of this paper provides a brief overview of the establishment, mandate, and cases of the ECCC. Section II provides reasons for ending the ECCC unless Case 002 meets international standards. Section III looks at the arguments for pressing forward with the ECCC’s mandate and responds to them with counter arguments. Finally, Section IV offers a solution to achieving many of the ECCC’s goals and objectives.

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26. *Chronology of Modern Cambodian History*, *supra* note 6.

27. Hybrid tribunals are “called ‘hybrid’ because they involve the combined effort of the international community and the national institutions of the country where they [sic] crimes were committed. The hybrid tribunals typically employ both national and international judicial actors and incorporate both domestic and international law in their statutes.” David Cohen, “*Hybrid Justice in East Timor, Sierra Leone, and Cambodia: ‘Lessons Learned’ and Prospect for the Future*,” 43 *STAN. J. INT’L L.* 1, 2 (2007).

28. During the last decade of the twentieth century, one of the most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities—found its purpose as mass killings and ethnic cleansing consumed entire regions of the earth. The grand objective since 1993 has been to end impunity at the highest levels of government and the military not only for genocide, which captures the popular imagination with its heritage in the Holocaust, but also for the far less understood offenses of crimes against humanity and even war crimes. Because such crimes coexist as heinous acts in almost every atrocity zone, and because the criminal tribunals built in recent years have bundled them together in complex prosecutorial strategies, I use the term *atrocities crimes* . . . .

DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 2 (2012).

## I. BRIEF HISTORY AND OVERVIEW OF THE ECCC

A. *How was the ECCC Established?*

“The creation of the Cambodia Tribunal—spanning 1997 to 2006— took longer than the creation of any other international or hybrid criminal tribunal in the post-Cold War era.”<sup>29</sup> After the Cambodian atrocity crimes and subsequent civil war ended with the Paris Peace Accords in 1991,<sup>30</sup> Cambodia and the international community began to consider what, if any, response it would take to the fact that approximately 1.7 million people had perished under the Khmer Rouge regime.<sup>31</sup> David Scheffer, the first American war crimes ambassador-at-large,<sup>32</sup> “helped marshal State Department efforts in the U.N. Commission on Human Rights to formulate a request that U.N. Secretary-General Kofi Annan examine seriously any request from Cambodia for assistance to develop a mechanism of accountability for the atrocity crimes of the Pol Pot era.”<sup>33</sup> And Cambodia did, in fact, request such assistance of the UN shortly thereafter. On June 21, 1997, first Prime Minister Prince Norodom Ranariddh and second Prime Minister Hun Sen asked Annan “‘for the assistance of the United Nations and the international community in bringing justice to those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.’”<sup>34</sup>

The UN’s initial response to the atrocities and the request for assistance was mixed with pro-amnesty for some leaders of the Khmer Rouge in exchange for a return to peace within the country.<sup>35</sup> The Cambodian government, however, needed the UN’s assistance because it lacked the expertise and resources to effectively respond to the atrocities.<sup>36</sup> Still, many countries, even those that were relatively in favor of ending impunity of human rights violations or grave crimes in Cambodia, did not initially support an ad hoc tribunal like the ECCC.<sup>37</sup> In fact, in the initial planning and brainstorming phase, Scheffer

advised that it would be desirable to remove Pol Pot and perhaps other Khmer Rouge leaders from Cambodia, that they be transported to a country that exercised universal (or near-universal) jurisdiction over crimes against humanity, and that they ulti-

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29. *Id.* at 343.

30. *Id.*

31. *Id.*

32. *See id.* (explaining that negotiations towards establishing a criminal tribunal did not occur until 1997 because Cambodian society remained fragile and its political climate was explosive).

33. *Id.* at 345.

34. SCHEFFER, *supra* note 28, at 345–46.

35. *Id.*

36. *Id.* at 346 (explaining that Cambodia’s two prime ministers expressed the belief that UN assistance was necessary in their letter to Kofi Annan).

37. *Id.*

mately be brought to justice before some sort of U.N.-constituted or U.N.-approved judicial body.<sup>38</sup>

After Pol Pot's death on April 15, 1998, the US continued to support accountability for the crimes committed under the Khmer Rouge. President Clinton stated, "[a]lthough the opportunity to hold Pol Pot accountable for his monstrous crimes appears to have passed . . . [w]e must not permit the death of the most notorious of the Khmer Rouge leaders to deter us from the equally important task of bringing . . . others to justice."<sup>39</sup>

With the political will finally in favor of ending impunity among the Khmer Rouge senior leaders, the Cambodian government and the UN ultimately came to an agreement and established a "uniquely designed national Cambodian court" called the Extraordinary Chambers in the Courts of Cambodia.<sup>40</sup> The Court's founding legal documents are: 1) 2001 Law on the Establishment of the Extraordinary Chambers;<sup>41</sup> 2) 2004 Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers;<sup>42</sup> and 3) "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" (hereinafter "The Agreement").<sup>43</sup> The Agreement sets forth thirty-two articles, including the recognition of the establishment of the ECCC, and thus prevails over the Law on the Extraordinary Chambers.<sup>44</sup>

The Cambodian government and the UN had lengthy negotiations over the proper level of prosecution, but were eventually able to begin investigating the first accused person in 2007, nearly thirty years after the

38. *Id.*

39. Elizabeth Becker, *Pol Pot's End Won't Stop U.S. Pursuit of His Circle*, N.Y. TIMES, Apr. 17, 1998 at A15.

40. SCHEFFER, *supra* note 28, at 342.

41. *The ECCC Law*, ECCC, <http://www.eccc.gov.kh/en/tags/topic/79> (last visited Oct. 10, 2013).

42. Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers, Reach Kram No. NS/RKM/1004/006, (Oct. 27, 2004), available at <http://www.eccc.gov.kh/en/documents/legal/law-amend-2001-law-establishment-extraordinary-chambers> [hereinafter "Law to Amend"].

43. *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*, 2329 U.N.T.S. 41723, (June 6, 2003), available at [http://www.unakrt-online.org/Docs/Court%20Documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.unakrt-online.org/Docs/Court%20Documents/Agreement_between_UN_and_RGC.pdf) (entered into force Apr. 29, 2005) [hereinafter "The Agreement"].

44. See Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal* in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 207, 210 (Cesare P. Romano, Andre Nollkaemper, & Jann K. Kleffner eds., Oxford Univ. Press 2004) (explaining that Articles 2 and 31 of the Agreement bind Cambodia and the ECCC to rules of international law and that Cambodia may not use its domestic law as an excuse for any failure to carry out its obligations established by international law).

Cambodian atrocity crimes had ended.<sup>45</sup> However, “[a]ll the compromising and giving in by the United Nations to the demands of the Cambodian government . . . resulted in a structure of a dubious legal quality.”<sup>46</sup> An ECCC analyst observed that this lack of quality was in the procedural law and structure of the court system, which made the “tribunal prone to very long procedures, obstruction, and delaying of justice.”<sup>47</sup>

Because of the almost total lack of independence in the Cambodian domestic judiciary, there were serious concerns regarding its ability to arrive at a structure that would ensure that the ECCC could function independently and meet appropriate international standards.<sup>48</sup> At the dawn of the ECCC, one scholar remarked:

[o]f course, whether the Extraordinary Chambers are able to do what they were established for will depend to a large extent on the willingness of the Cambodian government to cooperate with the Extraordinary Chambers, on the integrity of the judges, investigating judges, prosecutors, and support staff. If the government gives its full cooperation and all of the officials of the Extraordinary Chambers fulfill their tasks with the impartiality and integrity required, the Extraordinary Chambers may achieve the result aimed for: bringing to justice those responsible for the ‘killing fields’ of Cambodia.<sup>49</sup>

And at this time in 2007, the ECCC was Cambodia’s and the international community’s best attempt to end impunity for atrocity crimes that occurred from 1975 to 1979 and to bring justice to the people of Cambodia who suffered so much under the Khmer Rouge.

### *B. What is the Role of the ECCC?*

The ECCC is a “special new court” designed to be independent of both the Cambodian government and the UN.<sup>50</sup> “It is a Cambodian court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.”<sup>51</sup> As is often noted, the ECCC is a unique court because “[i]t is a domestic Cambodian court with Cambodian legal procedure but is comprised of both Cambodian

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45. Kaing Guek Eav, alias Duch, was placed into provisional detention in 2007 by order of the Co-Investigating Judges of the ECCC. He was indicted in 2008, and his Initial Appearance took place in 2009. *Case 001*, EXTRAORDINARY CHAMBERS IN THE CTs. OF CAMBODIA, <http://www.eccc.gov.kh/en/case/topic/1> (last visited Feb. 16, 2013).

46. Meijer, *supra* note 44, at 232.

47. *Id.* at 232.

48. Cohen, *supra* note 27, at 27.

49. Meijer, *supra* note 44, at 232.

50. *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited Apr. 24, 2012).

51. *See id.*

and international lawyers and judges who enforce domestic and international laws.”<sup>52</sup>

### C. *Who is Accountable?*

A widely debated issue, the Cambodian government and the UN finally came to The Agreement after long and contentious debates that the ECCC would bring “to trial *senior leaders* of Democratic Kampuchea and 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 17 April 1975 to 6 January 1979.”<sup>53</sup> “This agreement took many years to reach and involved notoriously difficult and protracted negotiations over the issues of Cambodian ‘ownership of the process’ and independence.”<sup>54</sup>

Thus far, there has been one convicted in Case 001 and four accused in Case 002.<sup>55</sup> The ECCC has found one of the accused in Case 002—Ieng Thirith—unfit to stand trial and has ordered her release.<sup>56</sup> Additionally, the proceedings against her husband, Ieng Sary, were terminated due to his death on March 14, 2013.<sup>57</sup> There are five more individuals who are suspects in Cases 003 and 004, but their identities remain confidential because there are no requirements to make these public when no formal charges have been brought.<sup>58</sup> However, the individuals’ names are widely known amongst those familiar with the ECCC.

### D. *What Crimes can be Charged at the ECCC?*

The ECCC has subject-matter jurisdiction for the following crimes under Cambodian law: murder, torture, and religious persecution. Under international law, the ECCC may prosecute those accused of the following crimes: genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (such as mass killing or causing serious mental or physical harm intended to destroy all or part of a national,

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52. *The Khmer Rouge Tribunal: Resources for the Cambodian Diaspora*, THE ADVOCATES FOR HUMAN RIGHTS (Mar. 28, 2012) [http://www.theadvocatesforhumanrights.org/the\\_khmer\\_rouge\\_tribunal.html](http://www.theadvocatesforhumanrights.org/the_khmer_rouge_tribunal.html) (last visited Mar. 14, 2013).

53. *The Agreement*, *supra* note 43, at art. 1 (emphasis added).

54. Cohen, *supra* note 27, at 27.

55. *Kaing Guek Eav alias Duch Sentenced to Life Imprisonment by the Supreme Court Chamber*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-alias-duch-sentenced-life-imprisonment-supreme-court-chamber-0> (last visited May 28, 2013).

56. *Case 002*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/case/topic/2> (last visited May 28, 2013).

57. *Id.*

58. *Case 003*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/case/topic/286> (last visited May 28, 2013).

ethnic, racial, or religious group); crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court (such as mass murder, extermination, enslavement, deportation, torture, imprisonment, persecution on political, racial and religious grounds, rape and other crimes of sexual violence); grave breaches of the Geneva Conventions (such as unlawful treatment of civilians or prisoners of war, attacks on civilian targets, and destruction of educational or religious institutions); destruction of cultural property (such as theft or damage of historical buildings, archaeological sites, museums, art, and important book collections); and crimes against internationally protected persons (diplomats).<sup>59</sup>

### E. *What is the Appellate Process at the ECCC?*

The ECCC operates under the civil law system<sup>60</sup> and is uniquely organized with three judicial chambers—Pre-Trial Chamber, Trial Chamber, and Supreme Court Chamber—and an investigatory office called the Office of the Co-Investigating Judges (OCIJ). “The judicial chambers operate on the principle of supermajority, but the Co-Prosecutors and Co-Investigating judges are expected to work jointly by achieving consensus in their decision-making.”<sup>61</sup> The OCIJ is comprised of a national (Cambodian) judge and an international (other than Cambodian) judge and investigates facts from the Co-Prosecutors before it issues a Closing Order. Appeal of an OCIJ order is heard before the Pre-Trial Chamber, which has three national and two international judges.<sup>62</sup> The Trial Chamber makes decisions and judgments about whether an accused is guilty or innocent based on all parties’ presentation at trial.<sup>63</sup> The Trial Chamber is also made up of three national and two international judges.<sup>64</sup> Appeal of a Trial Chamber verdict is heard by the Supreme Court Chamber, which has four national and three

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59. *The Agreement*, *supra* note 43, at art. 9 says:

Crimes falling within the jurisdiction of the Extraordinary Chambers. The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

60. “[T]he ECCC procedural law is based upon Cambodian law which is itself heavily influenced by the French civil law system.” Michael Saliba, *Civil Party Participation at ECCC: Overview*, CAMBODIA TRIBUNAL MONITOR (Nov. 6, 2009), <http://www.cambodiatribunal.org/blog/2009/11/civil-party-participation-eccc-overview>.

61. Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. U. J. INT’L HUM. RTS. 165 ¶ 19, (2010).

62. *Organizational Chart of the ECCC*, ECCC, <http://www.eccc.gov.kh/sites/default/files/ECCCchart-%20December2012.pdf> (last visited Feb. 18, 2013). *See also* Law to Amend, *supra* note 42, at 6–7.

63. *Judicial Chambers*, ECCC, <http://www.eccc.gov.kh/en/judicial-chamber> (last visited Feb. 18, 2013).

64. *Organizational Chart of the ECCC*, *supra* note 62; *see also* Law to Amend, *supra* note 42, at 3.

international judges.<sup>65</sup> Interestingly, the Supreme Court Chamber has the ability to increase a sentence by overturning the sentencing decision of the Trial Chamber, as happened in Case 001 before the Supreme Court Chamber.<sup>66</sup>

## F. *What are the Cases at the ECCC?*

### 1. *Case 001*

In the first case, Case 001, Kaing Guek Eav (alias “Comrade Duch”) the former Chairman of the Khmer Rouge S-21 Security Prison in Phnom Penh, was the only defendant.<sup>67</sup> During the Khmer Rouge regime, Duch was “head of Democratic Kampuchea’s ‘special branch’—the Santebal. The Santebal was in charge of internal security and running of the prison camps.”<sup>68</sup> “Duch was transferred from military detention and placed in provisional detention” on July 31, 2007, and had his initial hearing before the Trial Chamber in February 2009.<sup>69</sup> On July 26, 2010, the Trial Chamber found Duch guilty of two international crimes.<sup>70</sup> First, he was found guilty of crimes against humanity for persecution on political grounds, which subsumed the crimes against human extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts.<sup>71</sup> Second, he was found guilty of grave breaches of the Geneva Conventions of 1949; namely, willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.<sup>72</sup>

In 2010, the Trial Chamber sentenced Duch to thirty-five years of imprisonment but then reduced his sentence to thirty years because of Duch’s unlawful detention from 1999 to 2007.<sup>73</sup> Duch also received credit for time already served in detention, thus resulting in nineteen total years of impris-

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65. *Organizational Chart of the ECCC*, *supra* note 62; *see also* Law to Amend, *supra* note 42.

66. *Case 001*, ECCC, <http://www.eccc.gov.kh/en/case/topic/1> (last visited Oct. 13, 2012) [hereinafter “*Case 001*”].

67. *Id.*

68. Northwestern University School of Law & Youk Chhang, *Accused Persons: Kaing Guek Eav (a.k.a. “Comrade Duch”)*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodia-tribunal.org/tribunal-background/accused-persons> (last visited Oct. 14, 2012) [hereinafter “*Accused Persons*”].

69. *Case 001*, *supra* note 66.

70. *Id.*

71. *Accused Persons*, *supra* note 68; *see also* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 5, 2–3 [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

72. *See id.* at art. 6; *see also Accused Persons*, *supra* note 68.

73. *Case 001*, *supra* note 66.

onment.<sup>74</sup> The Trial Chambers judgment was appealed by both sides; however, in February 2012, the Supreme Court Chamber actually increased Duch's prison sentence from thirty-five years to life imprisonment.<sup>75</sup> "A life sentence is the maximum penalty available under the law for crimes against humanity and grave breaches of the 1949 Geneva Convention, which set forth standards of international law for the humanitarian treatment of the victims of war."<sup>76</sup> The Supreme Court Chamber overturned the Trial Chamber's sentencing decision and reasoned that too much weight had been given to Duch's illegal detention.<sup>77</sup>

While Cambodians and the international community, including Steven Rapp, US ambassador-at-large for war crimes issues,<sup>78</sup> seem generally satisfied with a life sentence for Duch, the human rights community in Cambodia, and elsewhere, pointed out that the sentence appeared to violate Duch's right to be given credit for his illegal detention before being transferred to detention at the ECCC. According to Article 9(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party,<sup>79</sup> "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."<sup>80</sup> Theary Seng, a Cambodian human rights activist who lost her parents under the regime, stated, "[i]t feeds into my fear that this was really a political decision to make Duch the scapegoat for the whole regime. . . . We're only starting to chip away at the atrocities of the Khmer Rouge era. Duch should not be made the face of the Khmer Rouge regime."<sup>81</sup>

74. *Id.*

75. *Id.*

76. Maly Leng & Samean Yun, *Cambodia: Duch Appeal Rejected, Gets Life*, UNHCR, Feb. 3, 2012, <http://www.unhcr.org/refworld/country,,,KHM,,4f3a2520c,0.html>.

77. *Case 001*, *supra* note 66.

78. Mark McDonald, *A Life Sentence for 14,000 Deaths*, INTERNATIONAL HERALD TRIBUNE, Feb. 6, 2012, <http://rendezvous.blogs.nytimes.com/2012/02/06/a-life-sentence-for-14000-deaths/>.

79. *The Agreement*, *supra* note 43, at art. 13: Rights of the Accused.

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence [sic]; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her. 2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence [sic] counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

80. International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A(XXI), U.N. Doc. A/6316 (Dec. 16, 1966) <http://www2.ohchr.org/english/law/ccpr.htm#art14> [hereinafter "ICCPR"].

81. Bridget Di Certo, *Judge's Order Draws Praise*, THE PHNOM PENH POST, Feb. 13, 2012, [http://issuu.com/cofficer/docs/120220.news.scan.13-19\\_february.\\_phnom\\_penh\\_post](http://issuu.com/cofficer/docs/120220.news.scan.13-19_february._phnom_penh_post).

But in Duch, the perfect soldier of the revolution, the government and the judiciary found the perfect villain to make into a symbol of justice. Yet while the difference between a sentence of 30 years and one of life in prison also carries much symbolism, there is no sentence commensurate with the crimes.<sup>82</sup>

Whether Duch will continue as the face of the Khmer Rouge regime may be dictated, in part, by the outcome of Case 002.

## 2. *Case 002*

In the second case, Case 002, there are two named defendants: (1) Nuon Chea, also known as “Brother No. 2” and former Deputy Secretary of the Communist Party of Kampuchea; and (2) Khieu Samphan, former Head of State.<sup>83</sup> The defendants were indicted on charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949, and genocide, by killing Vietnamese and Cham.<sup>84</sup> The initial hearing of Case 002 occurred on June 27, 2011, and the opening statements commenced on November 21, 2011.<sup>85</sup> In 2011, the ECCC’s Supreme Court Chamber stayed the charges against a fourth defendant, Ieng Thirith, former Minister of Social Affairs, after the Trial Chamber reaffirmed its previous conclusion that she remained “unfit to stand trial due to a progressive, dementing illness.”<sup>86</sup> On September 13, 2012, the Trial Chamber reaffirmed an earlier decision that found Ieng Thirith unfit to stand trial and ordered her released from detention at the ECCC.<sup>87</sup>

## 3. *Cases 003 and 004*

Cases 003 and 004 officially have no named defendants. In 2011, however, disgruntled staff in the OCIJ leaked court documents shortly before they tendered their resignation at the ECCC.<sup>88</sup> As a result, in Case 003, also known as the “military case,” it is widely believed that the defendants will

82. Thierry Cruvellier, Op-Ed., *The Khmer Rouge’s Perfect Villain*, N.Y. TIMES, Feb. 8, 2012, [http://www.nytimes.com/2012/02/09/opinion/the-khmer-rouges-perfect-villain.html?\\_r=2](http://www.nytimes.com/2012/02/09/opinion/the-khmer-rouges-perfect-villain.html?_r=2).

83. *Case 002*, ECCC, <http://www.eccc.gov.kh/en/case/topic/2> (last visited May 28, 2013). Note: The proceedings against Ieng Sary were terminated on Mar. 14, 2013 due to his death on the same day.

84. *Id.*

85. *Id.*

86. ECCC, Supreme Court Chamber, *Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith*, Case File/Dossier No. 002119-09-2007 ECCC-TC/SC, [http://www.eccc.gov.kh/sites/default/files/documents/court/2013-01-04%2010:44/E138\\_1\\_10\\_1\\_5\\_7\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/court/2013-01-04%2010:44/E138_1_10_1_5_7_EN.PDF).

87. ECCC, Trial Chamber, *Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011*, Case File/Dossier No. 002119-09-2007/ECCC/TC, Page 19, [http://www.cambodiatribunal.org/sites/default/files/documents/E138\\_1\\_10\\_EN.pdf](http://www.cambodiatribunal.org/sites/default/files/documents/E138_1_10_EN.pdf).

88. Email with former ECCC court reporter who wishes to remain anonymous [hereinafter “Court Reporter”].

include Navy Commander Meas Muth and Air Force Commander Sou Met.<sup>89</sup> In Case 004, it is suspected that the defendants will include three Khmer Rouge regional officials: Ta An, Ta Tith, and Im Chaem.<sup>90</sup>

In both Cases 003 and 004, there is strong disagreement between the Cambodian government and the UN regarding whether the suspects should be investigated.<sup>91</sup> The Cambodian government “has openly stonewalled on new prosecutions beyond the current trial . . . [Prime Minister] Hun Sen bluntly told visiting U.N. Secretary-General Ban Ki-moon that new cases would ‘not be allowed.’”<sup>92</sup> Former International Reserve Co-Investigating Judge Kasper-Ansermet publically supported reopening the investigations in these cases, which is the suspected reason behind the Cambodian government’s opposition to his appointment as the replacement International Co-Investigating Judge at the ECCC. The Cambodian government—specifically the Supreme Council of the Magistracy—cited Judge Kasper-Ansermet’s so-called unprofessionalism for using his Twitter account to discuss the ongoing events at the ECCC.<sup>93</sup> Although the government, specifically Hun Sen, “has warned of the potential for civil war . . . opposition likely stems from the fact that many Khmer Rouge officials . . . are now in government and fear that investigators could dredge up new evidence of war crimes.”<sup>94</sup> As one former UN staff member, who wishes to remain anonymous, said, “[n]o one believes 003 and 004 will happen. It’ll take 002 until the last accused dies. The Court could die with the accused.”<sup>95</sup>

## II. ARGUMENT FOR ENDING THE ECCC UNLESS THE CAMBODIAN GOVERNMENT FULLY COOPERATES

As I developed my thesis that the UN should mandate the ECCC’s completion unless Case 002 is held to international standards, I was hesitant to take a position that might be interpreted as supporting impunity. How-

89. Sok Khemara, *Suspect Questions ‘Most Responsible’ Tribunal Mandate*, VOICE OF AMERICA – KHMER (Aug. 16, 2011), <http://www.cambodiatribunal.org/sites/default/files/news/suspectquestionsmostresponsibletribunalmandate.pdf>.

90. Stéphanie Giry, *Necessary Scapegoats? The Making of the Khmer Rouge Tribunal*, THE NEW YORK REVIEW OF BOOKS (July 23, 2012), <http://www.nybooks.com/blogs/nyrblog/2012/jul/23/necessary-scapegoats-khmer-rouge-tribunal/> (last visited May 28, 2013).

91. Di Certo, *supra* note 81 (“Investigations into Case 003 were abruptly closed in April last year by Cambodian co-investigating judge You Bunleng and German judge Siegfried Blunk. After they closed investigations, international co-prosecutor Andrew Cayley said a serious amount of investigation into the government-opposed case still needed to be undertaken.”).

92. Mike Eckel, *Cambodia’s Kangaroo Court: Why isn’t the U.N. Tribunal to Prosecute Genocidal Khmer Rouge War Criminals Going After More Bad Guys?*, FOREIGN POLICY, (July 20, 2011) [http://www.foreignpolicy.com/articles/2011/07/20/cambodias\\_kangaroo\\_court](http://www.foreignpolicy.com/articles/2011/07/20/cambodias_kangaroo_court).

93. Prak Chan Thul, *U.N. Says Won’t Change Judge for Cambodia War Crimes Court*, REUTERS, Jan. 25, 2012, <http://www.reuters.com/article/2012/01/25/us-cambodia-rouge-idUSTR E80012K20120125>.

94. Eckel, *supra* note 92; *see also* Chan Thul, *supra* note 93.

95. Telephone interview with former UN staff who wishes to remain anonymous [hereinafter “UN Staff 1”].

ever, upon conducting further research and interviewing ECCC staff and former staff, I realized that that this idea—of ending the ECCC—was not new. Some argue that the UN should take the position, supported by donors, that it is impossible to pursue Cases 003 and 004 because the UN is in Cambodia, and the Cambodian government does not want the cases to proceed. They argue that in order to provide justice to the victims of the Khmer Rouge, all energies should be focused on Cases 001 and 002.<sup>96</sup>

While accountability for the almost-incomprehensible human violence that occurred under the Khmer Rouge regime is important, fair trial rights and human rights in Cambodia are just as important. One of the Defence Support Section's (DSS) duties was to continually remind the Court that the ECCC should conduct trials against the accused—no matter who those accused were—in a manner that upheld fair trial rights, such as the right to be innocent until proven guilty and the right to be tried by an impartial tribunal.<sup>97</sup> It was not necessarily about the individuals accused, though:

One of the reasons for having the tribunal in Cambodia was so that it could have a positive impact on the domestic justice system, and that was recognized way back by the UN, by Kofi Annan, in the early 2000 . . . and even the Royal Government of Cambodia is on record saying it recognizes the tribunal will play this role of improving the Cambodian justice system.<sup>98</sup>

Although the UN was aware a year-and-a-half ago that the Cambodian government did not want to go through with any other cases after Case 002, it chose to drive on, knowing that the government was interfering and the political will was against the UN after Case 002. The UN seemed to have the mentality that it had come this far and did not want to turn back. Rupert Abbott, stated:

Amnesty International has not got to the point of asking for the UN to withdraw from the ECCC. Obviously there are a lot of people—including us—who want the tribunal to succeed, for the victims of the Khmer Rouge. But there could come a point—if the trials were clearly not meeting international fair trial standards—when we would consider making that call.<sup>99</sup>

I argue that the stakes in terms of upholding international human rights are too high to maintain the status quo at the ECCC. The UN should mandate the dismantling of the tribunal in Cambodia, conditioned upon cooperation and zero interference from the Cambodian government, for several reasons: 1) Cambodia lacks an independent judiciary because the

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96. Telephone interview with former UN staff who wishes to remain anonymous [hereinafter "UN Staff 2"].

97. See ICCPR, *supra* note 80, at art. 14.

98. Telephone interview with Rupert Abbott, Southeast Asia Researcher, Amnesty International (Mar. 20, 2012).

99. *Id.*

Cambodian government interferes with the ECCC; 2) as a result, the ECCC is not operating in accordance with international standards; 3) dysfunction at the ECCC decreases its credibility; and 4) the ECCC's resources are very constrained and do not meet the needs of the victims in delivering an international standard of justice.

#### A. *Cambodia Lacks an Independent Judiciary*

Because Cambodia lacks an independent judiciary, it cannot be said that the judges at the ECCC are impartial and able to deliver fair verdicts against the accused. It is well known that the Cambodian judiciary has a “dubious reputation . . . [that] is widely perceived as corrupt, lacking impartiality and independence.”<sup>100</sup> It was not uncommon to read in the local newspapers about a trial conducted *in absentia* or corrupt judges taking bribes.<sup>101</sup> The norm appeared to be that the domestic courts could not be trusted to deliver a fair verdict, and it was truly in a person's best interest to stay far away from the government-controlled court system.<sup>102</sup> In fact, “the Cambodian court system has been used to protect the interests of the ruling party and its supporters, and to persecute those challenging the status quo.”<sup>103</sup>

It could be assumed the ECCC would not face a similar issue of bias and corruption among its judges—simply because the judges at the Court, as part of a UN-backed tribunal, would be held to a higher standard and a more rigorous selection process than the judges in Cambodia's domestic courts. As it turned out, I arrived at the Court about a week after almost the entire support staff in the OCIJ quit because of their criticism of International Co-Investigating Judge Blunk's management of Cases 003 and 004. Apparently, “[the] judges closed the investigation into Case 003, despite having taken no basic steps, such as questioning the suspects, identifying crime sites, or notifying victims' lawyers, to advance the case.”<sup>104</sup> Judge Blunk was seen as being partial and “siding” with his counterpart, National Co-Investigating Judge You Bunleng, because he agreed, by issuing an order, with Judge Bunleng that Cases 003 and 004 should not go forward.<sup>105</sup> Allegedly, interviews of victims, suspects, and other relevant people were

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100. Meijer, *supra* note 44, at 218.

101. Briefing Paper, Cambodian League for the Promotion and Defense of Human Rights (LICADHO), In *Absentia 2012: An Update on Cambodia's Inmate Transportation Crisis & the Right to Appeal*, 3, April 2012, <http://www.licadho-cambodia.org/reports.php?perm=165>.

102. Mark Ellis, *The ECCC – A Failure of Credibility*, 2012 INT'L BAR ASS'N REP. 7, available at [http://www.ibanet.org/Human\\_Rights\\_Institute/Work\\_by\\_regions/Asia\\_Pacific/Cambodia.aspx](http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Cambodia.aspx). (“The Cambodian Constitution provides for the separation of powers, including an independent judiciary, and specifies that the legislative and executive branches shall not have judicial power.”).

103. Interview with Rupert Abbott, *supra* note 98.

104. Eckel, *supra* note 92.

105. UN Staff 1, *supra* note 95.

not conducted, despite the Office of the Co-Prosecutors (OCP) having delivered extensive files to the OCIJ.<sup>106</sup> One of the interesting points to this development, I found, was that there was a degree of acceptance that the National Co-Investigating Judge was partial and under the Cambodian government's control. It seemed that no one truly felt the National Judge would be impartial, but had hoped the International Judge would be, and therefore, would ensure proper investigations be conducted in Cases 003 and 004.

Additionally, there was also criticism about the President of the Trial Chamber Judge Nil Nonn, because Judge Nonn had a reputation for accepting bribes in the past. "Allowing Judge Nil Nonn to sit on the ECCC panel, despite his established history of accepting bribes, self-evidently contravenes international standards protecting the integrity and independence of the judiciary."<sup>107</sup> If the President of the Trial Chamber has a past riddled with accusations of corruption, how can the ECCC demand justice or hope to deliver credible verdicts? If the summer of 2011 is indicative of what appears to be an on-going issue of a lack of judicial independence in the Court, the UN should mandate the ECCC's completion, unless the Cambodian government agrees to cease interference at the ECCC and work to uphold international trial standards. If this condition is not met, the UN risks being forever tied to supporting a judicial system that does not adhere to international standards in judicial selection and fair and impartial trials.

### *B. The Cambodian Government Interferes with the ECCC*

The Cambodian government is uncooperative and interferes with the ECCC, making the Court unable to effectively and efficiently carry out its mandate of bringing senior leaders of the Khmer Rouge and those most responsible for atrocity crimes to justice. "Hun Sen is a shrewder politician than most people realize, and he's gotten better at the game as he has gotten older and as Cambodia has gotten wealthier. I think he's played the game to manipulate the court since before its creation and throughout its existence."<sup>108</sup> Because of the Cambodian government's both overt and covert interference, the UN should end its assistance to the ECCC, thus terminating the functioning of the ECCC. "For years, the Cambodian government has bluntly shown that it wants the judicial system to operate under its tight control. The regime has protected at least two suspects who were ranked higher than Duch in the Khmer Rouge hierarchy."<sup>109</sup>

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106. *Id.*

107. Ellis, *supra* note 102 ("These standards are set out in the 2002 Bangalore Principles of Judicial Conduct (BPJC)," and "[t]he Cambodian Constitution provides for the separation of powers, including an independent judiciary, and specifies that the legislative and executive branches shall not have judicial power.").

108. Court Reporter, *supra* note 88.

109. Cruvellier, *supra* note 82.

Prime Minister Hun Sen, himself a former low-level cadre of the Khmer Rouge with ties in the court to National Co-Prosecutor Chea Leang, niece of Deputy Prime Minister Sok An,<sup>110</sup> has openly called for the termination of the ECCC after Case 002—meaning no investigations of Cases 003 and 004.<sup>111</sup> Even though the government should not be involved in the cases at the ECCC, there is no doubt that its will has tremendous impact on the Court.

Beginning with the formation of the ECCC, there were signs of government interference with the Court. Although the government agreed to a tribunal, it wanted to maintain a significant presence and ownership of the Court, hence the later agreed-upon “hybrid” nature of the court that operated in Cambodia as a uniquely *Cambodian* court, as its name—Extraordinary Chambers in the Courts of Cambodia—suggests. Because certain members of the government were also former members of the Khmer Rouge, the government and the UN had lengthy negotiations about the level of prosecution the ECCC would have. These former Khmer Rouge-turned government officials did not want to relinquish Cambodian control and ownership and face potential prosecution down the line for their involvement in the Khmer Rouge.

While these concerns by the Cambodian government do not appear to be explicitly expressed, there are signs of this viewpoint in the words of Hun Sen. The Prime Minister has repeatedly stated that Cambodia is better off only trying a few people for the deaths of 1.7 million because to prosecute others would disrupt society.<sup>112</sup> Even the ECCC itself, through its website managed by its Public Affairs Office, explains that it limits prosecution to senior leaders and those most responsible because:

Over the years, tens of thousands of ordinary Khmer Rouge soldiers have defected to the government. They have nothing to fear from this court. The policy of national reconciliation is still in place. . . . [O]nly the most culpable people will be tried under the law governing the Extraordinary Chambers.<sup>113</sup>

By not prosecuting people who had worked as low- and mid-level leaders of the Khmer Rouge, the ECCC, in accordance with Cambodia’s political will, emphasizes to civil society that peace and reconciliation are

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110. Peter Maguire, *Brother Duch in the Dock*, N.Y. TIMES, Nov. 2, 2009, [http://www.nytimes.com/2009/02/12/news/12iht-edmcguire.2.20142831.html?\\_r=0](http://www.nytimes.com/2009/02/12/news/12iht-edmcguire.2.20142831.html?_r=0).

111. Deirdre Montgomery, *Cambodian PM Says Case 002 Will Be Final Case at ECCC*, INTERNATIONAL CRIMINAL LAW BUREAU, (Oct. 29, 2010), <http://www.internationallaw-bureau.com/index.php/eccc-update-cambodian-pm-says-case-002-will-be-final-case-otp-files-appeal-in-duck-vss-prepares-for-case-002-and-more/>.

112. Peter Maguire, *Opinion, Cambodia’s Troubled Tribunal*, N.Y. TIMES, July 28, 2010, [http://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html?\\_r=0](http://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html?_r=0).

113. ECCC, *Who Will Be Put on Trial?*, <http://www.eccc.gov.kh/en/faq/who-will-be-put-trial> (last accessed Apr. 28, 2012).

important priorities. The language of The Agreement<sup>114</sup> has come under recent scrutiny because of the disagreement within the ECCC, specifically the OCIJ, about whether or not to investigate additional Khmer Rouge members in Cases 003 and 004. In an email to the Phnom Penh Post, Rupert Abbott of Amnesty International stated that the tribunal's reputation was being shattered by the government's obstruction of Cases 003 and 004.<sup>115</sup>

The Cambodian government's continuing obstruction of Cases 003 and 004 amounts to impunity for serious crimes committed during the period of Khmer Rouge rule in Cambodia. . . . Further, this obstruction is undermining the reputation of the Tribunal and therefore risks tainting—in the eyes of the victims and the Cambodian public—judgments issued in Cases 001 and 002.<sup>116</sup>

Unfortunately, government interference in Cambodia should come as no surprise. The real issue for the ECCC, then, is whether to push forward in the investigations or acknowledge that a hybrid tribunal cannot effectively function in a country with a corrupt and uncooperative government. As Dame Silvia Cartright, a Trial Chamber judge, stated in 2009:

Countries where the rule of law is respected and where their citizens can be sure of a fair trial are those in which the independence of the courts and judges is guaranteed. . . . Comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence are therefore to be deplored.<sup>117</sup>

The ECCC cannot, and should not, continue in the same path it is headed because of the government's interference in the Court. Rather, the UN should adjust its course in Cambodia without accepting defeat for the victims of the Khmer Rouge. Now is not the time to maintain the status quo when thousands of survivors and their families are relying on a method of justice that upholds international human rights standards. The Senior Legal Advisor of the Documentation Center of Cambodia, Joh Ciorciari, emphasized that:

[C]orruption is one issue that simply cannot be ignored. The ECCC, for example, cannot make survivors of Democratic Kampuchea whole for the abuses they suffered. What the [tribunal] can do is deliver a set of credible verdicts and the promise of

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114. *The Agreement*, *supra* note 43.

115. Di Certo, *supra* note 81.

116. *Id.*

117. Maggie Tait, *Interference Deplored by Judge*, STUFF N.Z., (Apr. 5, 2009), <http://www.stuff.co.nz/world/asial2315921/Interference-deplored-by-judge>; *see also* Application for Summary Action Against Hun Sen Pursuant to Rule 35 at p. 7, *Trial of Nuon Chea*, No. 002/19-09-2007-ECCC-TC, (Feb. 22, 2011), *available at* <http://www.eccc.gov.kh/en/document/court/application-summary-action-against-hun-sen-pursuant-rule-35>.

a judicial system that will better protect and uphold [a nation's] rights in the future.<sup>118</sup>

C. *The ECCC is Not Operating in Accordance with International Standards*

*"We all have to accept that with regards to Cases 003 and 004, the tribunal has not met international standards of justice."*<sup>119</sup>

The ECCC is not operating in accordance with international standards, specifically Articles 9, 14, and 15 of the ICCPR and the 2002 Bangalore Principles of Judicial Conduct (BPJC). As mentioned, Article 9 calls for credit to be given to Duch for his time in illegal detention by stating, "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."<sup>120</sup> Article 14 discusses fair trial rights, and Article 15(2) states: "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."<sup>121</sup> The Preamble of the BPJC declares, in part:

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.<sup>122</sup>

Because there is reason to believe that the ECCC has not followed these international standards, the UN should mandate that the Court be terminated unless the government is willing to abolish, in good faith, its cur-

118. Mark Ellis, *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, 2011 INT'L BAR ASS'N REP. 43, available at [http://www.ibanet.org/Human\\_Rights\\_Institute/Work\\_by\\_regions/Asia\\_Pacific/Cambodia.aspx](http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Cambodia.aspx).

119. For victims to have closure and feel that justice is being delivered, the proceedings need to be recognized internationally as having met a certain standard, and it needs to be felt that all sides have had a chance to tell their stories and that the truth has come out. And if there's interference, if certain people are not being investigated and others are for political reasons . . . that taints the justice that is being delivered by the tribunal, and that's concerning for reconciliation, in terms of how the victims perceive the tribunal's rulings.

Interview with Rupert Abbott, *supra* note 98.

120. ICCPR, *supra* note 80, at pt. III, art. 9, subpt. 5.

121. *Id.* at pt. III, art. 15, subpt. 2.

122. The Bangalore Principles of Judicial Conduct, U.N. Doc. E/CN.4/2003/65 (Jan. 10, 2003) available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

rent interference. Although “everyone wants there to be accountability . . . [t]he feeling is that with the political control, international standards of justice are not being met.”<sup>123</sup>

The unfortunate truth is that the Cambodian government selected the national judges who are likely under the auspices of the Cambodian government. This is a reality that the UN was aware of when it responded to Cambodia’s request for assistance in bringing justice to those responsible for the crimes committed during the Khmer Rouge regime. As discussed earlier, however, the UN conceded to certain issues involving Cambodian “ownership” of the Court in an effort to end impunity. However, for the UN to take any action to address government interference, it needs the support of international donors.

As time continues, it becomes more evident that without fair, impartial, and independent judges—national or international—the Court cannot uphold fair trial rights and therefore function in accordance with international human rights standards. Hans Correll, the chief U.N. Negotiator during the creation of the tribunal, echoed such concerns:

I did not want . . . the U.N. emblem to be given to an entity that did not . . . represent the highest international standards. But of course what we predicted seems to have developed into the problem that we were concerned would occur.<sup>124</sup>

As a result, the UN should mandate that the ECCC discontinue before human rights, its reputation, and the Court’s credibility are further eroded.

#### *D. Dysfunction at the ECCC Decreases its Credibility*

Although the ECCC is touted as a one-of-a-kind hybrid tribunal, some critics call the ECCC nothing more than a “kangaroo court.”<sup>125</sup> As mentioned, the Cambodian government’s position is that the ECCC’s investigations into Cases 003 and 004 should cease and desist. Because of its position, the government has been able to effectively undermine the ECCC’s functioning and therefore reduce its credibility in the eyes of many. As the dysfunction in the Court has continued for the past six months or more, so too will the erosion of the Court’s credibility. Therefore, the UN should end the ECCC sooner rather than later.

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123. Interview with Rupert Abbott, *supra* note 98.

124. Eckel, *supra* note 92.

125. BLACK’S LAW DICTIONARY, 409 (9th ed. 2009) (defining Kangaroo Court as “1. A self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied; 2. A court or tribunal characterized by unauthorized procedures, esp. as to render a fair trial impossible; or 3. A sham legal proceeding.”).

In October 2011, German Judge Siegfried Blunk resigned as the International Co-Investigating Judge in the OCIJ.<sup>126</sup> Judge Blunk cited government interference as his reason for leaving the Court.<sup>127</sup> Interestingly, Judge Blunk had been the subject of much discussion because he, along with the national co-investigating judge, had closed the investigations into Cases 003 and 004.<sup>128</sup> Blunk's motives and rationale were questioned because it was widely believed that the prosecution had delivered a plethora of evidence to his office so that investigations could continue.<sup>129</sup> There was speculation that Judge Blunk may have been bribed by the Cambodian government or succumbed to pressure from his national counterpart and the government. If Blunk's resignation was not enough to hurt the ECCC's functioning, then his replacement's lack of an appointment by the Cambodian government and almost-forced resignation was.

During Judge Blunk's appointment, Swiss Judge Laurent Kasper-Ansermet was the reserve co-investigating judge for the OCIJ, and should have been appointed to replace Judge Blunk as the International Co-Investigating Judge.<sup>130</sup> The government and Judge Bunleng clashed with Kasper-Ansermet immediately, as Judge Kasper-Ansermet said he would resume investigations into Cases 003 and 004.<sup>131</sup> Court observers called for Kasper-Ansermet's official appointment by the Cambodian government in accordance with the ECCC's legally binding agreement between the government and the UN. According to Article 5, paragraph 6 of The Agreement, Judge Kasper-Ansermet *must* be appointed to fill Blunk's former position as the co-investigating judge.<sup>132</sup> The local and international communities waited for the Cambodian government to go through the motions in appointing the Judge, but suspected the government would be uncooperative.

Despite The Agreement, however, Kasper-Ansermet was rejected by Cambodia's Supreme Council of the Magistracy on Friday, January 13, 2012.<sup>133</sup> The government's unwillingness to cooperate and adhere to The

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126. *UN Calls on Cambodia to Appoint International Judge to Genocide Court*, UN NEWS CENTRE, (Jan. 20, 2012), <http://www.un.org/apps/news/story.asp?NewsID=40992&Cr=cambodia&Cr1=> (emphasis added).

127. Seth Mydans, *Judge Quits Tribunal in Khmer Rouge Inquiry*, N.Y. TIMES, Oct. 10, 2012, [http://www.nytimes.com/2011/10/11/world/asia/judge-quits-cambodia-tribunal.html?\\_r=0](http://www.nytimes.com/2011/10/11/world/asia/judge-quits-cambodia-tribunal.html?_r=0).

128. UN Staff 2, *supra* note 96.

129. *Id.*

130. *Judge Resigns Citing Interference*, RADIO FREE ASIA, Mar. 19, 2012, <http://www.rfa.org/english/news/cambodia/resignation-03192012165430.html>.

131. Bridget Di Certo, *Judge Wants to Restart Case 003*, THE PHNOM PENH POST, Feb. 10, 2012, <http://www.phnompenhpost.com/national/judge-wants-restart-case-003>.

132. *The Agreement*, *supra* note 43, at art. 5.

133. Statement by UN Secretary-General, *Secretary-General Says Decision by Cambodia not to Appoint Current Reserve Judge to Position on Extraordinary Chambers 'Matter of Serious Concern'*, (SG/SM/14072) Jan. 20, 2012, available at [www.un.org/News/Press/docs/2012/sgsm34072.doc.htm](http://www.un.org/News/Press/docs/2012/sgsm34072.doc.htm).

Agreement created additional dysfunction and decreased credibility of the ECCC.

Shortly after being officially notified by the Cambodian government that it had not selected Judge Kasper-Ansermet as the international co-investigating judge, the UN's Secretary-General's spokesperson said:

'[t]his is a matter of serious concern,' . . . stating that the decision is a breach of the 2003 agreement between the UN and the Government that set up the court, which states that the person appointed to fill this particular vacancy *must* be the reserve international co-investigating judge.<sup>134</sup>

As an indication that the ECCC needed dire attention, on January 18, 2012, David Scheffer, former Ambassador-at-Large for War Crimes, was selected by UN Secretary-General Ban Ki-Moon as the Special Expert to advise the United Nations Assistance to the Khmer Rouge Trials (UNAKRT) on the ECCC. I had the opportunity to briefly meet David Scheffer about a month later, and after he thanked me for my contribution to the ECCC, he said that he did not know what the future held for the Court.<sup>135</sup>

However, after becoming increasingly frustrated with the recalcitrance of his Cambodian colleague and the resulting "dysfunctional situation within the ECCC," Judge Kasper-Ansermet resigned on March 19, 2012.<sup>136</sup> In the accompanying press release, Judge Laurent Kasper-Ansermet said that the "present circumstances no longer allow him to properly and freely perform his duties."<sup>137</sup> A day after, Abbott called the Judge's resignation "really disastrous," and said that the "interference [by the government] continues."<sup>138</sup> No replacement judge had been appointed as of April 29, 2012, when this article was initially drafted, thus affirming the Court's dysfunction and causing its credibility to suffer.

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134. *UN Calls on Cambodia to Appoint International Judge to Genocide Court*, UN NEWS CENTRE, (Jan. 20, 2012), <http://www.un.org/apps/news/story.asp?NewsID=40992&Cr=cambodia&Cr1=> (emphasis added).

135. In person discussion between Author and David Scheffer, Special Expert to UNAKRT (Feb. 8, 2012).

136. Jennifer Prestholdt & Amy Bergquist, *Justice Delayed May Be Justice Denied for Minnesotan Cambodians*, MINNPOST, (Mar. 27, 2012), <http://www.minnpost.com/community-voices/2012/03/justice-delayed-may-be-justice-denied-minnesota-cambodians>.

137. Judge Laurent Kasper-Ansermet, *Press Release from the International Reserve Co-Investigating Judge*, (Mar. 19, 2012), <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>.

138. Interview with Rupert Abbott, *supra* note 98.

E. *The ECCC's Resources are Very Constrained and do not Meet the Needs of the Victims in Delivering an International Standard of Justice*

It is often said that hybrid tribunals, by virtue of being located in-country, have a greater chance of making effective contributions to reconciliation, stability, development of the rule of law, and capacity-building. It remains at present an open question if any courts can successfully promote reconciliation and stability. It is clear, however, that they cannot if they are not given the human and financial resources, and the long-term commitment to develop programs that might have such a positive effect.<sup>139</sup>

The ECCC has now operated in Cambodia for more than its originally mandated three years, and it has had significant problems securing and allocating resources throughout this time. Essentially, the ECCC seems to have the weight of Cambodia on its shoulders. The Court is supposed to deliver justice, prosecute and hold certain Khmer Rouge members accountable (many years later) for atrocity crimes, provide relief/closure/compensation/truth to victims, preserve history, and serve as a model for the Cambodian domestic judiciary, all while operating in a country with a knowingly corrupt government and adhering to international justice standards. These expectations of the Court are realistically insurmountable challenges. It would be difficult enough for a robustly funded court to achieve any of these goals, but it is even more challenging for the ECCC, given the political factors and lack of resources.

As a result, the Court's constrained resources do not meet the needs of the victims in delivering an international standard of justice. As discussed prior to the Court's commencement, "[i]t will be a major challenge for the Court to develop effective and comprehensive programs in these and other areas within the budgetary strictures it faces."<sup>140</sup> Five years later, this is still the case, and the UN should mandate the completion of the Court if it—more accurately, donor countries and Cambodia—cannot contribute more funds and provide better oversight for legacy initiatives.

1. *Budget Structure*

When the UN first contemplated forming the tribunal, it wanted to ensure the Court was cheap and quick. Initially, the Court was only supposed to last three years,<sup>141</sup> never to be a permanent fixture in Cambodia's court system. Its "total three year budget of \$56.3 million,"<sup>142</sup> paled in comparison to heftier-funded international tribunals like the International Crimi-

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139. Cohen, *supra* note 27, at 36.

140. *Id.* at 32.

141. *Id.* at 30.

142. *Id.* at 31.

nal Tribunal for [the former] Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which “each operate with an annual budget of over \$200 million.”<sup>143</sup> The ECCC’s budget “divid[ed] the financial obligations between a national government and an international organization like the United Nations,” and “rel[ie]d on the fundraising of two fundamentally different institutions, each of which has its own priorities and concerns.”<sup>144</sup> Early on, Cambodia could not fund its obligations as agreed to under Article 44 of the ECCC Law,<sup>145</sup> and other countries stepped in. Japan, in fact, is the ECCC’s largest donor country.<sup>146</sup>

Before the 2012–2013 budget was passed in March 2012, it was widely known at the ECCC that the Cambodian staff at the Court was not being paid due to budget constraints and the budget approval process.<sup>147</sup> The Cambodian staff already receives substantially less pay than their international counterparts, and the lack of resources at the Court certainly must have had an impact on the Court’s overall ability to function in a time when half of its employees were experiencing financial hardship. Additionally, if the lack of reliable pay was not enough for Cambodian staff, it is also rumored that Cambodian staff must pay part of their income back in bribes to Cambodian officials in order to maintain their employment at the ECCC.<sup>148</sup>

## 2. *Lessons Not Learned*

The fact that the Court is relatively underfunded creates problems not just among the staff, but arguably more importantly, among the general Cambodian civil society. As noted, the ECCC was established, in part, to assist in Cambodian domestic legal reform and to assist victims in the reconciliation and truth-finding process. The ECCC, thus, had “legacy” initiatives built into its limited budget for 2012–2013, which is “encouraging,” but so far—it seems—has not applied many of the lessons learned from the other ad hoc tribunals about how to ensure a positive legacy.<sup>149</sup> Former UN

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143. Alison Kamhi, *Private Funding for Public Justice: The Feasibility of Donations to the Cambodian Tribunal*, 48 HARV. INT’L L.J. 581, 584 (Summer 2007) (citing David Wippman, *The Costs of International Justice*, 100 AM. J. INT’L J. 861, 861 (2006)).

144. *Id.* at 581.

145. *See id.* at 584–85.

146. *See ECCC Financial Outlook*, ECCC, <http://www.eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2031%20October%202012.pdf> (last visited Feb. 18, 2013) (showing Japan alone has contributed 49% of the ECCC’s budget as of Oct. 31, 2012).

147. *See Ravipal Bains, ECCC Staff Protest Over Unpaid Wages*, LAWYER BLOG, (Jan. 13, 2013), <http://ilawyerblog.com/eccc-staff-protest-over-unpaid-wages/> (reporting that the Cambodian staff of the ECCC “lodged a protest with the tribunal’s Office of Administration over unpaid wages”).

148. *See Virorth Doung & Sophal Ear, Transitional Justice Dilemma: The Case of Cambodia*, PEACE & CONFLICT REV. vol. 4 issue 1, n. 27 (Fall 2009), available at [http://www.review.uceapce.org/index.cfm?opcion=0&ejemplar=18&entrada=89#\\_ftn27](http://www.review.uceapce.org/index.cfm?opcion=0&ejemplar=18&entrada=89#_ftn27); *see also* Christopher Dearing, *An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia*, [www.genocidewatch.org/cambodia.html](http://www.genocidewatch.org/cambodia.html).

149. Interview with Rupert Abbott, *supra* note 98.

employee Rupert Abbott, who took the lead on the legacy in the DSS and was the Officer-in-Charge of that section for a number of months in 2010–2011, said the Court has failed to learn three key legacy lessons: 1) develop a comprehensive legacy strategy at the outset; 2) provide a strong legacy oversight structure to plan and coordinate between the ECCC sections; and 3) engage Cambodian civil society organizations working to improve the Cambodian justice system in the planning and implementation of legacy initiatives.<sup>150</sup>

The Court's failure to apply these lessons undermines Cambodian domestic legal reform and civil society because it means that any legacy initiatives from the Court are "rather ad hoc in nature themselves" and "rely solely on individuals with a passion and interest to do it."<sup>151</sup> Abbot continued:

I think that there was concern that the ad hocs—the ICTY and the ICTR, and also other hybrid tribunals like the Special Court for Sierra Leone—did not have enough done in terms of legacy, so there was hope that this Court could be a real driver for change in that regard.<sup>152</sup>

But without a systematic, structured legacy strategy that includes working with non-governmental organizations (NGOs) already committed to legal reform and capacity-building, the ECCC cannot hope to leave a positive, enduring legacy in Cambodia.

### III. COUNTER ARGUMENTS TO CONTINUING THE ECCC AFTER CASE 002

There are plenty of good reasons to continue the ECCC until it has fulfilled its legal mandate of bringing to justice senior leaders of the Khmer Rouge and those most responsible for atrocity crimes committed from April 1975 to January 1979. However, many of these reasons rely on these two assumptions: 1) any trial is better than no trial, and 2) there is cooperation from the government in a hybrid tribunal. In this case, though, the Cambodian government is knowingly interfering with the ECCC and the ECCC is not operating under international human rights standards. Supporting accountability through a hybrid tribunal should be premised on the Cambodian government's cooperation in having a trial that meets international standards. From a human rights perspective, "sometimes having no trial is better than having flawed trials,"<sup>153</sup> and this section counters some of the common arguments for continuing the ECCC.

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

A. *There are Alternatives to Bringing Justice to Cambodia*

The primary argument for continuing the ECCC is that it should persist in prosecuting people in order to bring justice to the victims of the Khmer Rouge. Supporters of this argument cite The Agreement made between the government and the UN, and point out that there was never a set number of people who would be prosecuted based on the wording of the mandate. This is a fair argument, but given that the government continues to interfere in this tribunal, other alternatives of justice can and should be explored in Cambodia. As the Court drags on, people will continue to ask:

At what point does justice delayed appear to the victims of mass atrocities to be justice denied? It is difficult for the victims and others who suffered in a prolonged and horrible conflict to understand why justice takes so long and may not even be completed in their lifetimes.<sup>154</sup>

Alternatives to the tribunal may be more agreeable to the Cambodian government, which seems to be worried that its own members will face prosecution by the ECCC. One such alternative to the ECCC is to strengthen non-governmental organizations (NGOs) in Cambodia that have similar goals as the Court—assisting victims, educating the domestic judiciary, and preserving history. The Documentation Center of Cambodia (DC-CAM), for example, has documented thousands of pages of the Khmer Rouge history,<sup>155</sup> and the UN can work with DC-CAM to set the record straight and educate Cambodian society about genocide, crimes against humanity, its judicial system, and the Khmer Rouge atrocities so that this history is not repeated. This will do more good than prosecuting three to ten people for the deaths of 1.7 million innocent people.

Although supporters of the ECCC want it to serve as a role model for the judiciary and leave a legacy in Cambodia, the reality is that the Court is actually setting a bad example for the Cambodian judiciary right now. Because of the lack of judicial independence and the political will of the government, the ECCC is being interfered with and showing the domestic judiciary that the government can get what it wants through control and interference. “The biggest hurdle in the way of the Court leaving a positive legacy is really, really negative demonstration effects of ongoing political interference.”<sup>156</sup> As a result, the UN should focus on supporting survivors of the Khmer Rouge through outreach and legacy projects, but with a strict stance against government interference.

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154. Cohen, *supra* note 27, at 5.

155. See Documentation Center of Cambodia, <http://www.dccam.org/> (last visited May 7, 2012) [hereinafter DC-CAM].

156. Interview with Rupert Abbott, *supra* note 98.

*B. The Cambodian Government Should be Stopped from Continuing to Get what it Wants*

The UN's strict stance against government interference should not be words alone; the UN "ha[s] to follow up their words with action."<sup>157</sup> While the UN possibly should be more concerned about attaching its name, reputation, and resources to a Court that has ongoing, destructive corruption, the worry is understandable that ending the Court now would send a dangerous message to the Courts that the government can get what it wants.<sup>158</sup> Another way to put it, however, is that the UN is already showing the Cambodian government that it (the government) can continue to get what it wants in a hybrid, international tribunal like it does in its domestic courts. Without action, the UN risks its reputation and the real ability to assist survivors of the Khmer Rouge regime in alternative methods that still promote truth-finding and healing for victims.

Because the Cambodian government is arguably already getting what it wants, the UN should terminate the operation of the ECCC loudly, not quietly, unless the government immediately cooperates and upholds human rights in Case 002 before the Court. Currently, the UN is dealing with feuds at the Court with "strong words," but those words are allowing the government to continue quietly undermining the Court.<sup>159</sup> The UN should loudly send the message to the government that there are repercussions at the UN and in the international community for corruption and interference at the Court. Namely, donor countries of the UN should advocate against Cambodia obtaining a non-permanent seat on the UN Security Council for 2013 and 2014, something Cambodia badly wants this year.<sup>160</sup> Furthermore, donor countries can cut funding to certain "economic development" programs in Cambodia until the government can be persuaded to uphold human rights and fair trial practices. "It's not as if the Cambodian government holds all the cards. They're aware that if this tribunal fails, and it collapses, it's not going to be perceived very well by the Cambodian people, certainly not perceived well by other countries in the international community."<sup>161</sup>

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157. *Id.*

158. "Observers say the damage the court has suffered as a result of the feud, the lack of transparency, and the confusing legal orders could be mitigated by how the Case 002 trial plays out—and whether Cambodian society embraces the court's decisions in the end." Eckel, *supra* note 92.

159. "The diplomat was blunter about the United Nations. 'The U.N. has to make things work; it has to get its house in order,' said the diplomat, who was not authorized to speak to the media. 'Where is the institution of the court' in this feud?" *Id.*

160. Chun Sakada, *Foreign Minister Gathers Diplomats for Security Council Bid*, VOICE OF AMERICA KHMER NEWS (Jan. 23, 2012), <http://www.voanews.com/khmer-english/news/Foreign-Minister-Gathers-Diplomats-for-Security-Council-Bid-137912233.html> (noting that the country's "poor human rights records, its failure to approve a UN appointed judge at the Khmer Rouge tribunal and past threats to shut down the UN's human rights office all stand as black marks against it").

161. Interview with Rupert Abbott, *supra* note 98.

### C. *No Trial is Better than a Flawed Trial*

The “view of some,” is:

Even if the trial is not perfect, even if the human rights of the accused and the interest of the victims in terms of having a fair trial and ensuring that the truth comes out . . . even if not ideal, at least a trial is better than nothing at all because it will help with the healing; it will help draw the line.<sup>162</sup>

If the ECCC perpetuates the corruption and Executive Branch interference at the Court, it is not better than doing nothing. Something different can and should be done that does not include eroding human rights. Articles 9, 14, and 15 of the ICCPR should be upheld and the rights of the accused should be respected because their rights represent all others’ rights in Cambodia. If the Cambodian government cannot respect the rights of those who are being tried at a UN-backed, hybrid tribunal, how can the rights of others be ensured, especially the rights of the innocent who may be prosecuted for not supporting the political will at the time? The UN should end the tribunal and come up with a new course of action to ensure that the Court can deliver an international standard of justice commensurate with the expectations and hopes of Cambodians.

## IV. A SUGGESTED SOLUTION

The ECCC should be ended and donor countries encouraged by the UN to support a permanent documentation and atrocity crimes center in Cambodia. Without understanding or being aware of every possible factor and consideration that exists for ending the ECCC, or not choosing this proposed solution, I humbly offer a suggested course of action that could be a way to combat the government’s interference and the ECCC’s inability to uphold international human rights and promote the intentions and goals of many, which are the following: to assist victims of the Khmer Rouge by providing opportunities for truth-finding, healing, and education; to promote legacy through outreach projects; to strengthen the Cambodian judiciary; and to preserve the violent history of atrocity crimes in Cambodia so that they never happen again. Establishing a documentation and atrocity crimes center would assist in achieving the legacy of “lessons not learned” mentioned in Section II.

When I began to think of a civil society organization that might be able to perform these goals, DC-CAM immediately came to mind. DC-CAM is a well-known, highly respected, and impressive NGO that “seek[s] to shed light on the Khmer Rouge era,”<sup>163</sup> and “aim[s] to help Cambodians heal the wounds of the past by documenting, researching, and sharing the history of

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162. *Id.*

163. DC-CAM, *Focus*, [http://www.dccam.org/#/our\\_mission/focus](http://www.dccam.org/#/our_mission/focus) (last visited May 7, 2012).

the Khmer Rouge period.”<sup>164</sup> DC-CAM was originally a field office of Yale University’s Cambodian Genocide Program, funded by the US State Department, but since 1997, has operated as an independent NGO in Cambodia with assistance from “government sources in the United States, Canada, Europe, Australia, and Japan.”<sup>165</sup>

I first learned of DC-CAM while I conducted a brief humanitarian mission for the US Embassy in 2008. Then, in 2011, my friend had the opportunity to intern for DC-CAM as a law student, and she spoke very highly of the organization and the director and founder, Youk Chang, himself a survivor of the Khmer Rouge. DC-CAM documented the atrocity crimes of the Khmer Rouge and educated rural Cambodians about the history of the Khmer Rouge and genocide.<sup>166</sup> DC-CAM also conducted interviews with survivors, witnesses, and other relevant people from the Khmer Rouge era, and the Court used these documents for investigation purposes and as evidence.<sup>167</sup> DC-CAM “‘maintain[s] 600,000 documents[ ] related to 19,521 mass graves, 194 prisons, and 80 memorial sites. Additionally, [DC-CAM has] interviewed 30,000 people . . . focus[ing] on oral history of the KR, and allow[ing] this to stand-alone [without interpretation].’”<sup>168</sup> Currently, DC-CAM has “nearly one million pages of documents [and has] built a reputation as an international leader in the quest for memory and justice.”<sup>169</sup>

While DC-CAM is well-equipped and knowledgeable about documenting the Khmer Rouge era, it has also been working hard to create other avenues of support for survivors and future generations. According to DC-CAM’s website, its vision is to create a *permanent* institution, The Sleuk Rith Institute (SRI), which will encompass a museum, a research center, and a school on a section of land donated by the Cambodian government in 2008:

The Sleuk Rith Institute aims to be the leading center for genocide studies in Asia. It will consist of three major pillars: a museum, a research center and a school. The museum will serve as a public archive of the history of Cambodia where locals and visitors can come not only to learn about the history of the Khmer Rouge, but also to enjoy a quiet place for reflection and healing. The research center will allow DC-CAM to continue its work

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164. DC-CAM, *Purpose*, [http://www.dccam.org/#/our\\_mission/purpose](http://www.dccam.org/#/our_mission/purpose) (last visited May 7, 2012).

165. DC-CAM, *History*, <http://www.dccam.org/#/theorganization/history> (last visited May 7, 2012).

166. DC-CAM, *Work to Date*, <http://www.dccam.org/#/theorganization/worktodate> (last visited Oct. 10, 2013).

167. Author’s personal knowledge based on work experience at the ECCC.

168. Antonio Graceffo, *The Documentation Center of Cambodia*, FOREIGN POL. J. (Mar. 1, 2009), <http://www.foreignpolicyjournal.com/2009/03/01/the-documentation-center-of-cambodia/> (quoting Youk Chang).

169. The Sleuk Rith Institute, *Memory of a Nation, Justice for All*, <http://www.cambodiasri.org/> (last accessed May 7, 2012).

compiling, analyzing and preserving information about the Pol Pot era. It will also welcome scholars from around the world that are interested in studying human rights atrocities in Cambodia and beyond. The school will educate leading Cambodian students about Cambodia's history as well as certain principles of law and human rights in an effort to build a more promising future.<sup>170</sup>

During the Initial Hearing in Case 002, a museum for civil parties was discussed briefly since convicted persons should bear the costs of collective and moral reparations.<sup>171</sup> Therefore, DC-CAM's strategic plan hopefully serves as good news for civil parties.

Based on this finding, DC-CAM, through the SRI, is an intelligent choice for donor countries that want accountability and justice in Cambodia because the SRI would promote healing, documentation and memory, and education. This Institute would reach many more people than the ECCC can hope to, and it can educate future generations about the past, human rights, and atrocity crimes. The SRI would even be able to create a display and educational material about the ECCC, thereby helping to leave a legacy regarding the challenges of an international hybrid tribunal. Furthermore, the SRI would serve as a visual and audible reminder—through photos, displays, paper documents, oral history, and videos—of a time when so many Cambodians died, were injured, barely survived, and now have lasting scars of the Khmer Rouge era. After all, these types of mediums create enduring impressions on people, something that court verdicts may not be able to do.

The SRI is already being planned and shares similar objectives with the ECCC and the Cambodian and international communities, but this institution could use more funding as it continues to develop its current vision and build the SRI. Because of this, the UN should encourage donor countries to support the SRI and end the ECCC's operation, unless, of course, the Cambodian government meets the condition of full cooperation with the Court. The SRI could continue to engage civil society in a way that is distinctly Cambodian and would leave the most impact on the people through a museum, research center, and a school. The Cambodian government does not appear to pose a threat to the SRI, as it has donated land to it in the past. This most likely alleviates any concerns that it (the Cambodian government) might shut down the NGO, as it did with certain NGOs it opposed in 2009. While the SRI will never be able to bring back the 1.7 million victims of the Khmer Rouge or make their families whole, it can provide a lasting impact by preserving the past with documentation and a museum, improving the present with a school, and promoting the future by conducting re-

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170. *Id.*

171. Petit & Ahmed, *supra* note 61, at ¶17.

search and educating future leaders about atrocity crimes and the Khmer Rouge.

#### CONCLUSION

All of that leads one to conclude this: while many people want accountability, not impunity, for the atrocity crimes during the Khmer Rouge regime in Cambodia, the Cambodian government does not, and is seriously undermining the ECCC's credibility, reputation, function, and ability to deliver an international standard of justice. There are good reasons to keep the Court operating in Cambodia, but there are better reasons to end the Court due to the political interference and lack of judicial independence at the ECCC. "No one wants to admit that this is a mistake. It's so sad. It's a wasted opportunity because it's one of the worst atrocities of the century."<sup>172</sup>

The UN needs to mandate the termination of the ECCC, conditioned upon the Cambodian government's cooperation and absolute pristine deliverance of international human rights in Case 002, and take further action to ensure that the current civil society and future generations in Cambodia are educated about the Khmer Rouge's violent history and the issues surrounding delivering justice through a hybrid tribunal. Donor countries—and even the Cambodian government—can engage civil society organizations, specifically DC-CAM through the SRI, that are already committed to reforming the Cambodian judiciary, to documenting the Khmer Rouge crimes, and to educating youth about crimes against humanity, genocide, and grave breaches of the Geneva Conventions. This will be a step toward ensuring that this level of human violence does not repeat itself and that survivors understand the international community wants an international standard of justice delivered in Cambodia as well.

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172. UN Staff 1, *supra* note 95.