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The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System

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Abstract

The Cambodian judicial system is fraught with deficiencies. The Extraordinary Chambers in the Courts of Cambodia – established to try the leaders of the Khmer Rouge and those most responsible for the atrocities committed during the regime – has been hailed as a model court from which to bolster domestic legal and judicial reform. While the ECCC has made some steps towards providing a positive legacy - enhancing the capacity of the judiciary, addressing fair trial rights and standards of justice - in the absence of political will to address corruption and political interference, this legacy is superficial at best.

Introduction

The Khmer Rouge had a devastating impact on the Cambodian judicial system. The regime attempted to exterminate the country's intellectuals and consequently, when the Khmer Rouge fell in 1979, there were only ten qualified lawyers in the country.¹ The justice system was decimated and has been slow to recover. Since that time, deficiencies within the Cambodian judicial system have been well documented.² The Cambodian Center for Human Rights (CCHR) for instance, which advocates for greater adherence to international judicial standards by the Cambodian courts as part of its objective to enhance human rights protection, has recorded a number of deficiencies in the domestic courts through its Trial Monitoring Project.³ Although the Royal Government of Cambodia (RGC) has pledged to reform the courts,⁴ progress has been slow. Some of the more pressing concerns include the

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¹ Amnesty International, 'Kingdom of Cambodia: Urgent need for Judicial Reform', at: <http://www.unhcr.org/refworld/pdfid/3deb63334.pdf> (accessed 23 January 2012), p. 2.

² See for example S. Subedi, 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia', at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.46_en.pdf (accessed 24 January 2012).

³ See CCHR, 'Reports and Publications', at: http://www.cchrcambodia.org/index_old.php?url=project_page/project_page.php&p=reports.php&id=3&pro=TMP&show=show (accessed 13 March 2012).

⁴ Council for Legal and Judicial Reform, 'Legal and Judicial Reform Strategy', at: http://www.cljr.gov.kh/eng/library/doc/06_Legal.and.Judicial.Reform.Strategy.pdf (accessed 23 January 2012).

fact that the judiciary are susceptible to political interference and fair trial rights are not adequately protected.

When the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 to try the leaders of the Khmer Rouge and those most responsible for the atrocities committed during the regime, it was hailed as a model court for the domestic legal system that could have a “positive long-term impact on national justice efforts.”⁵ This legacy, it was said, could help bolster the rule of law in Cambodia and build the national judiciary’s capacity.⁶ However, the ECCC has been beleaguered by several problems which threaten to overshadow the potential it has to pass on a positive legacy to the domestic courts.

This article seeks to determine the likely impact of the ECCC on Cambodia’s judicial system, focusing on fair trial rights and political interference. It is the reasoned opinion of the authors that unless there is the political will for reform on the part of the RGC, the ECCC can only have minimal impact on the domestic system. While the ECCC may positively impact fair trial rights protection, it will do little to alleviate the more overarching problem of political interference in Cambodian courts. The article makes this argument by first examining problems endemic in the Cambodian legal system so as to underscore the deficiencies which it is hoped the ECCC can alleviate to some degree. The article then considers what is meant by legacy and what, if any, provision is made for it in the ECCC’s constituting documents. Elements of the ECCC’s legacy that will affect the domestic judiciary positively are then scrutinised, followed by an examination of the issues undermining the legitimacy of the ECCC and its potential to effect positive change.

I. Cambodia’s Deficient Legal System

A system of patronage exists in Cambodia in which judges align themselves closely to politicians with the power to influence judicial appointments from whom judges require ongoing support to ensure career advancement.⁷ Patronage adversely affects the rule of law as prosecutors and judges do not operate according to the law but at the whim of their ‘patron’.⁸ If judges do not act according to their patrons’ wishes, they risk displeasing them and could easily find their careers stagnating or even lose their position.⁹ Cambodia also lacks an established, experienced judiciary and suffers from resource and personnel shortages.¹⁰ These two issues underlay the entire legal system which suffers from serious deficiencies as a result. Although the Council for Legal and Judicial Reform has implemented a strategy and

⁵ Victims Support Section of the ECCC and the International Center for Transitional Justice, ‘Leaving a Lasting Legacy for Victims: Practical Workshop for ECCC Victims’ Representatives’, at: <http://ictj.org/sites/default/files/ICTJ-ECCC-Cambodia-Victims-Workshop-2009-English.pdf> (accessed 23 January 2012), p. 7.

⁶ International Center for Transitional Justice, ‘Where to from here for International Tribunals?: Considering Legacy and Residual Issues’, at: <http://ictj.org/sites/default/files/ICTJ-Global-Legacy-Tribunal-2009-English.pdf> (accessed 23 January 2012), p. 1.

⁷ Open Society Justice Initiative, ‘Political Interference at the Extraordinary Chambers in the Courts of Cambodia’, at: http://www.soros.org/initiatives/justice/articles_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf (accessed 7 February 2012), p. 5.

⁸ Subedi 2010, *supra* note 2, p. 13.

⁹ Open Society Justice Initiative, *supra* note 7.

¹⁰ For more on this see UN, ‘Report of the Group of Experts for Cambodia Established Pursuant to General Assembly resolution 52/135’, at: <http://www.unakrt-online.org/Docs/GA%20Documents/1999%20Experts%20Report.pdf> (accessed 24 January 2012).

action plan for reform,¹¹ many of these shortcomings persist. While issues pertaining to impunity exist,¹² they are beyond the scope of this article, which focuses on corruption,¹³ political interference and the judiciary's poor record on protecting fair trial rights.

I.1 Judicial Independence and Political Interference

The principles of judicial independence and separation of powers are safeguarded by the Constitution of the Kingdom of Cambodia (the Constitution) under Articles 128 and 51 respectively,¹⁴ as well as a plethora of international treaties ratified and incorporated into the Cambodian legal system.¹⁵ These principles are instrumental in providing effective checks and balances on the executive, legislature and judiciary to ensure that no single institution can gain too much power. Unfortunately the judiciary in Cambodia is weak and highly susceptible to political interference,¹⁶ particularly from the executive, which is dominated by the ruling Cambodian People's Party (CPP).¹⁷

According to the Cambodian Human Rights Action Committee, three laws fundamental for judicial independence have still to be promulgated, namely the Law on the Status of Judges, the Law on the Functioning and Organisation of the Court and the Law on the Amendment to the Law on the Organisation and Functioning of the Supreme Council of Magistracy.¹⁸ Despite repeated assurances in 2004 that these laws would be prioritised and adopted, they have yet to be promulgated, demonstrating the RGC's weak commitment to legal and judicial reform.¹⁹ Without these measures the executive, to ensure its political dominance, can exert pressure on the judiciary. The President of the ECCC Trial Chamber Nil Nonn acknowledges the lack of a meaningful separation of powers in Cambodia, stating that "judges aren't independent in Cambodia - [the government] threaten and put pressure on judges".²⁰ As a consequence of this pressure, the courts are frequently used by the RGC to silence

¹¹ Council for Legal and Judicial Reform, *supra* note 4; Council for Legal and Judicial Reform, 'Plan of Action for Implementing the Legal & Judicial Reform Strategy', at: <http://www.cljr.gov.kh/eng/library/doc/03-Action.Plan.Program.En.pdf> (accessed 26 January 2012).

¹² For more see LICADHO, 'Human Rights in Cambodia: Charade of Justice', at: <http://www.licadho-cambodia.org/reports/files/113LICADHOREporTrial ChamberharadeJustice07.pdf> (accessed 7 February 2012).

¹³ *Ibid.*

¹⁴ The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, at: http://cambodia.ohchr.org/klc_pages/KLC_files/section_001/section_01_01_ENG.pdf (accessed 7 February 2012).

¹⁵ *Ibid.*, by way of Article 31 of the Constitution.

¹⁶ Y. Ghai, 'Technical Assistance and Capacity-Building- Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai', 28 February 2008, A/HRC/7/42, p.6.

¹⁷ H. Grozdanic, 'The Extraordinary Chambers in the Courts of Cambodia in a Hybrid System; The Effects of Politics, Law and History', at: http://gupea.ub.gu.se/bitstream/2077/24093/1/gupea_2077_24093_1.pdf (accessed 7 February 2012), p. 25.

¹⁸ NGO Forum on Cambodia, 'NGO Position Papers on Cambodia's Development in 2009-2010 to the 3rd Cambodia Development Cooperation Forum', at: http://www.ngoforum.org.kh/eng/dip/dipdocs/DPP_NGOPositionPapersMay2010Eng.pdf (accessed 7 February 2012), pp.12-3.

¹⁹ NGO Forum on Cambodia, 'Cambodia Development Watch', at: http://www.ngoforum.org.kh/eng/dip/olddipdocs/DPP_CambodiaDevelopmentWatch-March2006-English.pdf (accessed 7 February 2012), p. 5. Attempts were made to contact the Legal and Judicial Reform Council concerning the current status of these laws however it was not forthcoming with information.

²⁰ Quoted in Atlas Project, 'Transitional Justice in Cambodia: Analytical Report', at: http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf (accessed 7 February 2012), p. 51.

political opposition and criticism with civil and criminal charges regularly being filed against individuals speaking out against the government.

I.2 Corruption

Corruption is a complex issue that is endemic in the judiciary and continues to plague the courts. Although difficult to measure, in 2010²¹ and 2011²² Cambodia featured in the thirty most corrupt countries in the world in Transparency International's Corruption Perception Index. In a survey conducted in Cambodia in 2006, the courts were considered the most corrupt state institution.²³ Although judicial salaries were increased from \$20 a month to between \$325 and \$625 a month in 2003,²⁴ it has done nothing to hinder corruption in the judicial system, which is so widespread that it can be considered the norm. Tim Sothy, Takeo Provincial Court President in 2007, stated for instance that "[i]f a judge is a clever man, he can find ways to make a lot of money."²⁵

The RGC has attempted to curb corrupt practices on a number of occasions. However, its efforts have largely been superficial in nature and are considered to have been taken merely to calm government criticism.²⁶ In 2005 Prime Minister Hun Sen initiated an 'iron fist' campaign against corruption. At the height of the campaign three judges, two prosecutors and two court clerks were convicted under the UNTAC Criminal Code for accepting bribes. However, highlighting the insincere nature of the campaign, they were later acquitted at retrial in 2006 and eight other judges that were suspended during the campaign were later reappointed to judicial positions.²⁷

I.3 Fair Trial Rights

Fair trial rights in Cambodia are protected by a number of legal instruments. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) for instance are part of Cambodian law.²⁸ In relation to domestic law the Constitution guarantees a number of fair trial rights, including the right to be treated equally before the law,²⁹ the presumption of innocence³⁰ and the right to an independent and impartial hearing.³¹ There are also several laws and guidelines outlining procedures to be followed in criminal cases such as the Code of Criminal Procedure³² and guidelines including

²¹ Transparency International, 'Corruption Perceptions Index 2010 Results', at: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (accessed 7 February 2012).

²² Transparency International, 'Corruption Perceptions Index 2011', at: <http://cpi.transparency.org/cpi2011/results> (accessed 7 February 2012).

²³ LICADHO, supra note 12, p. 22.

²⁴ H. Bertelman, 'National ownership and international standards: Independence and impartiality in hybrid courts: The Extraordinary Chambers in the Courts of Cambodia', at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1556231&fileId=1563920> (accessed 8 February 2012).

²⁵ Quoted in LICADHO, supra note 12, p. 22.

²⁶ Grozdanic, supra note 17.

²⁷ LICADHO, supra note 12, p. 22.

²⁸ The Constitution, supra note 14, Article 31. A decision by the Constitutional Council dated 10 July 2007 confirmed that all human rights instruments to which Cambodia has acceded form part of the Constitution.

²⁹ Ibid.

³⁰ Idem, Article 38.

³¹ Idem, Article 128.

³² Code of Criminal Procedure of the Kingdom of Cambodia, adopted 7 June 2007, at: http://cambodia.ohchr.org/KLC_pages/KLC_files/section_011/S11_CriminalProcedureCode2007E.pdf (accessed 8 February 2012).

the Code of Ethics for Judges and Prosecutors which is binding for judges and prosecutors in Cambodia.³³

Despite these measures guaranteeing a certain level of protection for an accused's fair trial rights, the courts have often fallen below these standards. CCHR has documented a number of problems of which the more disconcerting shall now be considered.³⁴ Pre-trial detention of accused is particularly high, being recorded in 83% of all trials monitored in 2011.³⁵ More worryingly, pre-trial detention exceeded statutory limits in 34 of the 1,316 trials monitored.³⁶ There are also concerns regarding the judiciary's ability to recognise legitimate grounds for placing individuals in pre-trial detention as most of those in such detention were charged with misdemeanour offences rather than felony offences and of the courts reducing final sentences of accused in acknowledgement of illegal pre-trial detention.³⁷ Legal representation is another area in which Cambodia falls short. Notwithstanding the fact that the right to legal representation is a fundamental right protected under international³⁸ and Cambodian law,³⁹ legal representation is only compulsory in cases involving minors or where the accused is charged with a felony,⁴⁰ there is no such requirement for misdemeanour offences. Although an accused is required to have legal representation in felony trials, in 2011 only 62% of the accused monitored had legal representation. In relation to misdemeanour cases, only 60% had legal representation.⁴¹ These figures raise serious questions relating to the equality of arms principle- how can such individuals adequately defend themselves if legal counsel is not available to them throughout the trial process?

In Cambodia questions about the ability to be tried by an independent and impartial judiciary are prevalent. The right to be tried by an independent and impartial tribunal is so fundamental that the UN Human Rights Committee has stated that it "is an absolute right that may suffer no exception."⁴² An issue of concern from monitoring has been the frequency in which CCHR trial monitors observe a prosecutor or another lawyer entering the judge's deliberation room immediately after the ending of a hearing and prior to the judge reaching a verdict.⁴³ In 2009 in 16% of all trials monitored, another party appeared to speak to the judge during deliberation.⁴⁴ While the number of instances where another party has appeared to speak to the judge during deliberation has significantly reduced since 2009, any such

³³ Code of Ethics for Judges and Prosecutors, adopted 5 February 2007, a copy of the Code is on archive with CCHR.

³⁴ For full details of CCHR's findings please see *supra* note 3.

³⁵ CCHR, 'Key Trial Monitoring Statistics: Phnom Penh Court of First Instance January to December 2011', 2012, available at:

http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=press_detail.php&pid=235&id=5&lang=eng.

³⁶ This information was extrapolated from the three trial monitoring reports. See *ibid*; CCHR, 'Fair Trial Rights in Cambodia: First Bi-annual Report', 2010 at:

http://www.cchrcambodia.org/index_old.php?url=project_page/project_page.php&p=report_detail.php&reid=17&id=3 (accessed 8 February 2012); CCHR, 'Second Bi-Annual Report: "Fair Trial Rights in Cambodia"', 2011, at:

http://www.cchrcambodia.org/index_old.php?url=project_page/project_page.php&p=report_detail.php&reid=63&id=3 (accessed 8 February 2012).

³⁷ CCHR 2012, *supra* note 36.

³⁸ International Covenant on Civil and Political Rights 1966, Article 14(3)(d).

³⁹ The Constitution, *supra* note 14, Article 38.

⁴⁰ Code of Criminal Procedure, *supra* note 32, Article 301.

⁴¹ CCHR, 2012, *supra* note 35.

⁴² Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No.263/1987: *M. Gonzalez del Rio v Peru*, 28 October 1992 (CCPR/C/46/D/263/1987), §5.2.

⁴³ CCHR 2011, *supra* note 36.

⁴⁴ CCHR 2011, *supra* note 36, p. 31.

instances are disturbing and further undermine the public's confidence in the judiciary and cement the perception that judges are open to outside influence.⁴⁵

II. Legacy and the ECCC

Internationalised courts, like the ECCC, are only temporary in nature, they have specific mandates and once this is completed their lifecycle ends. Unlike other internationalised courts, the ECCC is a true hybrid court because it is framed within the courts of Cambodia thus placing itself directly within the national legal system and making the question of how such a court can improve the legal system within which it operates all the more pertinent. This is important as, although their primary function is bringing those responsible for international crimes to justice, internationalised courts have the potential to impart a lasting positive effect in their host country. In this regard, the United Nations Office of the High Commissioner for Human Rights (OHCHR) has described legacy as a hybrid court's capacity to bolster "the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity."⁴⁶

Proffered as a model court, the ECCC is advantageously placed to strengthen the rule of law in Cambodia. Former UN Secretary-General Kofi Annan has stated that the ECCC should have "considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel."⁴⁷ It can improve the domestic judiciary's understanding of international standards as well as provide them with experience in conducting trials according to international principles. It can also provide best practices to the domestic judiciary in areas such as fair trial rights protection and court administration which can then be applied in a domestic context.⁴⁸ In broader terms, it can demonstrate to the public that those that have committed crimes, even mass atrocities, can successfully be held accountable for their actions.⁴⁹ The ECCC can also have an important demonstration effect in that it can foster a cultural shift in how the domestic courts are perceived. As it aspires to the highest standards of independence, impartiality, due process and human rights norms, the ECCC can demonstrate the supremacy of law and the ability of a court to operate free from political interference.⁵⁰ In this way, the ECCC can raise standards within the Cambodian judiciary and promote greater public confidence in the legal system to deal with human rights violations and resolve future conflicts.⁵¹

The extent to which legacy issues should be outlined in a court's constituting document is a matter of some controversy.⁵² The Law on the Establishment of the Extraordinary Chambers

⁴⁵ CCHR 2012, supra note 35.

⁴⁶ OHCHR, 'Rule-of-Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts', at: <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> (accessed 25 January 2012), p. 4.

⁴⁷ UN, 'Report of Secretary-General on Khmer Rouge Trials', UN Doc A/59/432, § 27.

⁴⁸ Martin-Ortega & Herman, 'Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia', at: <http://www.ucl.ac.uk/chrc/documents/WP7.pdf> (accessed 25 January 2012), p. 15.

⁴⁹ Statement by UN Legal Counsel H. Corell, 'Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders', at: <http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm> (accessed 24 January 2012), § 2.

⁵⁰ OHCHR, supra note 46, p. 17.

⁵¹ DC Cam, 'Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview', at: http://www.dccam.org/About/Intern/Tessa_Bialek_Legacy_FINAL.pdf (accessed 25 January 2012), p. 8.

⁵² For example, some contend that a hybrid court should concentrate on a core mandate of ending impunity, each legacy being a matter for design and implementation, while others hold it is difficult to build political support for legacy without a specific mandate. See OHCHR, supra note 46 pp. 7-8.

in the Courts of Cambodia⁵³ and the Agreement between the United Nations and the RGC concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea⁵⁴ have followed the example of constituting documents for previous international tribunals in that there is no explicit mention of legacy in either document.⁵⁵ Similarly, there are no specific provisions concerning legacy in the Internal Rules of the ECCC, although it does provide for training for defence lawyers.⁵⁶ While some assert that a court's legacy can be sustainable even if it is not explicitly mandated, others contend that specific provisions relating to legacy are required in order to ensure that there is the necessary political support vital for a court's legacy to have a lasting impact.⁵⁷ The OHCHR holds that measures outlining legacy are preferable because "international experience illustrates that the potential impact is much greater if legacy is an integral part of policy planning from the conception of a hybrid court."⁵⁸

Despite this, according to the Atlas Project, pressures of time relating to the aging and progressively infirm accused and shortfalls in the ECCC's budget have brought legacy issues to the fore.⁵⁹ Legacy at the ECCC is an expansive concept, as defined by the Atlas Project:

[i]t spans and impacts on the judicial system, on the development of internationalised justice systems internationally, of personal, political and institutional relationships within the elite of Cambodia's society, relationships between many different groups within Cambodian society, between generations, between people on different sides of the war in the 80s and 90s. It has to do with what's taught in Cambodian schools; what will be done with all of the records; the extent to which victims feel that they have any closure from the process and many other categories.⁶⁰

A lot of what the Atlas Project defines as legacy activities are in fact being undertaken by NGOs based in Cambodia rather than the ECCC itself. The focus of this article is rather on the activities of the ECCC, specifically in building a positive legacy for the Cambodian legal and judicial system. The ECCC has instituted several initiatives in relation to its legacy. The Department of Administration of the ECCC for instance has established a Legacy Advisory Group to discuss matters relating to legacy and a Legacy Secretariat to take steps based on these discussions.⁶¹ The Defence Support Section (DSS) has also been quite active in this area.⁶² Furthermore, there is great potential for legacy benefits to transfer organically to the Cambodian courts. These issues shall be discussed further in the next section.

⁵³ The Law on the ECCC, NS/RKM/1004/006, at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (accessed 26 January 2012).

⁵⁴ The Agreement, at: http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf (accessed 26 January 2012).

⁵⁵ OHCHR, *supra* note 46.

⁵⁶ Internal Rules (Rev. 8) Extraordinary Chambers in the Courts of Cambodia, at: <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf> (accessed 26 January 2012), Rule 11(2)(k).

⁵⁷ OHCHR, *supra* note 46.

⁵⁸ *Ibid.*, p. 16.

⁵⁹ Atlas Project, *supra* note 20, p. 74.

⁶⁰ *Ibid.*

⁶¹ DC Cam, *supra* note 51, p. 10.

⁶² *Idem.*, p. 11.

III. The ECCC: Positive practices for positive change

The ECCC faces great challenges in providing a positive legacy for Cambodia. It must maintain its legitimacy and impress upon the domestic judiciary the importance of international standards of law while simultaneously building the capacity of the judiciary. It must also attempt to alleviate the difficulties embedded in the system, such as political interference and the courts' poor human rights record. Although these challenges seem insurmountable, the ECCC has made inroads into fulfilling these objectives. While NGOs have been prolific in this area, undertaking ambitious outreach and capacity building programmes, only legacy elements directly provided by, and in collaboration with, the ECCC itself are considered below.⁶³ Similarly, although outreach programmes are an important facet of hybrid courts,⁶⁴ focus here shall be given to ECCC activities that may bolster Cambodian courts and judicial system specifically.

III.1 Fair Trial Rights

The manner in which the Trial Chamber has dealt with certain fair trial rights has the potential to leave an important legacy for the Cambodian justice system. Judgments and the constituting documents of the ECCC can help develop Cambodian jurisprudence and set an example for better human rights protection. They may provide greater protection for certain rights, which the Cambodian judiciary can learn from. The right to silence for instance is protected under the Internal Rules.⁶⁵ Although the right against self-incrimination is incorporated into Cambodian law⁶⁶ through the ICCPR⁶⁷ and while the use of evidence obtained through coercive means at trial in domestic courts is prohibited,⁶⁸ the right to silence is not explicitly protected under Cambodian law. As highlighted in CCHR trial monitoring, the use of confessions as evidence in court is very common and there have been instances at trial where the accused may have suffered either physical or emotional abuse at the hands of authorities.⁶⁹ By explicitly listing the right to silence as a right afforded to the accused, the ECCC acknowledges its importance. This could create the impetus in Cambodian law to provide greater protection for this right.

The importance of ensuring that an accused's rights are safeguarded at the ECCC has brought the role of the defence to the fore and the mandatory nature of the right to legal representation. Under Article 13 of the Agreement⁷⁰ and Article 35 of the Law on the ECCC⁷¹ an accused has the right to legal representation of his or her own choice. Under the Internal Rules, where one cannot afford legal representation and does not want to self-represent, he or she has the right to choose freely from the list compiled by the DSS and the Bar Association of the Kingdom of Cambodia (BAKC).⁷² Similar rights are provided for civil parties.⁷³ As considered above, legal representation in Cambodian courts, while mandatory for felony cases, is not required for misdemeanour or petty crime proceedings. Furthermore,

⁶³ For an outline of NGO activities see DC Cam, *supra* note 51.

⁶⁴ For more see *ibid*.

⁶⁵ Internal Rules, *supra* note 56, Rule 21(d).

⁶⁶ *Idem*, Article 31.

⁶⁷ The Constitution, *supra* note 14, Article 38.

⁶⁸ ICCPR, *supra* note 38, article 14(g).

⁶⁹ CCHR 2012, *supra* note 35.

⁷⁰ *Supra* note 54.

⁷¹ *Supra* note 53.

⁷² *Supra* note 56, Rule 22.

⁷³ *Idem*, Rule 23.

free legal aid in Cambodia is extremely limited and mostly provided by NGOs.⁷⁴ By acknowledging the inalienable nature of the right to legal representation, particularly the right to choose one's own legal team, and by extension free legal aid, the ECCC may lead to a positive change in the culture of legal representation in Cambodia and provide the drive to develop a more extensive free legal aid service.

The manner in which the Trial Chamber treated Kaing Guek Eav's (Duch) excessive period of pre-trial detention in Case 001 is particularly relevant as unlawful periods of pre-trial detention in the Cambodian legal system have been reported.⁷⁵ Much can be learned from this judgment on how to properly redress unlawful periods of pre-trial detention as well as taking into consideration time already served in detention pending and during the trial. The Trial Chamber found that Duch was illegally detained by the Cambodian Military Court from 1999 until his transfer to the ECCC in 2007.⁷⁶ In its ruling the Trial Chamber alluded to an earlier decision where it found there was a "general lack of reasoning setting out the legal basis for [detention]. Further, several laws on which the Military Court relied [were] applied retroactively" in contravention of Cambodian and international law.⁷⁷ The Trial Chamber consequently found that Duch was entitled to a remedy for the violation of his rights arising from his illegal detention, granting him a five-year reduction to his sentence.⁷⁸ The Trial Chamber stated that "[n]either the gravity of the crimes of which he was suspected nor the constraints under which the Cambodian legal system was operating at the time can justify these breaches of the [a]ccused's rights."⁷⁹ The Trial Chamber also reduced Duch's sentence for time already served, reducing his 35-year prison sentence by a further 11 years.

Ieng Thirith's fitness to stand trial proceedings are also of great importance as they outline the elements necessary for an accused to be considered fit to stand trial. The Trial Chamber applied the *Strugar* test established by the International Criminal Tribunal for the former Yugoslavia in determining Ieng Thirith's fitness, or otherwise, to stand trial.⁸⁰ The applicable standard for this test is whether the accused can meaningfully participate, allowing "the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings."⁸¹ Two assessments were conducted by a number of experts to determine Ieng Thirith's ability to fulfil this test.⁸² Tests concerning Ieng Thirith's cognitive function and her medical history led the experts to conclude that she lacked sufficient understanding of trial proceedings, her cognitive function was likely to fluctuate and measures undertaken to counter her condition were unlikely to improve her capacity to understand trial proceedings. She was consequently not fit to stand trial.⁸³ The Trial Chamber, in concurring with the experts, stated that the "[t]rial and continued detention of an [a]ccused who lacks capacity to understand proceedings against her

⁷⁴ For more see Council for Legal and Judicial Reform, 'Legal aid in Cambodia: Practices, Perceptions and Needs', at: <http://www.cwmi-praj.org/Files/Legal%20Aid%20in%20Cambodia%20study%20report.pdf> (accessed 15 March 2012).

⁷⁵ *Ibid.*

⁷⁶ ECCC Trial Chamber, Judgment, Case No. 001/18-07-2007/ECCC/TRIAL CHAMBER, 26 July 2010, p. 216.

⁷⁷ ECCC Trial Chamber, Decision on Request for Release, Case No. 001/18-07-2007/ECCC/TRIAL CHAMBER, 15 June 2009, p. 10.

⁷⁸ ECCC Trial Chamber, *supra* note 76, p. 198.

⁷⁹ *Idem*, p. 215.

⁸⁰ ICTY Appeal Chamber, Judgment Prosecutor v Pavle Strugar, Case No. IT-01-42-A, 17 July 2008.

⁸¹ ECCC Trial Chamber, Decision on Ieng Thirith's Fitness to Stand Trial, Case No. 002/19-09-2007/ECCC/TRIAL CHAMBER, 17 November 2011, p. 11.

⁸² *Idem*, pp. 3-6.

⁸³ *Idem*, p. 12.

or to meaningfully participate in her own defence would not serve the interests of justice". After lengthy deliberation the Trial Chamber ordered Ieng Thirith's unconditional release.⁸⁴ The above two findings illustrate the lengths courts must go to in order to meet international fair trials standards. They provide clear rationale for protecting an accused's fair trial rights regardless of the crimes alleged. Duch's trial shows that everyone is entitled to remedies for a violation of their rights. Fair trial rights are not conditional, they are a separate matter from the guilt or innocence of an accused. Ieng Thirith's fitness to stand trial proceedings highlight that there can be no justice where one cannot adequately defend oneself. This proposition not only encompasses an accused's fitness to stand trial, but also for instance the necessity of equality of arms between parties and trial by an independent and impartial tribunal.

Recent events have somewhat undermined these developments. The Supreme Court Chamber reversed the five year remedy granted to Duch for his illegal detention, stating that the Trial Chamber had misinterpreted international law in reasoning that Duch's "rights should be redressed by it *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process."⁸⁵ It is important to note the dissenting opinions of two international judges, Agnieszka-Klonowiecka-Milart and Chandra Nihal Jayasinghe, who disputed the premise that the tribunal did not have a connection to Duch's imprisonment given the position of the court vis-à-vis Cambodia's national system.⁸⁶ They stated that they would have preferred to reduce the life sentence to 30 years in prison to reflect the violations of his rights:

Our remedy ensures that [Duch's] crimes are strongly condemned and forcefully punished. It also ensures, however, that his sentence is consistent with internationally recognized standards of fairness and that this court continues to serve as a model for fair trials conducted with due respect for the rights of the accused.⁸⁷

The Supreme Court Chamber also reversed the Trial Chamber's decision on the unconditional release of Ieng Thirith, ordering her to undergo treatment to improve her condition so that she may become fit to stand trial.⁸⁸ The Supreme Court Chamber reasoned that the Trial Chamber did not give any direction as to how proceedings may be resumed, "an outcome [that] is irreconcilable with the interests of justice [and] the strong public interest to prosecute the [a]ccused."⁸⁹ Despite this, it is hoped the rationale behind the Trial Chamber decisions will have a longstanding impact on how Cambodian courts treat fair trial rights and positively affects perceptions of the role of the defence in ensuring that their clients' rights are respected as discussed in further detail below.

⁸⁴ *Idem*, p. 29.

⁸⁵ Emphasis added. ECCC Supreme Court Chamber, Summary of Appeal Judgement, Case No. 001/18-07-2007/ECCC/SC (Kaing Guek Eav), 3 February 2012, p. 9. For more on this see CCHR, 'Good and bad at the ECCC as Duch's prison sentence is extended to life', at: www.cchrcambodia.org/index_old.php?url=media/media.php&p=press_detail.php&prid=218&id=5 (accessed 12 March 2012), p. 9.

⁸⁶ See ECCC Supreme Court Chamber, Full Appeal Judgment, Case No.001/18-07-2007/ECCC/SC (Kaing Guek Eav, 3 February 2012, pp. 324-7.

⁸⁷ *Idem*, p. 337.

⁸⁸ ECCC Supreme Court Chamber, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, Case No. 002/19-09-2007-ECCC-TRIAL CHAMBER/SC(09), 13 December 2011, p. 24.

⁸⁹ *Idem*, p. 16.

III.2 Capacity Building

Capacity building within the Cambodian judiciary is another principle benefit of the ECCC. In a country where the legal profession was decimated and where there is a serious lack of qualified and experienced legal personnel, the ECCC is providing much needed legal training. The DSS, which is mandated to organise training for defence lawyers in cooperation with the Bar Association of the Kingdom of Cambodia (BACK),⁹⁰ has been active in this area, providing training to a range of legal personnel and students.⁹¹ Training for lawyers includes courses on legal skills and international law⁹² which are provided to both national staff and lawyers outside of the ECCC.⁹³ There are also opportunities for on the job training, with provision of in-office mentoring and seminars involving presentations and discussions between visiting legal experts and ECCC defence teams.⁹⁴ While there are opportunities for staff training, the ECCC has been criticised, particularly during its infancy, for limited interaction with the wider domestic legal system. It has been commented that judicial appointments by the SCM to the ECCC have been the extent of its interaction.⁹⁵ With regard to law students, the DSS, in collaboration with the Cambodian Office of the OHCHR, established the Fair Trial Rights Club consisting of eight seminars on fair trial rights. The initiative aims to provide students with a greater understanding of fair trial rights and encourage them to promote greater respect for such rights when they work in the Cambodian legal system.⁹⁶ Furthermore, the DSS organises presentations and seminars in universities to further students' understanding of human rights and the role of the defence.⁹⁷

The Office of the Co Prosecutors (OCP) has also undertaken capacity building initiatives. Staff of the OCP participate in annual four-day workshops on procedural and substantive aspects of international criminal law. These workshops include senior prosecutors from international tribunals as speakers.⁹⁸ The ECCC runs internship programmes in all of its offices.⁹⁹ Trainee judges from the Cambodian Royal Academy for the Judicial Professions are also seconded to the OCP for short-term internships on a revolving basis.¹⁰⁰ Unfortunately, the concept of an internship is unfamiliar to many national students and staff. Consequently, these positions are often not in demand and intern supervisors frequently do not provide interns with relevant work.¹⁰¹

Capacity building is essential to improving not only the knowledge and experience of the legal sector but also for developing professionalism in the industry and encouraging greater adherence to human rights standards. It provides students and lawyers with a clearer understanding of the requirements of the law. The knowledge gained from mock trials and role-playing scenarios can easily be transferred to real court situations. By expounding the essential nature of fair trial rights through capacity initiatives, the ECCC may also impress

⁹⁰ Internal Rules, supra note 56, Rule 11.

⁹¹ DC Cam, supra note 51, pp. 11-12.

⁹² ECCC, 'DSS', at: <http://www.eccc.gov.kh/en/dss/defence-support-section-dss> (accessed 26 March 2010).

⁹³ DC Cam, supra note 51.

⁹⁴ ECCC, supra note 92.

⁹⁵ Martin-Ortega & Herman, supra note 48, p.20.

⁹⁶ Fair Trial Rights Club, at: <http://fairtrialrightsclub.posterous.com/> (accessed 23 February 2012).

⁹⁷ DC Cam, supra note 51, p. 12.

⁹⁸ ECCC, 'The Court Report: August 2008', at: <http://old.eccc.gov.kh/english/publications.courtReport.aspx> (accessed 23 February 2012), p.8.

⁹⁹ UN Assistance to the Khmer Rouge Trials, 'Internship programme', at: http://www.unakrt-online.org/06_recruitment.htm (accessed 23 February 2012).

¹⁰⁰ ECCC, 'Office of the CO-Prosecutors', at: <http://www.eccc.gov.kh/en/ocp/office-co-prosecutors> (accessed 23 February 2012).

¹⁰¹ DC Cam, supra note 51, p. 17.

upon Cambodian legal professionals and graduates a defence team's vital role in representing their clients at court.¹⁰² Ensuring that law students have access to training and capacity-building projects is of particular importance. Deputy Director of Administration, Knut Rosandhaug, has stated for instance that law students "are the judicial reform. If [they] don't do it nobody will."¹⁰³ This is a key issue that has been taken into account by the ECCC: in order to have the widest possible impact, tribunals must not only train legal professionals of today but also those of tomorrow.

Notwithstanding these efforts, the ECCC has been criticised for not taking a sufficiently active role in developing a legacy for Cambodian courts. Representatives of the OCP and the Civil Party Lead Co Lawyers have stated that trial related work must be given priority due to the limited availability of funds, resources and time created by the ailing health of the accused.¹⁰⁴ Establishing legacy initiatives are viewed as ancillary to this objective. Capacity building and skills transfer can occur organically throughout the lifetime of the ECCC without the need for legacy building activities. However, in order to ensure effective skill transfer, it is preferable that such activities are undertaken.¹⁰⁵

III.3 Case Management Work Practices

National and international staff work together closely at the ECCC, it is inevitable that such a working environment results in a certain level of work practice and skill assimilation. One of the most beneficial aspects of hybrid courts is that national staff are involved in every step of legal proceedings, from claim submissions to investigations, charging suspects, trial proceedings and appeals. As a result national staff are shown how to best conduct trials, what practices are most effective and what is required to fulfil their respective roles. Skills that can be acquired include court and case management, court preparation, trial advocacy and legal document drafting. Judge Nil Nonn for example has commented on the "reasoning culture" of international judges that he has observed, stating that Cambodian judges frequently do not sufficiently explain their judgments.¹⁰⁶ It is also possible that skills acquired during complex international criminal trials involving genocide and crimes against humanity for instance are transferred to comparatively complex domestic cases such as human trafficking trials.¹⁰⁷

Document archiving is another area that has been given considerable attention and could be quite beneficial to the domestic legal system. The 'Virtual Tribunal' was launched in July 2011 by the ECCC together with a number of other institutions as an online multimedia library and archive for information related to the Khmer Rouge and ECCC proceedings among other things.¹⁰⁸ Similarly, the website of the ECCC itself publicises all court documents. Both websites are invaluable as they grant the Cambodian judiciary access to documents that can be used both to make arguments at court and as examples in drafting legal documents. The Virtual Tribunal and the ECCC's website are also excellent court document repository models for the Cambodian legal system which has yet to establish one even though it has been marked as a strategy objective since 2005.¹⁰⁹ These websites

¹⁰² *Idem*, p. 11.

¹⁰³ ECCC, 'The Court Report: October 2010', at: http://www.eccc.gov.kh/sites/default/files/publications/Court_Report_October2010.pdf (accessed 23 February 2012), p. 2.

¹⁰⁴ DC Cam, *supra* note 51, p. 12.

¹⁰⁵ OHCHR, *supra* note 46, p. 42.

¹⁰⁶ Quoted in Atlas Project, *supra* note 20, p. 50.

¹⁰⁷ OHCHR, *supra* note 46, p. 31.

¹⁰⁸ ECCC, 'Virtual tribunal', at: <http://www.eccc.gov.kh/en/virtual-tribunal> (accessed 23 February 2012).

¹⁰⁹ Council for Legal and Judicial Reform, *supra* note 4, p. 20.

illustrate the importance of the right of access to information, the benefits of providing access to court documents and how one might go about providing such access. They also encourage better work practices for document filing generally.

There are certain prerequisites necessary for maintaining an environment conducive to effective work practice transfer. Firstly, good working relations must exist. Discord between officials can create a situation in which international and national staff do not work in a coordinated manner, adversely affecting an individual's ability to learn new techniques and practices. One 'side' of the national/international line may be unwilling to allow the other to observe its workings. Secondly, integrated administrative structures should be established over parallel frameworks as the latter can have an adverse impact on skill development.¹¹⁰ Parallel systems, as is in fact in place at the ECCC, create a divide between national and international activities, requiring staff to answer to two different superiority hierarchies. An integrated system ensures that both national and international staff work more closely together. Thirdly, the conduct and functioning of the various offices of the ECCC must meet the highest standards of professionalism and international law, as setting a bad example may result in the assimilation of less desirous practices.

The extent to which the ECCC meets these criteria is somewhat questionable. As discussed below, there have been several confrontations between the national and international co-investigating judges and prosecutors concerning Cases 003 and 004 which have resulted in the release of a number of hostile press statements by the judges and prosecutors directed at their national or international counterpart.¹¹¹ Such confrontations can create a caustic atmosphere in which working conditions can be unbearable, let alone conducive to skill development. Furthermore, the conduct of certain judges has not met international standards, undermining the ECCC's legitimacy and providing poor examples for national staff. As considered below, doubts have been raised about the independence of a number of judges and the investigation conducted by the Office of the Co-Investigating Judge (OCIJ) in relation to Cases 003 and 004 have been heavily criticised.

IV. The Never Ending Cycle of Corruption and Political Interference – Legacy's Achilles Heel

The ECCC has been plagued by several problems since its inception which seriously undermine the legitimacy of the Court and hinder its legacy's potential impact, overshadowing the ECCC's efforts to end impunity and risking the possibility that the legacy of the ECCC will be a negative one, which may actually impede the development of the domestic legal system. Allegations of corruption¹¹² and political interference in particular have been so widespread as to send a message to the national judiciary that the ECCC is no different than the Cambodian courts.

IV.1 Corruption

The ECCC has been unable to avoid the culture of corruption that, along with political interference, is so entrenched in the domestic legal system. Serious allegations of kickbacks from Cambodian staff to political leaders in exchange for their positions arose in 2007,

¹¹⁰ *Idem*, pp.14-5.

¹¹¹ See ECCC, 'Press Releases', at: <http://www.eccc.gov.kh/en/media-center/press-releases> (accessed 29 February 2012).

¹¹² For more on these issues see: International Bar Association, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future', at: <http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20%28Sept%202011%29.pdf> (accessed 24 January 2012).

allegedly having to share their entire first salary and 20% and 30% of their subsequent salary payments.¹¹³ An audit carried out by the UN Development Programme in 2007 on human resources management and hiring procedures also found that of 29 staff investigated 18 individuals did not meet the minimum requirements specified in the vacancy announcements. It also found that 28 positions were filled by appointment of the RGC without following a competitive selection process. Four of the 28 individuals were found to have been granted significant salary raises in 2006, though auditors could not determine the reasoning behind the raises as they were denied access to the four individuals' personnel files.¹¹⁴

IV.2 Political Interference

IV.2.i Political Interference in Cases 002, 003 and 004

Allegations of political interference at the ECCC are frequently raised and observers continue to criticise the ECCC and the UN for their inability to adequately deal with the matter. Letters were prevented from reaching King Father Norodom Sihanouk inviting him to testify at the ECCC in Case 002.¹¹⁵ Six former Khmer Rouge cadres, now high ranking government officials, were also summoned by the OCIJ to give testimony in Case 002. However, the six individuals never appeared as ordered.¹¹⁶ In October 2009 Khieu Kanharith, Minister for Information, stated that they “could appear in court voluntarily, the government’s position was that they should not give testimony.”¹¹⁷

Submissions were made to the Pre-Trial Chamber to investigate RGC comments on the matter as a case of interference with the administration of justice. The Chamber decision was split down national/international lines. The international judges in their dissenting opinion found that,

[n]o reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the [RGC] may have knowingly and wilfully interfered with witnesses who may give evidence before the Co-Investigating Judges.¹¹⁸

Conversely, the national judges reasoned that the comments were not by their nature intimidating, threatening or coercive. They contended that as Khieu Kanharith used the term “should” and not “shall”, his comments did not have “the character of an absolute order”¹¹⁹ and could not be considered political interference.

Allegations of political interference were also raised in relation to Cases 003 and 004. In December 2008, disagreements between the Co-Prosecutors regarding adding five additional suspects for charging and judicial investigations led the International Co-Prosecutor to make

¹¹³ Ghai, *supra* note 16, p. 19.

¹¹⁴ UNDP, ‘Audit of human resources management at the Extraordinary Chambers in the Courts of Cambodia’, at: http://old.eccc.gov.kh/english/cabinet/files/auditReports/oapr_audit_report.pdf (accessed 15 February 2012).

¹¹⁵ C. Noun, Criminal Complaint in the Municipal Court of Phnom Penh before the Office of the Royal Prosecutor, 24 October 2011, at: http://www.bohler.eu/user/file/11-10-24%29_complaint_re_witness.pdf (accessed 15 February 2012), p. 1.

¹¹⁶ *Ibid.*

¹¹⁷ S. Strangio & S. Chean, ‘Gov’t Testimony could Bias KRT: PM’, *Phnom Penh Post*, 9 October 2009.

¹¹⁸ ECCC Pre-Trial Chamber, Second Decision on Nuon Chea’s and Ieng Sary’s Appeal against OCIJ Order on Requests to Summons Witnesses, Case No. 002/19-09-2007-ECCC/OCIJ (Pre-Trial Chamber 50), 9 September 2010, p. 20.

¹¹⁹ *Ibid.*, p. 26.

a submission to the Pre-Trial Chamber outlining the disagreement and stating his intention to investigate the suspects. The decision was split down national/international lines, with the national judges supporting the Cambodian prosecutor in stating that the case against the five additional suspects could not go forward, and the international judges supporting the International Prosecutor in finding no basis for preventing the case from moving forward.¹²⁰ In the absence of the judges reaching either a unanimous or supermajority decision, it was presumed that the prosecution could proceed according to Article 19 of the Law on the ECCC,¹²¹ the International Co-Prosecutor submitted the suspects' names for investigation.

The RGC has long made its opposition to these investigations vocal. In June 2010 for example, Khieu Sopheak, a RGC Ministry of the Interior spokesman, stated that "[j]ust only the five top leader[s] [are] to be tried. Not six. Just five."¹²² Prime Minister Hun Sen told UN Secretary-General Ban Ki-Moon in October 2010 that the cases were "not allowed".¹²³ Similarly, the spokesman for the Council of Ministers, Phay Siphon, said in October 2011 that "[w]e will stand on our ground regarding the ECCC. There will be no case 003 or 004."¹²⁴

The investigation into Case 003 has led many to believe that the OCIJ is toeing the government line on the case.¹²⁵ Basic information relating to the investigation such as the suspect name was kept confidential. It was only through leaked documents that their identities came to light.¹²⁶ The OCIJ failed to conduct interviews with suspects or visit locations under investigation.¹²⁷ The OCIJ also gave victims of the crimes outlined in Case 003 only 15 days to apply for civil party status despite the fact that information regarding the crimes under investigation and suspects was still not released to the public.¹²⁸ In addition, OCIJ staff filled the case file with documents from Case 002 in order to give the impression that the OCIJ had conducted a full investigation.¹²⁹ The conduct of the OCIJ has been heavily criticised by civil society¹³⁰ and five UN members of staff at the OCIJ resigned in protest of the premature closure of investigations in April 2011.¹³¹

¹²⁰ ECCC Pre-Trial Chamber, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTRIAL CHAMBER, 18 August 2009, p. 5.

¹²¹ Law on the ECCC, supra note 53, Article 19.

¹²² D. Gillison, 'KRT begins investigation of five new regime suspects', *Cambodia Daily*, 8 June 2010.

¹²³ S. Suy, 'Cambodian PM says no third Khmer Rouge Trial', *Agence France Presse*, 27 October 2010.

¹²⁴ J. Wallace & V. Neou, 'Additional KR Arrests in Cambodia's Hand, Ho Namhong says', *Cambodia Daily*, 5 October 2011.

¹²⁵ See for example Human Rights Watch, 'Cambodia: Judges Investigating Khmer Rouge Crimes should Resign', at: <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (accessed 15 February 2012).

¹²⁶ International Bar Association, supra note 112, p. 29.

¹²⁷ Open Society Justice Initiative, 'Recent developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 update', at: http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf (accessed 14 February 2012), p. 10.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Asian Human Rights Commission, 'Cambodia: Civil Society Expresses Concern over Recent Development in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out', at: <http://humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011> (accessed 15 February 2012).

¹³¹ J. O'Toole, 'Outgoing consultant blasts Tribunal judges,' *Phnom Penh Post*, 20 May 2011.

While the National Co-Prosecutor Chea Leang welcomed the closure of the case,¹³² International Co-Prosecutor Andrew Cayley appealed the decision and requested further sites be investigated and a time extension for civil party applications.¹³³ The OCIJ considered the request invalid on a technicality stating that the International Co-Prosecutor acted unilaterally in filing the request in contravention of the Internal Rules,¹³⁴ although the practice was previously accepted at the ECCC according to Cayley.¹³⁵ Cayley appealed the decision to the Pre-Trial Chamber, however it was unable to meet the required supermajority vote necessary to overrule the OCIJ decision as it was divided along national/international lines yet again.¹³⁶ The international judges on the Pre-Trial Chamber, Judges Lahuis and Downing, reiterated criticisms they expressed in a previous decision¹³⁷ questioning the conduct of the OCIJ in Case 003 and found that the OCIJ had failed to comply with several provisions of the Internal Rules during the investigation.¹³⁸

These matters came to a head in October 2011 when International Co-Investigating Judge Siegfried Blunk resigned from his position citing political interference as the primary reason for his resignation.¹³⁹ In response, the Council of Ministers stated that the government had never interfered with the workings of the ECCC. Rather, Judge Blunk's resignation was the "culmination of a sustained campaign by international organisations alongside persistent media interference [which] have exerted increasing pressure to discredit and undermine the ECCC, attempting to force it to charge more suspects."¹⁴⁰

IV.2.ii Political Interference with Judicial Appointments

There were additional claims of political interference more recently in relation to the appointment of the Reserve International Co-Investigating Judge Laurent Kasper-Ansermet as the replacement for Judge Blunk. In February 2010 Judge Kasper-Ansermet was appointed to the position of Reserve International Co-Investigating Judge by the SCM. Under Article 27 of the Law on the ECCC and Article 5 of the Agreement this reserve judge is mandated to replace the International Co-Investigating Judge where the latter can no longer fill the post.¹⁴¹ Despite this there was a string of communications between Prime Minister Hun Sen and UN Secretary-General Ban Ki-Moon from October to December 2011 in relation to

¹³² See ECCC, 'Statement by the National Co-Prosecutor regarding Case File 003', at: <http://www.eccc.gov.kh/en/articles/statement-national-co-prosecutor-regarding-case-file-003> (accessed 14 March 2012).

¹³³ ECCC Pre-Trial Chamber, Considerations of the Pre-trial Chamber Regarding the International Co-Prosecutor's Appeal against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, Case No. 003/07-09-2009-ECCC/OCIJ (Pre-Trial Chamber 04), 2 November 2011, p. 2.

¹³⁴ *Idem*, pp.3-4.

¹³⁵ ECCC OCIJ, Decision on Time Extension Request and Investigate Requests by the International Co-Prosecutors Regarding Case 003, Case No. 003/07-09-2009-ECCC/OCIJ, 7 June 2011, p. 3.

¹³⁶ ECCC PTRIAL CHAMBER, Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal against the Decision on Re-filing of Three Investigative Requests, Case No. 003/07-09-2009-ECCC/OCIJ (Pre-Trial Chamber 06), 15 November 2011, p. 5.

¹³⁷ ECCC PTRIAL CHAMBER, Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, Case No. 003/07-09-2009-ECCC/OCIJ (Pre-Trial Chamber 02), 24 October 2011.

¹³⁸ ECCC Pre-Trial Chamber 15 November 2011, *supra* note 136, pp. 6-11.

¹³⁹ S. Blunk, 'Press Release by the International Co-Investigating Judge', at: [http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf) (accessed 15 February 2012).

¹⁴⁰ Press and Quick Reaction Unit, 'Statement of the spokesperson of the press and quick reaction unit of the office of the council of ministers', at: <http://www.cambodiatribunal.org/sites/default/files/Judge%20Blunk%20resignation%20bow%20to%20NGOs%20pressure.pdf>. (accessed 14 February 2012).

¹⁴¹ Law on the ECCC, *supra* note 53; the Agreement, *supra* note 54.

Kasper-Ansermet's appointment as Co-Investigating Judge. The letters highlight the RGC's level of involvement in matters that it legally should have nothing to do with. In a letter on 3 November Hun Sen suggested careful consideration of Judge Kasper-Ansermet regarding "certain activities by Mr Kasper-Ansermet that have been brought to public attention."¹⁴²

The activities in question were posts by Judge Kasper-Ansermet on Twitter in which he provided information relating to Case 003 suspects that was already in the public domain, criticisms of Co-Investigating Judges You and Blunk as well as posting his intention to reopen Case 003.¹⁴³ On 13 January the SCM, which as noted above is heavily influenced by the executive, refused to appoint Judge Kasper-Ansermet. It reasoned that in posting the remarks on Twitter Judge Kasper-Ansermet violated provisions of the Code of Criminal Procedure, the Internal Rules and the Code of Judicial Ethics relating to the circulation of confidentiality information and criticisms of fellow judicial officers.¹⁴⁴ This is despite the fact that the UN had already investigated these concerns and decided they were unfounded.¹⁴⁵ The RGC and ECCC national staff have continuously contested Judge Kasper-Ansermet's authority to investigate Cases 003 and 004, particularly his national counterpart, Judge You Bunleng. Faced with this opposition, Judge Kasper-Ansermet has recently tendered his resignation with effect from 4 May 2012, citing a dysfunctional situation surrounding Cases 003 and 004 arising from Judge You's active opposition to investigations into the cases. Judge Kasper-Ansermet has also opened internal investigations into interference with the administration of justice.¹⁴⁶

The UN has been criticised for not properly dealing with the above allegations of political interference. UN officials, while unafraid to call on parties to respect the independence and integrity of the ECCC, have failed to adequately respond to the allegations.¹⁴⁷ UN participation and oversight has been essential to the legitimacy of the ECCC and the appearance of independence and professionalism. Despite this it has taken no meaningful action to investigate claims of political interference.¹⁴⁸ The UN Secretary-General for Legal Affairs Patricia O'Brien was dispatched to Cambodia to assess the situation after Judge Blunk's resignation. Although she urged the RGC to refrain from making statements opposing Cases 003 and 004 and from interfering with the administration of justice, she did

¹⁴² Press and Quick Reaction Unit, 'Press Statement'. The press statement was made on 12 January 2012 but then hastily retracted. It is available at: <http://ki-media.blogspot.com/2012/01/entertainment-from-kew-kew-kew-kew.html> (accessed 15 February 2012).

¹⁴³ L. Kasper-Ansermet's Twitter account is available at: <http://twitter.com/LKasperAnsermet> (accessed 15 February 2012).

¹⁴⁴ Press and Quick Reaction Unit, 'Summary Report of the Meeting of the Supreme Council of the Magistracy on the Proposed Appointment of Mr. Laurent Kasper-Ansermet as International Co-Investigating Judge in the ECCC', at: <http://www.pressocm.gov.kh/inside.php?view=detail&story=2096> (accessed 15 February 2012).

¹⁴⁵ 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), 20 January 2012.

¹⁴⁶ ECCC, 'Press Release from the International Reserve Co-Investigating Judge', at: <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge> (accessed 20 March 2012).

¹⁴⁷ See for example the statement made by the Spokesperson for UN Secretary-General Ban-Ki Moon, 'United Nations rejects 'media speculation' that judges received instructions to dismiss case before Extraordinary Chambers in Courts of Cambodia', at: <http://www.un.org/News/Press/docs/2011/sgsm13642.doc.htm> (accessed 15 February 2012).

¹⁴⁸ Human Rights Watch, *supra* note 125.

not assert any intention to investigate the claims further.¹⁴⁹ Ou Virak, President of CCHR, noted that Ms O'Brien seemed to be more interested in the fallout of such a probe, rather than the need to investigate the allegations.¹⁵⁰

V. Leaving a Lasting Legacy: Superficial or Confirming the Status Quo?

The likely influence of the ECCC on the Cambodian judiciary is somewhat difficult to gauge though it is perhaps fair to say that for the ordinary Cambodian spectator hoping that the ECCC would be an exception to a judicial landscape marred with corruption and political interference, such hopes have not actualised. Although it has been proffered as a model court for the domestic legal system, expectations must be realistic when measuring the impact of the ECCC's legacy. The OHCHR for instance has stated that "it takes many years to complete even basic legal training and that reforming dysfunctional judicial systems and developing a culture based on the rule of law and respect for human rights are long-term goals."¹⁵¹ It must also be remembered that hybrid courts are directed interventions, with limited time frames and due to limited resources, compelled to confine themselves to the objective of conducting trials.¹⁵² Similarly, one must accept the fact that while the ECCC is a UN-backed tribunal, it is still only one centralised court in a country that suffers from severe deficiencies in the legal system. However, even with these considerations in mind, the legacy of the ECCC is superficial at best with even positive developments being rolled back on. Headway that was made in relation to certain fair trial rights has ultimately fallen to the wayside, with the national judiciary not gaining any greater understanding of how to transfer adherence to these rights to domestic legal proceedings.

Ultimately it seems that we cannot ignore the institutional constraints and absence of political will for true legal and judicial reform which shape the contours of the justice system in which the ECCC operates. Apart from the DSS's mandate to train national lawyers in collaboration with the BAKC, the ECCC's legacy was not taken into account during the drafting stages of the Agreement, the Law on the ECCC or the Internal Rules and as a result contextual issues were not adequately considered. While certain sections of the ECCC have made efforts to initiate certain projects and strategies, there is no overarching strategy for the implementation of legacy initiatives.¹⁵³ There has been no concerted effort to tackle the entrenched flaws within the legal system. Training programmes run by the ECCC, while numerous, are not up to the task of educating and training an entire legal system that is sorely lacking in qualified, experienced personnel.¹⁵⁴ The availability of resources for domestic courts is another issue that must be considered. The Ministry of Justice has approximately 1% of the ECCC's budget to run Cambodia's courts.¹⁵⁵ Therefore, it is difficult to conceive how ECCC practices such as computerised case management can be replicated in the domestic system.¹⁵⁶ Echoing these sentiments, National Co-Prosecutor Chea has commented that while ECCC national staff members would like to apply what they

¹⁴⁹ A. Sok & P. O'Brien, 'Press Statement', at:

<http://www.cambodiatribunal.org/sites/default/files/reports/Press%20Statement%2020%20Oct%20011.pdf> (accessed 15 February 2012).

¹⁵⁰ Radio Netherlands Worldwide, 'Cambodia: UN Visit Ends without Decision', at:

<http://www.rnw.nl/international-justice/article/cambodia-un-visit-ends-without-decision> (accessed 13 March 2012).

¹⁵¹ OHCHR, *supra* note 46, p. 5.

¹⁵² *Idem*, pp. 5-6.

¹⁵³ DC Cam, *supra* note 51, p. 28.

¹⁵⁴ *Idem*, p. 51.

¹⁵⁵ Martin-Ortega & Herman, *supra* note 48, p.16.

¹⁵⁶ *Ibid.*

have learned to the domestic legal system, severe budgetary and human resource problems would make it difficult.¹⁵⁷

Political control and interference in the judicial system is by far the greatest challenge to any positive legacy that the ECCC can push forward, one that in fact stymies the ECCC's own ability to administer due process. The judiciary are not sufficiently independent and too ensconced in political machinations not to bow to political pressure when it is applied. Where a case comes before the courts with political undertones, there will likely be no change, an accused's fair trial rights will still be violated so that proceedings come to the desired result. In this regard it may be questionable to enhance the Cambodian judiciary's ability to manipulate the law where it is clearly under political control.¹⁵⁸ Such endemic problems will likely hamper the ECCC's ability to foster change in the domestic judiciary. These issues are too entrenched in the system for a 'one off' series of trials¹⁵⁹ to do much in the way of alleviating them. They have been embedded in the system for generations and it will be many years before any substantial change will occur.

The inability of the ECCC to properly investigate the allegations made against it has further consolidated the belief that political interference in legal institutions is the status quo in Cambodia. If the UN is unable to surmount such allegations, it is also unable to surmount perceptions that the ECCC is just another Cambodian court suffering from the same difficulties faced by domestic institutions and will unlikely be able to contribute to the development of the judiciary. For the credibility of the ECCC, these discrepancies and allegations must be fully investigated and not swept under the rug. They go to the heart of the ECCC's legitimacy and dealing with them openly and effectively will be the only way that the ECCC can provide a good model for the Cambodian courts.

The key criterion which is lacking in Cambodia is political will to introduce judicial and legal reform. In order for a hybrid court to establish a meaningful legacy for any domestic judiciary, to effect real reform, international and national interests must coincide.¹⁶⁰ Unfortunately this is not the case in Cambodia. As indicated above, while Cambodia has a rather progressive constitution and has adopted a number of international human rights treaties and incorporated them into domestic law, it frequently does not apply these instruments in practice. For years the RGC has promised to revolutionise the judicial system, including reforming the SCM and providing for judicial independence. However, despite repeated assurances from the government, the necessary legislation has yet to be promulgated. In the reasoned opinion of the authors, a strong and independent judiciary free of influence is simply not in the interest of the RGC.¹⁶¹ The development of a robust, independent legal system dispensing justice in accordance with the rule of law would diminish the RGC's current grip on power, something that it is unwilling to accept.¹⁶² The RGC prefers to maintain the judiciary as is, a tool to be used as it sees fit.

Consequently, any changes brought about as a result of the ECCC can only be superficial in nature. They will not go to the core of the flaws associated with the legal system in

¹⁵⁷ Atlas Project, *supra* note 20, p. 51.

¹⁵⁸ DC Cam, *supra* note 51, p. 23.

¹⁵⁹ S. Linton, *Reconciliation in Cambodia*, Phnom Penh: Documentation Centre of Cambodia 2004, pp. 249-50.

¹⁶⁰ OHCHR, *supra* note 46, p. 37.

¹⁶¹ Atlas Project, *supra* note 20, p. 50.

¹⁶² U. Kheang & J. Ledgerwood, 'Is the trial of 'Duch' a catalyst for change in Cambodia's Courts?', at: <http://www.asiapacificcrossings.org/wp-content/uploads/2011/11/Un-and-Ledgerwood-Change-in-Cambodias-Courts-6-2010.pdf> (accessed 29 February 2012), p. 9.

Cambodia as any such reform would not be permitted to take root,¹⁶³ fundamental flaws in the Cambodian legal system will not be addressed. Although the ECCC may influence individual judges to respect fair trial rights and adhere to justice standards, it will be unable to foster a culture of supremacy of law which requires the political will to bring about the structural change necessary to establish a truly independent legal system.¹⁶⁴ Any improvements in trial proceedings regarding fair trial rights protection, while welcome, will be overshadowed by the fact that the courts themselves still lack independence.

Conclusion

The ECCC has undertaken a number of initiatives aimed at enhancing the capacity of the national judiciary, adherence to fair trial rights and standards of justice. However, there is no overarching framework guiding these programmes. Inroads made by the ECCC to improve the legal system to date and its ability to foster change are hindered by a number of factors including political interference. While there is promise that reform may occur, particularly in relation to the protection of fair trial rights, Cambodia lacks the central component necessary to ensure the ECCC can have a lasting impact- the political will of the RGC. As such, any attempts to reform overarching deficiencies in the legal system, i.e. the system of patronage and political interference, will be unable to take root as it is not in the RGC's interest to establish a truly independent judiciary. There is however some hope that the ECCC can foster public demand for legal reform. Rather than expecting the ECCC to bring about such reform by itself, the ECCC should be considered as a means of planting the seed of legal reform, encompassing the separation of powers, greater adherence to fair trial rights and the rule of law, in the public consciousness. Only through the Cambodian people can real change come.

¹⁶³ *Idem*, p. 9.

¹⁶⁴ Martin-Ortega & Herman, *supra* note 48, p. 71.