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# Worth the Effort?: Assessing the Khmer Rouge Tribunal

Diane Orentlicher

# ‘Worth the Effort’?

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### Abstract

*Every international and hybrid war crimes court has attracted a measure of controversy, but none more than the Extraordinary Chambers in the Courts of Cambodia (ECCC). While myriad aspects of the ECCC’s record are crucial to its legacy, this article explores one question of overarching importance: whether its performance has justified a key risk the UN assumed when it agreed to support the court — that case selection would be improperly influenced by the Cambodian government. More particularly, it assesses the ECCC’s performance in light of two questions: How well have safeguards against political interference worked? Are survivors of Khmer Rouge atrocities and other Cambodian citizens satisfied with ECCC justice? Along with their intrinsic importance, these benchmarks for assessment derive from the primacy of both considerations in deliberations leading to the Court’s creation.*

### 1. Introduction

Every international war crimes court<sup>1</sup> has attracted controversy, but none more than the Extraordinary Chambers in the Courts of Cambodia (ECCC). Now in its twilight years, the ECCC has sparked robust debate since the late 1990s, before it was even launched. During negotiations aimed at creating a tribunal to address crimes of the Khmer Rouge, United Nations (UN) officials and others debated whether a court acceptable to Cambodia would be worthy

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1 Here I use the phrase ‘war crimes court’ as shorthand for criminal tribunals, whether international, special or hybrid, with subject matter jurisdiction over genocide and crimes against humanity as well as war crimes.

of UN support. Today, the fulcrum of debate is whether the ECCC was ‘worth the effort’ it has required.<sup>2</sup>

While myriad aspects of the ECCC’s record are crucial to its legacy, this article explores one question of overarching importance: whether the Court’s performance has justified a central risk the UN assumed when it agreed to support the Court — that case selection would be improperly influenced by the Cambodian government. More particularly, it assesses performance against two criteria: How well have safeguards against political interference worked? Are survivors of Khmer Rouge atrocities and other Cambodian citizens satisfied with ECCC justice?

Along with their intrinsic importance, these benchmarks for assessment derive from the primacy of both considerations in deliberations leading to the Court’s creation. Over the course of fraught negotiations about a possible Khmer Rouge tribunal, concerns about government interference loomed large in the concerns of UN officials and others. As noted, that risk was especially pronounced with respect to case selection. Ultimately, the UN and Cambodia agreed to include in the Court’s legal framework novel safeguards against such interference, but UN negotiators remained sceptical about their sufficiency.

While several factors led the UN to support the ECCC despite its concerns, one had overarching importance: the opportunity to provide justice to victims of Khmer Rouge atrocities could soon disappear. This consideration was amply warranted for reasons that transcend the advanced age of likely suspects. As elaborated later, there are few goals a war crimes court is better suited to achieve than providing justice to those who survived crimes of surpassing cruelty and scope.

## 2. Genesis of an Idea and Impetus for Planning

As a foundation for this assessment, it is necessary to recall key factors that led to the ECCC’s creation. While much of this history has been recounted elsewhere, this section highlights a factor that is often obscured, and which is fundamental to this article’s assessment: crucial impetus was provided by Cambodian citizens’ increasingly urgent demand for justice.

2 The quoted phrase comes from the report of a Group of Experts whom the UN Secretary-General appointed to assess the feasibility of and legal options for prosecuting Khmer Rouge suspects. *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, UN Doc. A/53/850-S/1999/231, Annex, 16 March 1999, § 101 (hereafter ‘Group of Experts Report’). See also S. Mydans, ‘11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?’ *New York Times*, 10 April 2017. For a positive assessment of the performance and legacy of the ECCC, see in this symposium, P. Lobba and N. Pons, ‘Rethinking the Legacy of the ECCC: Selectivity, Accountability, Ownership’.

### A. Origins of Planning Efforts

Early steps toward establishing a Khmer Rouge tribunal emerged less from survivors' expectations than the prevailing *Zeitgeist*. In a decade that saw the creation of two ad hoc international criminal tribunals, planning for a permanent international criminal court, unprecedented use of universal jurisdiction, and other efforts to bring to justice those responsible for atrocious crimes, it was natural to ask, 'What about Cambodia?' After all, an estimated 1.7–2.2 million Cambodians died at the hands of the Communist Party of Kampuchea (CPK), widely known as the Khmer Rouge, when it ruled Cambodia from April 1975 until January 1979.<sup>3</sup>

To be sure, two senior leaders of Democratic Kampuchea (DK), as the Khmer Rouge renamed Cambodia, had already been tried. In 1979, the government then recently installed by Vietnam<sup>4</sup> held a five-day trial *in absentia* of Khmer Rouge leader Pol Pot and DK Foreign Minister Ieng Sary, convicting both of genocide and sentencing them to death. But the procedure is widely considered a show trial.<sup>5</sup> Even so, it would take years before the international community seriously pursued credible prosecutions for Khmer Rouge atrocities.<sup>6</sup>

- 3 See C. Etcheson, *Extraordinary Justice: Law, Politics, and the Khmer Rouge Tribunals* (Columbia University Press, 2019), at 259. Khmer Rouge atrocities have been widely documented and analysed. See e.g. B. Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–1979* (Yale University Press, 1996); D.P. Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945* (Yale University Press, 1991); E. Becker, *When the War Was Over: Cambodia and the Khmer Rouge Revolution* (Public Affairs, 1998).
- 4 The Vietnamese army, along with Cambodian resistance forces, launched a full-scale invasion of Cambodia on 24 December 1978, and installed in power what was then an opposition group in early January 1979.
- 5 See A.L. Hinton, *The Justice Façade: Trials of Transition in Cambodia* (Oxford University Press, 2018), at 45; S. Heder and B. Tittensor (eds), *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Documentation Center of Cambodia, 2004), at 3, note 3; H. Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal', 5 *Melbourne Journal of International Law* (2004) 462–482, at 466–467; *Group of Experts Report*, *supra* note 2, § 43. This view received judicial validation in Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne bis in idem and Amnesty and Pardon), *Nuon Chea et al.* (Case 002), E51/15, Trial Chamber, 3 November 2011, § 30 (1979 proceedings were so deficient as to render the judgment without legal effect). The 1979 trial, which was broadcast nationally on radio, nevertheless struck a resonant chord with many Cambodians. See Hinton, *ibid.*, at 46.
- 6 The reasons have been widely addressed elsewhere. See e.g. *Group of Experts Report*, *supra* note 2, § 43; S. Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge 'Senior Leaders' and Others 'Most Responsible' for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, available online at [www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf](http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf) (visited 25 April 2020), at 5–6. Before the question of international prosecutions was seriously pursued, there were efforts to persuade a state to bring a case before the International Court of Justice alleging that Cambodia had breached the Genocide Convention. See Etcheson, *supra* note 3, at 31–34; H. Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence', 11 *Human Rights Quarterly* (1989) 82–138.

The first significant governmental steps toward such a process were taken in Washington. In 1994, the US Congress enacted the Cambodian Genocide Justice Act,<sup>7</sup> which urged the President to collect or assist others to collect evidence of Khmer Rouge atrocities and support a tribunal to hold those responsible to account.<sup>8</sup> The Act might have been quietly buried in bureaucratic indifference were it not for a determined State Department official, David Scheffer, who pressed relentlessly for a Khmer Rouge tribunal.

In mid-1996, developments in Cambodia drew wider attention to the question whether Khmer Rouge leaders should face a judicial reckoning. After negotiating the defection to government forces of several remnant Khmer Rouge units once associated with Ieng Sary, then-Co-Prime Minister Hun Sen persuaded Ieng Sary to return from exile and act as leader of the defecting units, thus signalling an unravelling of the old DK leadership.<sup>9</sup> In August, Hun Sen prevailed upon King Norodom Sihanouk to grant Ieng Sary a pardon from his 1979 conviction and amnesty from prosecution under a 1994 law outlawing the Khmer Rouge.<sup>10</sup> Far from taking prosecutions off the table, however, the amnesty triggered robust debate in Cambodia and abroad.<sup>11</sup> Within the government, the prospect of welcoming Ieng Sary ‘back into society’ divided the two co-prime ministers, Prince Norodom Ranariddh and Hun Sen.<sup>12</sup>

As for Cambodian citizens, the influential *New York Times* reported that many seemed ‘to prefer not to reopen old wounds’, and were instead ‘more eager for peace than for retribution’.<sup>13</sup> In fact, however, the amnesty ‘created a huge outcry from survivors of Democratic Kampuchea and forced the issue of justice for the regime’s crimes to the fore’.<sup>14</sup>

7 22 U.S.C. 2656, Part D.

8 *Ibid.*, § 572(b)(1)–(2).

9 See Heder, *supra* note 6, at 9–12. Khmer Rouge forces had been fighting the Cambodian government from bases on the Thai-Cambodian border since early 1979.

10 See S. Mydans, ‘An Amnesty in Cambodia’, *New York Times*, 18 September 1996. Later, the ECCC ruled that neither the 1979 trial nor the 1996 pardon barred Ieng Sary’s prosecution. Decision on Ieng Sary’s Rule 89 Preliminary Objections, *supra* note 5.

11 See R. Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Springer Nature, 2019), at 80; T. Hammarberg, ‘How the Khmer Rouge Tribunal Was Agreed: Discussions between the Cambodian Government and the UN, Part I’ (2001), available online at [www.dccam.org/Tribunal/Analysis/How\\_Khmer\\_Rouge\\_Tribunal.htm](http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm) (subsequent pinpoint references are based on a hard copy printed from this link; visited 25 April 2020); ‘Peace, Then Justice in Cambodia (editorial)’, *New York Times*, 17 August 1996.

12 S. Mydans, ‘Cambodia’s Dual Premiers Are Split on Khmer Rouge’, *New York Times*, 21 August 1996. Soon, however, the two joined in seeking the amnesty. See S. Mydans, ‘Cambodians to Seek Amnesty for Khmer Rouge Defector’, *New York Times*, 24 August 1996; ‘Khmer Rouge Amnesty Announced by Sihanouk’, *New York Times*, 25 August 1996.

13 S. Mydans, ‘Why Cambodia May Overlook Its Past’, *New York Times*, 8 September 1996. Some contemporaneous media accounts did, however, reflect Cambodian opposition to the amnesty. See e.g. ‘Cambodia Grants Amnesty to Breakaway Khmer Rouge Leader’, Morning Edition, National Public Radio, 16 September 1996; A. Fifield, ‘Peace without Justice’, *In These Times*, 23 December 1996.

14 Y. Chhang, ‘The Thief of History — Cambodia and the Special Court’, 1 *International Journal of Transitional Justice (IJTJ)* (2007) 157–172, at 162.

The amnesty also galvanized attention within the UN. Not long after Ieng Sary's defection, Thomas Hammarberg, who had recently become Special Representative of the UN Secretary-General for Human Rights in Cambodia, began pressing for accountability.<sup>15</sup> At his initiative,<sup>16</sup> in April 1997, the UN Human Rights Commission asked the Secretary-General to 'examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law'.<sup>17</sup>

### **B. The Arrest and Death of Pol Pot**

In June 1997, Stephen Heder, one of the foremost scholars of Cambodia, called to share stunning news: a faction of the Khmer Rouge led by Ta Mok, formerly CPK Second Deputy Secretary, had rebelled against Pol Pot, whom the dissidents now held on the Thai-Cambodian border.<sup>18</sup> This faction indicated it was willing to turn Pol Pot over to a government that was prepared to try him. Might the US government be willing and able to respond to their offer?<sup>19</sup> I immediately conveyed this to Scheffer, who mounted a concerted effort to identify: (1) a way to extract Pol Pot from Cambodia, and (2) a government that had a legal basis for arresting Pol Pot for atrocities in Cambodia and that was willing to detain him, at least until an international court could be established.<sup>20</sup>

Pol Pot's arrest also energized UN efforts to create a Khmer Rouge tribunal.<sup>21</sup> Formally, those efforts were prompted by a letter dated 21 June 1997 from Cambodia's two co-prime ministers to then-UN Secretary-General Kofi Annan requesting 'the assistance of the United Nations and the international

15 In November 1996, the UN human rights office in Cambodia formulated suggestions for Hammarberg concerning the position he might take in response to the amnesty for Ieng Sary. See Heder, *supra* note 6, at 12.

16 See Hammarberg, *supra* note 11, at 2; M. Baaz, 'Bringing the Khmer Rouge to Trial: An Extraordinary Experiment in International Criminal Law', in P. Wahlgren (ed.), *Comparative Law*, Vol. 61 (Scandinavian Studies in Law, 2015) 291–338, at 298–299.

17 C.H.R. Res. 1997/49, § 12, UN Doc. E/CN.4/1997/49, 11 April 1997.

18 Mok's rebellion was pre-emptive: Pol Pot had just ordered the execution of another senior Khmer Rouge leader, Son Sen. With justification, Mok feared that Pol Pot would order his execution next. See Heder, *supra* note 6, at 13.

19 The faction that arrested Pol Pot wanted a 'concrete, guaranteed' judicial venue before it would surrender him. See S. Heder and D. Orentlicher, 'The Myths that Keep Pol Pot Out of a Courtroom', *L.A. Times*, 10 August 1997. My undated notes from one conversation with Heder during this period record that Pol Pot's captors repeatedly asked Heder's interlocutors: 'Where's the plane [to take Pol Pot away]? Where's the court?'

20 For a detailed account of these efforts, see D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), 345 *et seq.*; Etcheson, *supra* note 3, at 48–51.

21 See S. Mydans, 'Cambodia's Bureaucracy of Death: Reams of Evidence in Search of a Trial', *New York Times*, 20 July 1997. Several weeks after Pol Pot's capture, the Khmer Rouge faction holding him announced it had condemned Pol Pot 'and his clique to life imprisonment'. 'Khmer Rouge Sentence Pol Pot to Life in Jail', *Washington Post*, 27 July 1997. See also N. Thayer, 'Brother Number Zero', *Far Eastern Economic Review*, 7 August 1997, 14–18, at 14–15.

community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979'. Asserting Cambodia lacked 'the resources and expertise to conduct this very important procedure' and alluding to the ad hoc Tribunals the UN Security Council had established for the former Yugoslavia and Rwanda, the leaders asked 'that similar assistance be given to Cambodia'.<sup>22</sup>

The letter marked a rare and fleeting accord between the co-prime ministers. In early July, then-Second Prime Minister Hun Sen mounted a coup against then-First Prime Minister Norodom Ranariddh.<sup>23</sup> While efforts to create a tribunal lost momentum as a result, Hammarberg continued to advance UN deliberations. At his initiative,<sup>24</sup> the UN General Assembly asked the Secretary-General to examine Cambodia's request for assistance and suggested that, to this end, he appoint 'a group of experts to evaluate the existing evidence and propose further measures' of accountability.<sup>25</sup> Six months later, Pol Pot died.<sup>26</sup>

Far from ending the quest for DK-era justice, Pol Pot's death breathed new life into efforts to ensure a legal reckoning.<sup>27</sup> Of crucial importance, the reaction of many Cambodians 'seemed to belie' the view — previously popularized in Western media — that most preferred to avoid a trial 'in ... a spirit of Buddhist forgiveness'.<sup>28</sup> As one Cambodian told the *New York Times*, 'the Jewish people's search for justice did not end with the death of Hitler, and the Cambodian people's search for justice doesn't end with Pol Pot'.<sup>29</sup>

22 Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, UN Doc. A/51/930-S/1997/488, 24 June 1997, Annex. Although signed by the co-prime ministers, the letter was suggested by Hammarberg, whom Prince Ranariddh asked to draft it. See Hammarberg, *supra* note 11, at 2. The text was drafted by staff of the UN human rights field office in Phnom Penh. See Heder, *supra* note 6, at 14; Etcheson, *supra* note 3, at 45. Brad Adams, who took the lead in drafting the letter, would later become a prominent critic of the ECCC in his capacity as Asia Director of Human Rights Watch.

23 See S. Mydans, 'Hun Sen Declares Victory in Cambodia', *International Herald Tribune*, 7 July 1997; T. Rosenberg, 'Hun Sen Stages an Election', *New York Times Magazine*, 30 August 1998, 26, at 26. In 1993, Prince Ranariddh's party won UN-organized elections but Hun Sen challenged the results and threatened to renew civil war. To avert this, King Norodom Sihanouk helped broker an arrangement pursuant to which Hun Sen and Ranariddh would share power as co-prime ministers.

24 See Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, submitted in accordance with Commission resolution 1997/49, UN Doc. E/CN.4/1999/95, 20 February 1998, § 75.

25 GA Res. 52/135, 12 December 1997, § 16. In September 1997, Hammarberg confirmed that Hun Sen and Ranariddh still considered the June 1997 letter valid. See Hammarberg, *supra* note 11, at 4.

26 See K.B. Richburg, 'Pol Pot's World Ended with a Whimper', *Washington Post*, 23 April 1998.

27 See R. Birsel, "'Pol Pot's Men Should Be Tried', U.N. Official Says", *Reuters*, 17 April 1998; S. Erlanger, 'Death of Pol Pot: The Inner Circle; U.S. Wants to Try Khmer Rouge Leaders', *New York Times*, 18 April 1998; E. Becker, 'Pol Pot's End Won't Stop U.S. Pursuit of His Circle', *New York Times*, 17 April 1998.

28 S. Mydans, 'The Demons of a Despot', *New York Times*, 17 April 1998.

29 R.D. McFadden, 'Survivor of Killing Fields Is Resolute in Quest for Justice', *New York Times*, 17 April 1998, quoting Dith Pran.

The report of a Group of Experts appointed by Annan to explore the feasibility of and legal options for bringing key Khmer Rouge figures to justice, submitted on 22 February 1999, put to rest any lingering notion that few Cambodians sought justice for DK-era crimes. While acknowledging that systematic polling had not been undertaken on the subject, the experts heard 'an unambiguous demand for trials' during consultations in Cambodia.<sup>30</sup>

Cambodians' demand for justice helped ensure that the UN, as well as other key actors, would find a way to surmount myriad obstacles to the creation of a Khmer Rouge tribunal. Foremost among them was Hun Sen's waning appetite for trials. When two senior DK leaders, Khieu Samphân and Nuon Chea, defected from the Khmer Rouge in December 1998,<sup>31</sup> Hun Sen declared they should be welcomed 'with bouquets of flowers, not with prisons and handcuffs'.<sup>32</sup> He added: 'We should dig a hole and bury the past and look ahead to the 21st century with a clean slate.'<sup>33</sup>

Noting that Hun Sen's support for a tribunal faded upon the December defections and the March 1999 arrest of Ta Mok, the last remaining senior DK official still at large, Hammarberg surmised: 'It appears that the tribunal had been considered as a means of defeating the Khmer Rouge [as a military force]. When this goal now had been achieved through other means, there was no need to try anyone else than the one person who had refused to surrender: Ta Mok.'<sup>34</sup>

But the Cambodian leader faced an increasingly powerful demand for justice, which he could hardly ignore.<sup>35</sup> By August 1999, his government and the UN were negotiating the details of a Khmer Rouge tribunal.

### 3. A Compromise/d Court

#### *A. Foundational Battles: Controlling Appointments to the Court*

The seeds of the most vexing controversies associated with the ECCC were planted during those negotiations. A major point of contention was the nature of the court — whether, that is, it would be fundamentally international or domestic. Presciently, the Group of Experts appointed by Annan warned that endemic corruption in Cambodia's legal system 'and the routine subjection of judicial decisions to political influence would make it nearly impossible' for key

<sup>30</sup> *Group of Experts Report*, *supra* note 2, § 94.

<sup>31</sup> S. Mydans, '2 Key Aides of Pol Pot Said to Emerge from Hiding', *New York Times*, 27 December 1998.

<sup>32</sup> S. Mydans, 'Cambodian Leader Resists Punishing Top Khmer Rouge', *New York Times*, 29 December 1998.

<sup>33</sup> *Ibid.*

<sup>34</sup> Hammarberg, *supra* note 11, at 10. Hun Sen claimed Cambodia was ready to try Mok in a national court; outsiders would be welcome to observe those proceedings — if, that is, the Cambodian court invited them. *Ibid.*

<sup>35</sup> See L. McGrew, 'The Thorny Debate on Justice for Pol Pot's Madness', *Phnom Penh Post*, 18 February 2000 (a majority of Cambodians participating in then-recent survey 'felt strongly there should be a trial' for DK-era atrocities).



judicial actors ‘to be immune from such pressure’ in a court organized under Cambodian law.<sup>36</sup> Accordingly, the experts ‘strongly’ recommended that the UN create an ad hoc international tribunal,<sup>37</sup> an approach also favoured by the UN’s lead negotiator, then-UN Legal Advisor Hans Corell.

Hun Sen quickly rejected this model.<sup>38</sup> With an international court off the table, UN negotiators believed the only way to shield a Khmer Rouge tribunal from political interference was for the UN to appoint a majority of judges and the chief prosecutor.<sup>39</sup> Yet this, too, was anathema to Hun Sen, who never wavered from the position he conveyed to Hammarberg in October 1999: ‘Cambodia wants to be given opportunity to be masters of its own situation. You can participate, but do not try to be masters of the issue.’<sup>40</sup>

How the two sides ultimately agreed to create the ECCC has been described in depth elsewhere.<sup>41</sup> Here it will suffice to note five factors that, in combination, led the UN to support a court about which its senior officials had grave doubts and Hun Sen to accept a court he was hardly keen to create.

First, an emergent civil society in Cambodia supported international pressure on the Cambodian government<sup>42</sup> and made its views known.<sup>43</sup> When, for example, Corell announced in February 2002 that the UN had withdrawn from negotiations,<sup>44</sup> ‘[p]rotests and demands to restart negotiations poured in from genocide victims at home and abroad, and received ample coverage in the media’.<sup>45</sup> Although Cambodian citizens did not play a formal role in negotiations, their views bolstered the position of key participants.

36 *Group of Experts Report*, *supra* note 2, § 133.

37 *Ibid.*, § 139.

38 See *Report of the Secretary-General: Situation of human rights in Cambodia*, UN Doc. A/54/353, 20 September 1999, § 55. Cambodia’s agreement would not have been legally necessary if the UN Security Council established a tribunal. But China, which had long supported the Khmer Rouge, blocked this path. See Hammarberg, *supra* note 11, at 3, 5.

39 See Gidley, *supra* note 11, at 91; J.D. Ciorciari and A. Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press, 2014), at 184. The UN put forth such a proposal in August 1999. See P. Shenon, ‘U.N. Plans Joint War Crimes Tribunal for Khmer Rouge’, *New York Times*, 12 August 1999.

40 Hammarberg, *supra* note 11, at 18.

41 See e.g. Etcheson, *supra* note 3, at 63 *et seq.*; Gidley, *supra* note 11, at 90–107; Hammarberg, *supra* note 11; C. Etcheson, ‘A ‘Fair and Public Trial’: A Political History of the Extraordinary Chambers’, in Open Society Justice Initiative (ed.), *Just. Initiatives: The Extraordinary Chambers* (Open Society Institute, 2006) 7; Chhang, *supra* note 14, at 162–168.

42 See Heder and Tittmore, *supra* note 5, at 16.

43 See *ibid.*, at 16 note 42; Hammarberg, *supra* note 11, at 18–19; B. Adams, ‘No Pass for the Khmer Rouge’ (opinion piece), *Washington Post*, 18 April 2000.

44 Corell explained that, based on negotiations up to that point, the UN had ‘come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have’. Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002.

45 Chhang, *supra* note 14, at 165. See also Y. Chhang, ‘Cambodia Won’t Easily Find Justice on Its Own’ (opinion piece), *New York Times*, 14 February 2002; S. Mydans, ‘Khmer Rouge Trials Won’t Be Fair, Critics Say’, *New York Times*, 10 February 2002; ‘Rights Groups Ask Government, UN to Open Credible Khmer Rouge Tribunal’, *Agence France-Presse*, 9 December 2002.

Secondly, influential states pressed the UN to conclude an agreement with Cambodia. While the US role was especially visible,<sup>46</sup> other states pushed the UN to find a way forward when negotiations stalled. For example, after the UN withdrew from negotiations in February 2002, France and Japan co-sponsored a resolution, adopted by the UN General Assembly in December 2002, calling for the Secretary-General to resume talks.<sup>47</sup>

Thirdly, despite his tepid support for prosecutions, Hun Sen believed he had to 'make at least some accommodation to rising international pressures for a credible accounting'.<sup>48</sup>

Fourth, international non-governmental organizations (NGOs) helped shape the course of negotiations, often amplifying the concerns of Cambodian civil society. Throughout the planning process, the Open Society Justice Initiative (OSJI) convened NGO meetings to strategize about difficult issues as they arose in negotiations.<sup>49</sup> These NGOs were influential; some marshalled pressure to revive negotiations after they broke off.<sup>50</sup>

Finally, and of overarching importance, a looming prospect animated Cambodian survivors and others who pressed the UN to persevere in the face of vexing challenges: the chance to prosecute any Khmer Rouge leaders might soon end.<sup>51</sup> One individual who sought to facilitate negotiations made the point this way: 'I was under the impression that this was the only chance to bring any of the Khmer Rouge to justice, and that the failure of a compromise solution would result in complete impunity.'<sup>52</sup>

46 The US government periodically injected itself into negotiations; at several points, US interventions defined key features of the ECCC structure. For examples, see Etcheson, *supra* note 3, at 61, 75–76.

47 GA Res. 57/228A, UN Doc. A/RES/57/228, 18 December 2002, § 1.

48 Heder and Tittmore, *supra* note 5, at 16. Hun Sen was more likely to make concessions in response to pressure from foreign governments, on whose support Cambodia depended for crucial aid, than from the UN. See Gidley, *supra* note 11, at 91.

49 Participating NGOs at times took divergent positions. While all were firmly committed to ensuring accountability, judicial independence and fair process, some were disposed to call for an end to negotiations when it seemed a flawed tribunal would result, while others were more inclined to press for negotiated solutions to challenges.

50 A notable intervention took place on 15 October 2002, when the Open Society Institute convened a meeting, chaired by Aryeh Neier, among representatives of seven key UN member states, Thomas Hammarberg, and five NGO representatives, including the author, to strategize about how to persuade the UN to resume negotiations, which had ended eight months earlier.

51 See A. Sipress, 'For Torture Camp Survivor, Time is Scarce; Chance to Bear Witness against Khmer Rouge Hinges on Stalled Tribunal', *Washington Post*, 18 February 2003; S. Mydans, 'Flawed Khmer Rouge Trial Better than None', *New York Times*, 16 April 2003; P. Shenon, 'U.N. Plans Joint War Crimes Tribunal for Khmer Rouge', *New York Times*, 12 August 1999. One individual who might have been charged before the ECCC, Kae Pok, died in 2002.

52 E-mail from Payam Akhavan, 26 July 2019. Akhavan, a former prosecutor at the Yugoslavia Tribunal, had become engaged in efforts to broker a compromise between Cambodia and the UN.

## B. Who Could Be Prosecuted, Who Would Decide

The UN would insist on guarantees of independence and due process for any tribunal it co-sponsored. But in its negotiations with Cambodia, its demands were driven by a specific preoccupation above all: who would determine which Khmer Rouge figures would be tried? This issue loomed large because, as elaborated in Section 6, there was every reason to expect Hun Sen to try to lash the court's selection of suspects to his political agenda.

Eventually, the UN and Cambodia reached formal agreement on language delineating who could be tried — not only 'senior leaders of Democratic Kampuchea', but also others 'who were most responsible for the crimes' of the Khmer Rouge.<sup>53</sup> Yet this hardly signified a shared understanding of whom the latter phrase encompassed. For the UN, the paramount point was that the determination must be made solely by independent court officials, not Cambodia's government. For Hun Sen, it would become abundantly clear, the phrase included just one man.<sup>54</sup>

## C. The Devil in the Details: The Supermajority Formula and the 'Co's'

As noted, with an international tribunal ruled out, UN negotiators believed judicial independence could be assured only if the UN appointed a majority of judges, as Cambodian judges would be more vulnerable to pressure from their government. Yet this was unacceptable to Hun Sen. A concept developed by Scheffer bridged their positions: a simple majority of each chamber would be Cambodian judges while the rest would be selected by the UN, but certain crucial decisions would require the support of a supermajority — that is, a simple majority plus at least one more judge.<sup>55</sup> In Scheffer's reasoning, requiring that at least one international judge vote for key decisions would ensure that none resulted (solely) from government pressure.

Scheffer also devised a way to address the risk that a Cambodian prosecutor and investigating judge would block prosecutions disfavoured by Hun Sen: '[t]here ... would be an international coprosecutor and international coinvestigating judge' working alongside Cambodian counterparts.<sup>56</sup> If the coprosecutors or co-investigating judges disagreed about whether to open an

53 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, signed 6 June 2003 (entered into force 29 April 2005) (hereafter the 'Agreement'), Arts 1, 2(1), 5(3), 6(3); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (hereafter the 'ECCC Law'), Arts 1, 2.

54 See Heder, *supra* note 6, at 17.

55 See Scheffer, *supra* note 20, at 387–388; B. Crossette, 'U.S. Seeks to Break Impasse Blocking Khmer Rouge Trials', *New York Times*, 20 October 1999. In the agreement ultimately reached, the international judges are nominated by the UN Secretary-General and appointed by the Cambodian Supreme Council of the Magistracy. Agreement, *supra* note 53, Art. 3.

56 Scheffer, *supra* note 20, at 388.

investigation or indict a suspect,<sup>57</sup> the investigation or indictment would proceed unless a supermajority of Pre-Trial Chamber (PTC) judges voted to block it.<sup>58</sup> Although UN negotiators opposed this approach, ultimately both parties agreed to incorporate it in the ECCC's legal framework.<sup>59</sup>

In March 2003, the two sides initialled and in June 2003 signed a framework agreement to govern the ECCC, which is also governed by a 2004 Cambodian law establishing the Court.<sup>60</sup> After further delays, judges were sworn in on 3 July 2006.<sup>61</sup> Less than three weeks later, a leading candidate for prosecution, Ta Mok, died, reviving the spectre that had shadowed negotiations: justice so long delayed would become justice denied.

#### 4. Government Interference and Landmark Trials

Today, the ECCC's defects are no longer hypothetical — though, it must be noted, the UN addressed a number of problems that surfaced early on.<sup>62</sup> The Court's bifurcated structure, with separate administration of the Cambodian and international 'sides', compounded the usual inefficiencies of new war crimes courts. Funding shortfalls have been chronic and proceedings protracted. While these and other aspects of the Court's record have shaped its legacy, this section is concerned solely with the challenge highlighted in previous sections — the ECCC's ability to resist political pressure concerning targets of prosecution.<sup>63</sup>

57 Under the ECCC's complex procedure, the Co-Prosecutors conduct a preliminary investigation to determine whether crimes within the Court's jurisdiction were committed and identify potential suspects and witnesses. If they believe such crimes were committed, they can file a submission to the Co-Investigating Judges, who conduct their own investigations within the parameters of that submission.

58 Scheffer, *supra* note 20, at 396–397. For a qualitative analysis of the purported dysfunctions of the ECCC Pre-Trial Chamber, in particular with regard to Cases 003 and 004, see in this symposium, N. Naidu and S. Williams, 'The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia'.

59 See e.g. Agreement, Art. 7.4; ECCC Law, Arts 20, 23, both *supra* note 53. When the UN Secretary-General submitted the draft agreement establishing the ECCC for the General Assembly's approval, he registered his discomfort with 'the problematic "supermajority" formula, which was introduced into the negotiations by member States, and not by the United Nations'. *Report of the Secretary-General on Khmer Rouge Trials*, UN Doc. A/57/769, 31 March 2003, § 30.

60 See *supra* note 53. The Agreement had to be approved by the Cambodian National Assembly and UN General Assembly before it became effective. Supplementary agreements were concluded in mid-March 2006. UN News Center, *UN and Cambodia Sign Key Agreements Ahead of Khmer Rouge Trials*, 14 March 2006.

61 'Judges Sworn in for Khmer Rouge Trials', *International Herald Tribune*, 3 July 2006.

62 For example, irregularities in Cambodian hiring practices prompted a UN audit. See *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia*, United Nations Development Programme, Office of Audit and Performance Review, Report No. RCM0172, 4 June 2007, available online at <http://old.eccc.gov.kh/english/cabinet/OAPR.pdf> (visited 25 April 2020), at 18–19.

63 Even with respect to this topic space constraints preclude a comprehensive assessment. For detailed discussions of ECCC rulings on challenges to judicial independence, including in respect

### A. Testing the ECCC's Independence: Cases 003 and 004

A decade after Pol Pot's capture catalysed urgent efforts to establish a Khmer Rouge tribunal, the ECCC Co-Prosecutors submitted the names of five suspects to the Co-Investigating Judges, who would decide whether to bring charges after conducting further investigations themselves. This was, in the words of a prominent Cambodian civil society leader, 'the moment the victims have been waiting for[,] a turning point toward justice'.<sup>64</sup>

The submission provided an early but limited test of the ECCC's ability to resist political pressure. International Co-Prosecutor Robert Petit had sought to include one suspect who had not been 'approved' by the government. The day before the submission was filed, the National Co-Prosecutor, Chea Leang, declined to approve that suspect's inclusion. Eager to avoid delay, Petit deleted him from the submission.<sup>65</sup>

The following year, Petit threw down the proverbial gauntlet, seeking investigations against six suspects who had been 'among the most brutal implementers' of DK policies,<sup>66</sup> but whose prosecution was not sanctioned by Hun Sen. Chea Leang declined to join Petit,<sup>67</sup> citing 'reasons that appear[ed] to reflect the government's position'.<sup>68</sup> In late 2008, Petit filed a notice of disagreement with the Court's PTC.<sup>69</sup> Hun Sen left no doubt where he stood; in March 2009, he publicly warned that any cases beyond those against the original five suspects could revive armed conflict, adding: 'I would prefer to see this tribunal fail instead of seeing war return to my country'.<sup>70</sup>

In its first test, the Court's dispute-resolution process functioned much as Scheffer anticipated. All three national judges voted against the investigations

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of case selection, see N.H.B. Jørgensen, *The Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing, 2018), at 178–186, 372; S.M. Torrens, 'Allegations of Political Interference, Bias and Corruption at the ECCC', in S.M. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (Springer, 2016) 45–75.

64 S. Mydans, 'Prosecutors Identify Suspects in Khmer Rouge Trial', *New York Times*, 19 July 2007, quoting Youk Chhang.

65 See Etcheson, *supra* note 3, at 222–224.

66 Ciociari and Heindel, *supra* note 39, at 176, quoting a US Embassy cable dated 1 September 2009.

67 See B. Brady, 'No More KR Suspects: Cambodian Prosecutor', *Phnom Penh Post*, 6 January 2009. In November 2008, Petit sought Chea Leang's signature on three submissions. One named Sou Met and Meas Muth, both Khmer Rouge military leaders, as suspects in Case 003. A second submission named Ao An, Yim Tith, and Im Chaem in Case 004. A Supplementary Submission in Case 002 named Van Rith, whose inclusion in the Co-Prosecutors' first Introductory Submission had been opposed by Chea Leang. The last submission was later withdrawn when the International Co-Prosecutor learned Van Rith had died in November 2008. See Annex I: Public Redacted Version, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 001/18-11-2008-ECCC-PT, 18 August 2009 (hereafter 'PTC Considerations'), § 6.

68 S. Mydans, 'Efforts to Limit Khmer Rouge Trials Decried', *New York Times*, 1 February 2009.

69 See PTC Considerations, *supra* note 67, § 1.

70 E. Madra, 'Cambodia PM Rejects Wider Khmer Rouge Trials', *Reuters*, 31 March 2009.

while both international judges supported them.<sup>71</sup> Pursuant to the supermajority formula, investigations were allowed to proceed in what became Cases 003 and 004.

But this is not to say safeguards against political interference have been successful. While they have enabled investigations in Cases 003 and 004 to proceed despite Cambodian opposition, national participants in the ECCC have found myriad ways to hinder these cases. For example, precious time was lost as the National Co-Investigating Judge, You Bunleng, delayed authorising crime base investigations desired by his international counterpart, Marcel Lemonde, in Cases 003 and 004<sup>72</sup> (though, it should be noted, Lemonde himself prioritized work on Case 002).<sup>73</sup> In light of the advanced age of Khmer Rouge suspects, such delays can defeat justice just as surely as rulings that bend to political pressure. Indeed, one of the suspects in Case 003 died in 2013.<sup>74</sup>

Moreover, the supermajority procedure simply did not address a problem that materialized soon after Lemonde resigned. In April 2011, his successor, Siegfried Blunk, joined with Judge You to close Case 003.<sup>75</sup> To be sure, in principle a joint decision to end a case could be taken fairly, independently, and impartially even if it happens to align with the government's wishes. Here, however, there were ample grounds to doubt the integrity of the Co-Investigating Judges' decision, which was taken after 'hardly any investigation at all'<sup>76</sup> and has been aptly described as 'a crude attempt to whitewash five suspects accused in the deaths of hundreds of thousands of people'.<sup>77</sup>

Several months later, Blunk announced that he was resigning because the government's attempted interference might lead people to question his independence.<sup>78</sup> As if to underscore the premise of his account, a government spokesman, commenting on Blunk's departure, said: 'We still stand on our ground regarding the ECCC. There will be no case 003 or 004.'<sup>79</sup>

Blunk's designated successor, reserve International Co-Investigating Judge Laurent Kasper-Ansermet, was determined to conduct a robust investigation

71 PTC Considerations, *supra* note 67.

72 Eventually, Lemonde proceeded without You. For details of this episode, see Ciociari and Heindel, *supra* note 39, at 178–179.

73 See Etcheson, *supra* note 3, at 296.

74 See L. Crothers and P. Bopha, 'War Crimes Suspect Sou Met Dead', *Cambodia Daily*, 27 June 2013.

75 See ECCC Press Release, Co-Investigating Judges, 29 April 2011.

76 Etcheson, *supra* note 3, at 299. See also D. Gillison, 'Justice Denied', *Foreign Policy*, 23 November 2011 (in a message seeking the UN Secretary-General's guidance on how to proceed, UN legal officers working in the office of the Co-Investigating Judges said that, in their view, the two judges 'did not conduct a genuine, impartial or effective investigation').

77 Gillison, *supra* note 76.

78 S. Mydans, Judge Quits Tribunal in Khmer Rouge Inquiry, *New York Times*, 11 October 2011. Media accounts suggest, however, that Blunk's resignation was prompted in large part by the fact that he was now under investigation himself for improper actions. See Gillison, *supra* note 76.

79 Ciociari and Heindel, *supra* note 39, at 181 (quoting Council of Ministers spokesman Phay Siphon).

in Cases 003 and 004. But You flatly refused to cooperate with him, and the Supreme Council of the Magistracy refused to formally approve Kasper-Ansermet. Unable to perform his functions, the Swiss jurist resigned.<sup>80</sup>

Before this happened, the UN lodged an ‘uncharacteristically direct’ protest,<sup>81</sup> and justifiably so: under the governing legal framework, Kasper-Ansermet should have automatically succeeded Blunk.<sup>82</sup> Yet Kasper-Ansermet was a flawed standard-bearer for the principles imperilled by his treatment. An avid and ‘imprudent’<sup>83</sup> social-media user, he had retweeted highly critical accounts of developments at the ECCC before he arrived in Cambodia. Once there, he took a number of provocative actions.<sup>84</sup> Arguably, then, the tenures of his two immediate successors, who worked in a relatively collaborative fashion with Cambodian personnel, offer a more instructive basis for assessing the ECCC’s ability to withstand political pressure.

By some measures Mark Harmon, a highly respected former prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY) who succeeded Kasper-Ansermet, enjoyed ‘a remarkably productive tenure’.<sup>85</sup> Despite the formal opposition of Judge You, Harmon conducted a serious investigation in Cases 003 and 004 and brought charges against the surviving suspect in the former, Meas Muth, and two of three suspects in the latter, Im Cheam and Ao An.<sup>86</sup> Yet, in notable contrast to the detention of suspects in Cases 001 and 002, none of these individuals was taken into custody despite multiple judicial orders requiring their arrests;<sup>87</sup> instead, government officials openly defied the orders.<sup>88</sup>

Harmon’s immediate successor, Michael Bohlander, brought charges against the remaining suspect in Case 004, Yim Tith, in December 2015.<sup>89</sup> Against

80 Kasper-Ansermet issued a blistering account of obstruction of his work. Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, (Cases 003 and 004), D114, 21 March 2012.

81 Etcheson, *supra* note 3, at 309–310.

82 Agreement, *supra* note 53, Art. 5(6) (the reserve Co-Investigating Judge shall replace the sitting Co-Investigating Judge in case of a ‘vacancy’ or ‘need to fill the post’).

83 OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, No. 26, February 2012.

84 Kasper-Ansermet’s stormy tenure is described in Etcheson, *supra* note 3, at 304–312.

85 *Ibid.* at 322.

86 See S. White, ‘Another KRT Judge Exits’, *Phnom Penh Post*, 8 July 2015; see also J. Hammer, ‘The Very Tricky Trial of the Khmer Rouge’, *New York Review of Books*, 21 May 2015, 42, at 42. Harmon’s successor later expanded the charges against Ao An. See A. Marazzi Sasson, ‘New Charges Brought against Ta An at KRT’, *Phnom Penh Post*, 15 March 2016.

87 See Etcheson, *supra* note 3, at 326. Harmon did, however, persuade Ao An to appear in court, where he was advised of the charges against him. Later, Harmon’s successor arranged to read charges to Meas Muth and Yim Tith. See *ibid.* at 327.

88 See *ibid.*, at 325–326.

89 See ECCC Press Release, ‘Statement of International Co-Investigating Judge regarding Case 004’, 9 December 2015. On 28 June 2019, the Co-Investigating Judges filed opposing closing orders in this case, with Bohlander finding sufficient grounds to commit Yim Tith to trial while dismissing certain charges. Closing Order, *Yim Tith* (Case 004), D382, International Co-Investigating Judge, 28 June 2019. Bohlander and You later issued opposing orders in the

the government's consistent opposition to Cases 003 and 004, this arguably marked 'a significant milestone in [ECCC] history[,] ... the first time all of the accused in [Cases 003 and 004] had formally become charged persons'.<sup>90</sup>

Even so, it would require an excess of optimism to believe the surviving suspects in Cases 003 and 004 will face trial. At this writing (February 2020), none of the individuals charged by Harmon or Bohlander has been arrested,<sup>91</sup> much less brought to trial. In larger perspective, the supermajority requirement has often operated in such a way that 'a genuine deadlock between national and international actors simply endures with potentially serious consequences for the legitimacy of the [ECCC]'.<sup>92</sup>

It remains to be noted that ECCC judicial panels have repeatedly ruled against defence motions alleging political interference as well as other sources of judicial bias.<sup>93</sup> This pattern raises the question whether defendants' allegations concerning the *effects* of government interference were indeed without merit. Here, it must suffice to note that this implication does not follow from the outcome of defence challenges. It is instead quite possible that rulings dismissing these challenges reflect, at least in part, ECCC judges' inclination to 'shield[] themselves from criticism directed towards their integrity' and that they 'are also protecting the Court from similar scrutiny'.<sup>94</sup>

## B. Landmark Trials and Judgments

How to assess a deeply flawed institution that nonetheless rendered historic justice presents challenges for which there are no generally accepted metrics. Yet that is precisely the paradox presented by the ECCC's record. Alongside the

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case of Ao An. ECCC Press Release: 'Co-Investigating Judges Issue Two Separate Closing Orders in Case Against Ao An Case No. 004/2/07-09-2009-ECCC/OCIJ', available online at [www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207](http://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207) (visited 16 August 2019).

90 Etcheson, *supra* note 3, at 327.

91 Judge Bohlander rescinded previous arrest orders against Meas Muth. See *ibid*.

92 Jørgensen, *supra* note 63, at 173. With Bohlander's concurrence, moreover, the case against one of the suspects in Case 004, Im Chaem, has been finally dismissed. Closing Order (Reasons), *Im Chaem* (Case 004/1), D308/3, 10 July 2017. The Co-Investigating Judges' reasoning has been sharply questioned. See e.g. Etcheson, *supra* note 3, at 329.

93 These legal challenges are described in detail in Jørgensen, *supra* note 63, and Torrens, *supra* note 63. Such challenges have been lodged against international as well as national judges. For an overall appraisal of whether suspects' rights were upheld during the ECCC investigative stage, see in this symposium, G. Sluiter and M. Tiernan, 'The Right to an Effective Defence During ECCC Investigations'.

94 Torrens, *supra* note 63, at 70. See also H. Ryan and L. McGrew, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, OSJI, available online at [www.justiceinitiative.org/publications/performance-and-perception-impact-extraordinary-chambers-court-cambodia](http://www.justiceinitiative.org/publications/performance-and-perception-impact-extraordinary-chambers-court-cambodia) (visited 9 May 2020), (hereafter 'OSJI, *Performance and Perceptions*'), at 39. This is not to suggest judicial self-interest alone accounts for ECCC rulings dismissing motions alleging bias. Evidence submitted by defence counsel has not always been sufficient to meet the standard applicable to disqualification and other motions.



problems highlighted in previous sections, the ECCC conducted three historic trials resulting in landmark judgments.

These cases were triggered in July 2007, when the Co-Prosecutors submitted to the Co-Investigating Judges the names of five suspects:<sup>95</sup> Kaing Guek Eav ('Duch'),<sup>96</sup> head of the notorious S-21 interrogation facility who in Case 001 became the first defendant to go to trial; Ieng Sary, DK Foreign Minister; Ieng Thirith, DK Minister of Social Affairs; Nuon Chea, Deputy Secretary of the CPK Central Committee; and Khieu Samphân, DK Head of State.<sup>97</sup> The last four became co-defendants in Case 002.

A crucial point to be made is that, had the UN determined it could fund the prosecution of five individuals, there would have been scant grounds to question the selection of *these* five.<sup>98</sup> This is not to say the Cambodian government's interference in case selection is irrelevant in assessing these cases, as I discuss later. The point instead is that an independent, impartial prosecutor or investigating judge reasonably could have determined these individuals merited prosecution, and surely would have selected most of them.<sup>99</sup>

### 1. Case 001: The Trial of Duch

If a regime can be understood by the institutions it creates, Democratic Kampuchea should be remembered through Tuol Sleng.<sup>100</sup>

On 30 March 2009 — three decades after the DK regime was ousted from power and one decade after the UN and Cambodia began negotiations over a Khmer Rouge tribunal — the first ECCC trial began in the case against Duch.<sup>101</sup> By then, the Court's integrity had been placed in substantial doubt.<sup>102</sup> Yet the opening of its first trial was undeniably a 'momentous'

95 See *supra* text accompanying note 64.

96 Already in military detention since his 1999 arrest, Duch was placed in provisional detention on 31 July 2007 based on an order of the Co-Investigating Judges. His August 2008 indictment was confirmed and amended by the ECCC's Pre-Trial Chamber on 5 December 2008. See Extraordinary Chambers in the Courts of Cambodia, Case 001, available online at [www.eccc.gov.kh/en/case/topic/90](http://www.eccc.gov.kh/en/case/topic/90) (visited 25 April 2020).

97 The last four were indicted in mid-September 2010. See S. Mydans, 'Four Khmer Rouge Leaders Are Indicted', *New York Times*, 17 September 2010.

98 To be sure, the Court's limited jurisdiction has been questioned on various grounds unrelated to the issue explored here. See e.g. R. Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (Routledge, 2018) 49, 53.

99 There is, nonetheless, room for differing views about who were the *most* culpable surviving Khmer Rouge; Ieng Thirith did not make some experts' short list of leading candidates for prosecution. See e.g. Heder and Tittmore, *supra* note 5.

100 Becker, *supra* note 3, at 261.

101 The trial officially opened on 17 February 2009, but the hearing that began that day was devoted to procedural issues. See S. Mydans, 'First on Cambodia's Docket: A Man Whose Jail Sent 14,000 to a Killing Field', *New York Times*, 17 February 2009.

102 The dispute between the first International Co-Prosecutor and his Cambodian counterpart over Cases 003 and 004 discussed in the previous section had recently been in the news, and allegations of corruption involving Cambodian participants in the ECCC had received

occasion.<sup>103</sup> Although Duch was never a 'senior leader' of the Khmer Rouge,<sup>104</sup> few individuals more fully personified its brutality. Thousands detained in the torture centre run by Duch, S-21 (also known as Toul Sleng), were tortured before all but a handful were executed.<sup>105</sup>

Even before judgment, proceedings in Case 001 delivered a palpable measure of justice. Duch's expression of remorse at the outset of his trial 'addressed a deep need among victims', according to a lawyer representing civil parties.<sup>106</sup> During his trial, Duch spoke expansively about atrocities in S-21, providing at least partial answers to questions that had long tormented many Cambodians — how and why did this happen?<sup>107</sup> As Rebecca Gidley has noted, Cambodians' desire 'to understand was served better by Case 001 [than Case 002] since Duch was willing and eager to explain and respond to witnesses'.<sup>108</sup> Even so, some who testified in Case 001 were disappointed when Duch failed to admit responsibility for the deaths of their loved ones.<sup>109</sup>

On 26 July 2010, Duch was found guilty of crimes against humanity and war crimes.<sup>110</sup> The Trial Chamber (with one judge dissenting) imposed a sentence of 35 years.<sup>111</sup> For Cambodians who had longed for a measure of justice, the verdict brought a mixture of satisfaction in Duch's conviction and disappointment — for some, distress and even outrage — in his sentence of

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substantial attention. See e.g. J.A. Hall, 'Yet Another U.N. Scandal' (opinion piece), *Wall Street Journal*, 21 September 2007.

103 T. Johnston, 'Trial of Khmer Rouge Boss Opens', *Washington Post*, 31 March 2009.

104 The ECCC's governing laws do not authoritatively define 'senior leaders' but the phrase is widely understood to include members of the CPK's Standing Committee and its subordinate Central Committee. See Heder, *supra* note 6, at 28, 41. But see Appeal Judgment, *Kaing Guek Eav alias Duch* (Case 001), F28, Supreme Court Chamber, 3 February 2012 (hereafter Case 001 Appeal Judgment), § 76 (noting in dictum that 'the term "senior leaders" is sufficiently flexible that it may not necessarily be limited to former members of the CPK Central and/or Standing Committees').

105 See Judgment, *Kaing Guek Eav alias Duch* (Case 001), E188, Trial Chamber, 26 July 2010 (hereafter Case 001 Trial Judgment), § 340 (no fewer than 12,272 detainees in S-21 were executed) and note 619 ('with very few exceptions', those detained in S-21 were executed).

106 S. Mydans, 'Khmer Rouge Defendant Apologizes for Atrocities', *New York Times*, 1 April 2009.

107 S. Scully, 'Judging the Successes and Failures of the Extraordinary Chambers of [sic] the Courts of Cambodia', 13 *Asian-Pacific Law and Policy Journal* (2011) 300–353, at 340.

108 Gidley, *supra* note 11, at 178.

109 E. Stover, M. Balthazard and K.A. Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia', 93 *International Review of the Red Cross* (2011) 503–546, at 536.

110 Case 001 Trial Judgment, *supra* note 105.

111 *Ibid.*, §§ 631, 679. The Trial Chamber determined that five years should be subtracted from this sentence because Duch was detained unlawfully before his transfer to ECCC custody, and that he was entitled to credit against his remaining sentence for time detained pending trial and judgment. Case 001 Trial Judgment, *supra* note 105, §§ 627, 632–633, 680–681.

35 years.<sup>112</sup> Not surprisingly, many were pleased when Duch's sentence was later changed to life in prison.<sup>113</sup>

## 2. Case 002: The Centrepiece

An initial hearing in the ECCC's 'centrepiece'<sup>114</sup> case against four surviving Khmer Rouge leaders began on 27 June 2011; opening statements in the trial proper began in November 2011. The head of a Cambodian human rights organization, Ou Virak, hailed the former as 'cathartic ... for all Cambodians'.<sup>115</sup>

Yet many worried about the 'age and ill health of the defendants', who then ranged from 79 to 85 years old.<sup>116</sup> The spectre of former Serbian leader Slobodan Milošević loomed over proceedings; what was meant to be the capstone trial before the ICTY ended abruptly when Milošević died shortly before his years-long trial was set to conclude.<sup>117</sup> And indeed, proceedings against Ieng Sary ended 16 months after his trial began when he died before judgment.<sup>118</sup> Proceedings against another defendant, Ieng Thirith, were terminated just before opening statements because she suffered from dementia.<sup>119</sup>

In light of the breadth of the charges in Case 002 and fears that defendants might not survive a trial of such sweep, the Trial Chamber had already split the case into two trials.<sup>120</sup> On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01, convicting surviving defendants Nuon Chea and Khieu Samphan of crimes against humanity and sentencing them to life

112 See Stover, Balthazard, and Koenig, *supra* note 109, at 538–541; Ciociari and Heindel, *supra* note 39, at 130; OSJI, *Performance and Perception*, *supra* note 94, at 80–81. Compare N. Stammel et al., *The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation* (Center for the Treatment of Torture Victims, 2010), at 48 (reporting relatively high levels of satisfaction with the sentence imposed at trial among surveyed civil parties).

113 Case 001 Appeal Judgment, *supra* note 104, § 383. See Ciociari and Heindel, *supra* note 39, at 132. International NGOs criticized the Supreme Court Chamber for overturning the Trial Chamber's reduction of Duch's sentence by five years to remedy his unlawful detention pending trial. See 'Khmer Rouge Chief Jailer Given Life Sentence', *Al Jazeera*, 3 February 2012; OSJI, *Performance and Perception*, *supra* note 94, at 22.

114 S. Mydans, 'Ex-Khmer Rouge Leaders Go on Trial in Cambodia', *New York Times*, 27 June 2011.

115 *Ibid.*

116 *Ibid.*

117 See D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018), 154.

118 Termination of the Proceedings against the Accused IENG Sary, *Nuon Chea et al.* (Case 002), E270/1, Trial Chamber, 14 March 2013.

119 Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, *Nuon Chea et al.* (Case 002), E138/1/10/1/5/7, Supreme Court Chamber, 14 December 2012. Ieng Thirith died in August 2015.

120 Severance Order Pursuant to Internal Rule 89ter, 22 September 2011. For a detailed account of legal challenges to this and later severance orders in Case 002, see Jørgensen, *supra* note 63, at 161 *et seq.*

imprisonment.<sup>121</sup> Many Cambodians ‘expressed a feeling of relief and satisfaction, as well as a sense of closure’.<sup>122</sup> When the verdict was announced, a group of ten victims said: ‘We will finally be able to mourn our relatives. It was important for us to see those who planned and ordered these crimes to be held to account’.<sup>123</sup>

The trial in Case 002/02 — the ECCC’s capstone case, albeit with a diminished dock of elderly suspects — covered crimes representing the hellish arc of the DK era. On 16 November 2018, the Trial Chamber delivered its judgment, which found Nuon Chea and Khieu Samphân guilty of crimes against humanity, war crimes, and genocide in relation to ethnic Vietnamese, and also found Nuon Chea guilty of genocide in relation to ethnic Cham.<sup>124</sup> Once again, the two men, by then aged 87 and 92,<sup>125</sup> received sentences of life imprisonment.<sup>126</sup>

The ruling was widely seen as a ‘landmark moment’ for the ECCC.<sup>127</sup> Youk Chhang hailed the verdict, which in his words ‘affirm[ed] the collective humanity of the victims and [gave] recognition to the horrible suffering’.<sup>128</sup> In the view of David Scheffer, who had pushed relentlessly for the Court’s creation, the ruling proved the ECCC had been ‘worth the money and effort’ its extended operation had entailed.<sup>129</sup>

121 Judgment, *Nuon Chea and Khieu Samphân* (Case 002/01), E313, Trial Chamber, 7 August 2014. Case 002/01 covered crimes accompanying two population transfers, including the evacuation of at least two million people from Phnom Penh on 17 April 1975, as well as the execution in Tuol Po Chrey of hundreds of officials who had served in the government that fell to the Khmer Rouge in April 1975. In November 2016, the Supreme Court Chamber reversed several of the trial convictions but affirmed the two defendants’ life sentences. Appeal Judgment, *Nuon Chea and Khieu Samphân* (Case 002/01), F36, Supreme Court Chamber, 23 November 2016 (hereafter ‘Case 002/01 Appeal Judgment’).

122 OSJI, *Performance and Perception*, *supra* note 94, at 24.

123 T. Fawthrop, ‘Despite the Controversy, the Khmer Rouge Tribunal Is a Success’, *Interpreter*, 19 January 2018.

124 Judgment, *Nuon Chea and Khieu Samphân* (Case 002/02), E465, Trial Chamber, 16 November 2018 (hereafter ‘Case 002/02 Trial Judgment’) (full reasons issued on 28 March 2019). The trial ran from 17 October 2014 to 11 January 2017.

125 See S. Mydans, ‘2 Aging Khmer Rouge Leaders Are Found Guilty of Genocide’, *New York Times*, 17 November 2019.

126 Case 002/02 Trial Judgment, *supra* note 124, §§ 4401–4402.

127 H. Ellis-Petersen, ‘Khmer Rouge Leaders Found Guilty of Genocide in Cambodia’s “Nuremberg” Moment’, *Guardian*, 16 November 2018. The main legal developments relating to the Case 002/02 Trial Judgment are addressed, in this symposium, by E. Fry and E. van Sliedregt, ‘Targeted Groups, Rape, and *Dolus Eventualis*: Assessing the ECCC’s Contributions to Substantive International Criminal Law’.

128 ‘Khmer Rouge Leaders Found Guilty of Genocide in Landmark Ruling’, *Agence France-Presse*, 16 November 2018. While fewer studies have documented Cambodian views of this trial than earlier trials, media reports suggest it provided significant satisfaction to some victims. See e.g. *ibid.* (quoting Los Sat, an ethnic Cham, saying ‘I am really satisfied with the sentences’), while others expressed more sober reactions. See e.g. H. Beech, ‘Khmer Rouge’s Slaughter in Cambodia Is Ruled a Genocide’, *New York Times*, 15 November 2018 (quoting one survivor saying ‘[i]t may be finished, but I won’t ever have peace’).

129 *Ibid.*

On 4 August 2019, Nuon Chea died at the age of 93.<sup>130</sup> Unrepentant to his last days, Pol Pot's second-in-command died convicted of the most serious crimes in the code of humanity.<sup>131</sup>

## 5. Victims' Justice

The ECCC has not substantially achieved many goals widely associated with transitional justice, such as strengthening the rule of law.<sup>132</sup> Yet it has meaningfully advanced one that is of fundamental importance — answering victims' demand for justice.

This section proceeds from the premise that victims' experience of justice is a key benchmark for assessing the ECCC's achievements.<sup>133</sup> This approach is grounded in two considerations. First, as noted earlier, Cambodian survivors' demand for justice provided crucial impetus for the ECCC's creation. Secondly, while myriad goals have been ascribed to war crimes courts, recent experience suggests they are well suited to achieve one in particular: satisfying survivors' desire for justice.<sup>134</sup>

At the heart of this desire is an almost universal need on the part of victims of atrocious crimes for 'recognition of the fact that they have been harmed' and that they were wronged.<sup>135</sup> This general observation is surely relevant in Cambodia, where vast numbers suffered grievous harm during the DK period. Four-fifths of Cambodians who participated in a Fall 2008 survey, all of whom were adults when surveyed, considered themselves victims of the Khmer Rouge.<sup>136</sup> While justice for DK-era atrocities was not the highest priority of

130 W. Branigan, 'Khmer Rouge's "Brother Number Two", Main Operator of Killing Machine' (obituary), *Washington Post*, 6 August 2019; S. Mydans, 'Nuon Chea, 93, Khmer Rouge Deputy Behind Cambodian Genocide, Is Dead' (obituary), *New York Times*, 5 August 2019.

131 Although an appeal lodged by Nuon Chea was pending at the time of his death, the Supreme Court Chamber ruled that the trial judgment in Case 002/02 was not therefore vacated. Decision on Urgent Request concerning the Impact on Appeal Proceedings of Nuon Chea's Death prior to the Appeal Judgment, *Nuon Chea and Khieu Samphan* (Case 002/02), F46/2/4/2, Supreme Court Chamber, 22 November 2019, §§ 16, 86.i.

132 See R.C. DeFalco, 'The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia', 42 *Fordham International Law Journal* (2018) 1–60. Nevertheless, the ECCC's existence and operation may have indirectly advanced the rule of law by, inter alia, intensifying local NGOs' demands for justice outside the context of the ECCC and enhancing their capacity to monitor Cambodian courts. See C. Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal', 6 *IJTJ* (2012) 149–160; OSJI, *Performance and Perception*, *supra* note 94, at 53, 75.

133 Due to space constraints, however, it does not address a key dimension of that experience, the participation of many victims as civil parties. This subject has been extensively analysed by others. See in particular Killeen, *supra* note 98.

134 See Orentlicher, *supra* note 117, at 8, 128, 189.

135 *Report of the Special Rapporteur [Pablo de Greiff] on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/21/46, 9 August 2012, § 2.

136 P. Pham et al., *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, UC Berkeley, 24 January 2009 (hereafter '2008 Berkeley Survey'), at 2.

survey participants,<sup>137</sup> just over 90% said it was important to hold accountable those responsible for Khmer Rouge depredations.<sup>138</sup> An even higher percentage (94) of respondents in a survey conducted in December 2010 supported accountability for Khmer Rouge atrocities.<sup>139</sup>

Of course, accountability and justice can take myriad forms, and respondents expressed a range of views about what these concepts mean. Significantly, however, roughly three-quarters of respondents in both surveys said they expected the ECCC to 'bring justice' to victims of the Khmer Rouge or their families.<sup>140</sup> Notably in light of Cambodian citizens' generally low esteem for national courts,<sup>141</sup> a substantial majority of respondents in the 2010 survey said they believe in the fairness and impartiality of the ECCC and its judges.<sup>142</sup>

While answering many survivors' desire for legal justice, Cases 001 and 002 also addressed, at least in part, a prevalent desire to learn 'the truth' about DK-era atrocities. Many Cambodians have said it is 'crucial for the next generation to learn about the crimes of the Khmer Rouge and who was most responsible'.<sup>143</sup> Responses to previously mentioned surveys confirmed a point that has often been noted — 'the older generation [of Cambodians] didn't talk to the younger generation about what happened, and [when they did] younger

137 An overwhelming majority cited issues affecting their daily lives as a higher priority. *Ibid.*, at 35, 45. See also N. Kirchenbauer et al., *Victims Participation before the Extraordinary Chambers in the Courts of Cambodia*, ADHOC, January 2013, available online at [www.ziviler-friedensdienst.org/de/publikation/baseline-study-cambodian-human-rights-and-development-associations-civil-party-scheme-case-002](http://www.ziviler-friedensdienst.org/de/publikation/baseline-study-cambodian-human-rights-and-development-associations-civil-party-scheme-case-002) (visited 9 May 2020), at 15–16 (similar findings in survey of civil party participants in Case 002).

138 2008 Berkeley Survey, *supra* note 136, at 31.

139 P. Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, UC Berkeley, 1 June 2011 (hereafter '2010 Berkeley Survey'), at 19. Respondents nonetheless overwhelmingly prioritized current concerns, such as poverty reduction. *Ibid.*

140 *Ibid.* at 29 (showing data for 2008 and 2010 Berkeley surveys). See also R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', 16 *International Criminal Law Review* (2016) 1–38, at 15.

141 See USAID and IRI, *International Republican Institute Survey of Cambodian Public Opinion October 28–10 November 2013*, 2014, at 7 (in response to survey question asking which of 10 issues participants considered the most important 'in continuing to push Cambodia to a free and fair democracy', the largest percentage selected 'making the judiciary system fair and independent'). See also Killean, *supra* note 140, at 31.

142 See 2010 Berkeley Survey, *supra* note 139, at 26 (75% of respondents said they believe the ECCC is neutral; 79% said they believe its judges will be fair; 83% said the ECCC should be involved in responding to what happened during the DK era). See also Stammel et al., *supra* note 112, at 52 (72% of respondents in a November–December 2010 survey of Cambodians who had applied to be civil parties in ECCC proceedings said they believe the court acts 'quite a bit' or 'totally' independent of political influence; two-thirds thought the ECCC would contribute to reconciliation; most others thought it would partly do so).

143 OSJI, *Performance and Perception*, *supra* note 94, at 71. For survivors, the desire to know what happened is often deeply personal. A survey of civil party participants in Case 001 found that many wanted to participate in that capacity above all so they could confront Duch about what happened to their deceased relatives, and also in the hope he would accept responsibility for his crimes. Stover et al., *supra* note 109, at 519.

people didn't believe the older people'.<sup>144</sup> Thus, it is notable that 57% of respondents in a population-based survey conducted after Duch's trial said they knew more about what happened in the DK period after the trial than before.<sup>145</sup> Just as important, the ECCC's work stimulated a wider public dialogue about the DK era than had previously taken place.<sup>146</sup>

Significantly as well, a large percentage of Cambodians surveyed *after* trial verdicts were reached in Case 001 and Case 002/01 expressed support for the ECCC.<sup>147</sup> This is striking: high expectations of some other war crimes courts have preceded disappointment in their work.<sup>148</sup> While merely suggestive, sustained support for the ECCC indicates trials have meaningfully satisfied the high expectations many Cambodians expressed before trials got underway.

## 6. Making Sense of the Paradox

The ECCC represents a delicate balance of legitimacy and illegitimacy.<sup>149</sup>

If Cases 001 and 002 have gone a long way toward meeting victims' and other Cambodians' expectations, this can count as a success only if trials satisfied fundamental standards of fair process. While an assessment of trials in light of relevant fair-trial standards is beyond the scope of this Article, it is notable that a number of independent assessments have found, with key caveats, that ECCC trial proceedings have 'met basic international standards of due process'.<sup>150</sup> Counsel for suspects have mounted robust defences; the Court's judgments have provided detailed discussions of evidence, assessed in light of international jurisprudence; and the Supreme Court Chamber has reversed certain convictions that were not adequately supported.<sup>151</sup>

Yet it is necessary to ask whether government interference, whose most visible effect has been to thwart progress in Cases 003 and 004, leaves room to consider *any* trials fundamentally sound. Or, instead, must every

144 A. Powell, 'A Thirst for Justice Delayed', *Harvard Gazette*, 9 April 2013, quoting Patrick Vinck, one of the survey leaders. See also Scully, *supra* note 107, at 339.

145 2010 *Berkeley Survey*, *supra* note 139, at 31. Even so, many respondents — particularly those who did not live under the Khmer Rouge — described their knowledge of the DK regime as poor. *Ibid.*

146 See K. Hodal, 'Khmer Rouge Survivor's Tale Helps Cambodia Confront Its Brutal Past', *Guardian*, 24 January 2012.

147 See OSJI, *Performance and Perception*, *supra* note 94, at 71.

148 See e.g. Orentlicher, *supra* note 117, at 23–24 (many Bosnians' high expectations for the ICTY were followed by disappointment in its performance).

149 Gidley, *supra* note 11, at 9.

150 OSJI, *Performance and Perception*, *supra* note 94, at 22 (writing about Duch's trial); *ibid.* at 25 (with one caveat, which relates to the issue of witness summonses discussed below, the trial in Case 002/01 'generally met basic fair trial standard[s]'). See also Ciciari and Heindel, *supra* note 39, at 121 (the Case 001 trial verdict showed the ECCC could 'satisfy international legal standards when it [was] able to exercise its authority independently'); S. Mydans, 'Moving Beyond Khmer Rouge's Ghosts', *New York Times*, 30 November 2009 (quoting Alex Hinton observing that 'Duch received the fair trial his victims never had').

151 See e.g. Case 002/01 Appeal Judgment, *supra* note 121.

case be deemed an act in a 'legal farce [playing] out in the outskirts of Phnom Penh'?'<sup>152</sup> After all, major human rights treaties require that criminal suspects be tried before an impartial and independent court,<sup>153</sup> and a situation in which the executive 'is able to control or direct' the judiciary 'is incompatible with the notion of [such a] tribunal'.<sup>154</sup> As Richard Rogers suggests, moreover, the supermajority system arguably presumes a majority of ECCC judges lacks the probity required of every judge.<sup>155</sup>

While acknowledging the force of Rogers' point, it should be noted that it problematizes the hybrid model of justice generally, not just in Cambodia.<sup>156</sup> One of the principal reasons hybrid courts have been established in myriad countries is to ensure, through the inclusion of foreign judges working alongside national judges, that criminal proceedings are adequately insulated from pressures to which the latter are more vulnerable without displacing local institutions and jurists.<sup>157</sup> Elsewhere protection from political pressure has been assured in part by appointing a majority of international judges, at least during a transitional period. While this is not the case with the ECCC, the supermajority requirement for verdicts<sup>158</sup> in principle achieves the same effect — ensuring no defendant is convicted as a result of political pressure.

The issue raised here deserves far more substantial treatment than I can provide in this Article. For present purposes, it must suffice to note several further considerations that would merit attention in such an assessment.

A key question is whether, or to what degree, political interference directly influenced Cases 001 and 002. As previously noted, concerns about interference in case selection have centred on Hun Sen's opposition to prosecutions beyond those cases;<sup>159</sup> there has been scant indication he was determined to secure prosecutions or convictions in the cases that were tried.<sup>160</sup> To the

152 Baaz, *supra* note 16, at 331. See also Human Rights Watch, *Cambodia: Khmer Rouge Convictions 'Too Little, Too Late'*, 8 August 2014.

153 See e.g. International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999, at 171, Art. 14.

154 UN Human Rights Committee, *Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, UN Doc. CCPR/C/51/D/414/1990, 10 November 1993, § 9.4. See also Human Rights Committee, General Comment No. 32, Article 14, UN Doc. CCPR/C/GC/32, 2007.

155 Conversation with Richard Rogers, former head of ECCC Defence Support Section, 21 May 2019, Washington, DC. See also Ciociari and Heindel, *supra* note 39, at 193. For a positive assessment of the supermajority rule and a suggestion that this formula could be used in future scenarios, see in this symposium, Lobba and Pons, *supra* note 2.

156 The Supreme Court Chamber of the ECCC has made a similar point. Case 002/01 Appeal Judgment, *supra* note 121, § 126.

157 See generally B. van Schaack, 'Building Blocks of Hybrid Justice', 44 *Denver Journal of International Law and Policy* (2017) 101–209. More affirmatively, the inclusion of local judges can anchor the legitimacy of hybrid courts. See H. Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy', 16 *Chicago Journal of International Law* (2016) 482–522.

158 Agreement, Art. 4(1)(a); ECCC Law, Art. 14(1)(a), both *supra* note 53.

159 See *supra* Section 4.A.

160 This is not to say the government refrained from any improper conduct in these cases. When asked about the lengthy pre-trial detention of Duch, for example, one of the Cambodian judges said: 'We have approval from the government to detain him for another year.' H. Bertelman,



contrary, Hun Sen apparently lost interest in prosecuting Khmer Rouge figures once DK forces no longer posed a military threat, years before the ECCC was launched.<sup>161</sup>

Brief consideration of Hun Sen's likely motives reinforces the general inference that he was keen to exclude trials beyond Cases 001 and 002, not affirmatively to ensure those trials took place at all or resulted in convictions if they did.<sup>162</sup> First, Hun Sen has long sought to ensure the loyalty to himself of the Cambodian armed forces, the ultimate guarantor of his continued hold on power.<sup>163</sup> To this end, he would want to avoid raising concerns among former Khmer Rouge soldiers now incorporated into government armed forces that they were at risk of prosecution. Expanding prosecutions beyond his approved list of suspects could raise precisely this concern.<sup>164</sup>

Secondly, along with other senior members of his government, Hun Sen was a member of the Khmer Rouge until he defected to Vietnam. It is thus widely believed he wanted to preclude any possibility, however remote,<sup>165</sup> that he and other members of his government face prosecution.<sup>166</sup>

Third, in the view of Cambodia scholar Stephen Heder, the government wanted to control case selection so that it could shield individuals 'now in

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'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia', 79 *Nordic Journal of International Law* (2010) 341–382, at 372.

161 See *supra* text accompanying note 34.

162 To be sure, securing convictions in Cases 001 and 002 could burnish Hun Sen's reputation. Trials limited to a handful of Khmer Rouge figures could reinforce a legitimating narrative the government has nurtured since January 1979, which draws a sharp line between senior DK leaders who plunged Cambodia into catastrophic violence on the one hand, and lower-level Khmer Rouge cadre like Hun Sen 'who ... defected and [later] returned to ... save the country' on the other hand. Gidley, *supra* note 11, at 48. Yet this narrative was far more important in the early years of Hun Sen's leadership than during the life of the ECCC.

163 His 1997 coup against then-First Prime Minister Norodom Ranariddh was prompted in significant part by Hun Sen's desire to disarm police and military units controlled by Ranariddh's political party, known by its French acronym FUNCINPEC. This, in turn, would ensure 'that FUNCINPEC politicians had no protection from violent threats and intimidation' in the lead-up to 1998 elections they were favoured to win. Heder and Orentlicher, *supra* note 19.

164 Publicly, Hun Sen made much the same point in terms that were not as self-serving. In early March 1999, for example, he told the UN Secretary-General that, 'if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerrilla war'. Hammarberg, *supra* note 11, at 9.

165 See *Group of Experts Report*, *supra* note 2, § 96 (UN experts 'have no reason to believe that the Prime Minister would be the subject of the legal proceedings that are within our mandate').

166 Hun Sen was likely involved in war crimes and crimes against humanity, even if not in the capacity as a 'senior leader' or someone otherwise 'most responsible'. See Human Rights Watch, *30 Years of Hun Sen: Violence, Repression and Corruption in Cambodia*, 12 January 2015, available online at [www.hrw.org/report/2015/01/12/30-years-hun-sen/violence-repression-and-corruption-cambodia](http://www.hrw.org/report/2015/01/12/30-years-hun-sen/violence-repression-and-corruption-cambodia) (visited 25 April 2020), at 16–17, 19–20. Hun Sen has, moreover, stated that he should be excluded from prosecution and, more generally, that the ECCC should not prosecute former Khmer Rouge cadres who defected. See Heder, *supra* note 6, at 31, 37.

positions of authority . . . from embarrassing scrutiny in the testimony of their former associates should the latter be prosecuted'.<sup>167</sup> This, like the two previously noted motivations, would impel the government to limit prosecutions, not to ensure any specific trials or convictions.

But an important caveat must be noted: much the same motivation noted by Heder apparently lay behind improper government conduct in respect of Case 002. Defence counsel (most insistently counsel for Nuon Chea) asked the Co-Investigating Judges to summon several high-level officials whose testimony the Cambodian government openly opposed<sup>168</sup> and who were never compelled to appear. Reviewing the Trial Chamber's treatment of this question, the Supreme Court Chamber identified a number of errors in the majority's reasoning,<sup>169</sup> but concluded that it had 'not been established' that the failure to summon certain witnesses 'resulted in a "grossly unfair outcome"'<sup>170</sup> such as to warrant a reversal of the judgment.<sup>171</sup> Nevertheless, as a remedy it 'dr[e]w inferences' in favour of the accused.<sup>172</sup> Even if one finds its ruling persuasive and its remedy sufficient, the institutional harm is not so readily dismissed. The highly publicized confrontation over blocked witnesses injected concerns about government interference into Case 002/01.

## 7. Concluding Observations

Throughout fraught negotiations with Cambodia over what was then a potential Khmer Rouge tribunal, UN negotiators faced a Hobson's choice. Any tribunal acceptable to the Cambodian government would fall short of UN demands. Yet refusing to compromise would almost certainly mean one of the most murderous regimes in recent history would evade justice. Pressed by member states and civil society organizations, the UN assumed the very risks its negotiators preferred to avoid, relying on the best safeguards it could secure in the circumstances.

Years later, there are grounds for opposing views about whether the UN decision to take those risks was justified in light of the ECCC's performance. On one side of the ledger, the Court has been unable thus far to surmount blatant government pressure to prevent prosecutions it opposes. On the other side, there is scant reason to believe trials that were allowed to take place resulted from political pressure, and independent analysts believe those trials were conducted in a fundamentally fair fashion.

167 S. Heder, 'The Senior Leaders and Those Most Responsible', in OSJI (ed.), *supra* note 41, 53, at 54.

168 See S. Strangio and C. Sokha, 'Govt Testimony Could Bias KRT: PM', *Phnom Penh Post*, 9 October 2009. In some instances, the Co-Investigating Judges themselves declined to issue the requested summonses; in others, witnesses summoned by the International Co-Investigating Judge did not appear. For analysis of the legal merits of this issue, see Ciciari and Heindel, *supra* note 39, at 146–151.

169 E.g. Case 002/1 Appeal Judgment, *supra* note 121, §§ 147–149, 158.

170 E.g. *ibid.*, §§ 155, 158.

171 *Ibid.*, § 100.

172 *Ibid.*, §§ 155, 953.

For countless survivors of Khmer Rouge crimes, moreover, the justice the ECCC delivered has been precious beyond measure. As journalist Elizabeth Becker has noted, ‘The tribunal accomplished the critical task of bringing justice in a country where the leaders had refused to discuss what had happened.’ Through its work, the ECCC ‘acknowledged the victims, gave dignity to their lives, and condemned the genocidal regime’.<sup>173</sup>

173 D. Southerland, ‘Remembering Cambodia’s Brutal Brother No. 2’, *Asia Times*, 17 August 2019.