

Performance and Perception



**THE IMPACT OF THE EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA**

OPEN SOCIETY JUSTICE INITIATIVE

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in the Courts of Cambodia

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Open Society Justice Initiative



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The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations.

Acronyms Used in the Report

ADHOC	Cambodian Human Rights and Development Association
ASRIC	Applied Social Research Institute of Cambodia, Inc.
AIJI	Asian International Justice Initiative
ASF	Avocats Sans Frontieres
bzfo	Berlin Center for the Treatment of Torture Victims
CCHR	Cambodian Center for Human Rights
CCPC	Cambodia Criminal Procedure Code
CDP	Cambodian Defenders Project
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CHRAC	Cambodian Human Rights Action Committee
CPC	Criminal Procedure Code
CPP	Cambodian People's Party
CSD	Center for Social Development
CTN	Cambodia Television Network
DK	Democratic Kampuchea
DC-Cam	Documentation Center of Cambodia
ECCC	Extraordinary Chambers in the Courts of Cambodia
FIDH	International Federation for Human Rights

GBV	Gender-Based Violence
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
KdK	Kdei Karuna (formerly the International Center for Conciliation)
KID	Khmer Institute for Democracy
KR	Khmer Rouge
KRT	Khmer Rouge Tribunal
LAC	Legal Aid of Cambodia
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
NGO	Non-Governmental Organization
OHCHR	Office of High Commissioner of Human Rights
OCIJ	Office of Co-Investigating Judges
PAS	Public Affairs Section
PTC	Pre-Trial Chamber
PTSD	Posttraumatic Stress Disorder
PUC	Pannasastra University of Cambodia
RGC	Royal Government of Cambodia
RUPP	Royal University of Phnom Penh
SCC	Supreme Court Chamber
SSC	Social Services of Cambodia
TC	Trial Chamber
TPO	Transcultural Psychosocial Organization
UN	United Nations
UNTAC	United Nations Transitional Authority in Cambodia
VSS	Victims Support Section
WMC	Women's Media Center
YfP	Youth for Peace
YRDP	Youth Resource Development Program

Foreword

It has been more than 40 years since the brutal reign of the Khmer Rouge, whose warped ideology and systematic violence brought death to nearly a quarter of Cambodia's eight million people.

For years afterward, the US government and its allies, fighting Cold War battles in the wake of the Communist victory in neighboring Vietnam, cynically backed the ousted Khmer Rouge at the United Nations.

In part as a result, it took more than a quarter century to establish a court to try those most responsible for the horrific crimes. By then, many Khmer Rouge leaders, including Pol Pot, had died.

The UN-backed Extraordinary Chambers in the Courts of Cambodia (ECCC) has now been in operation for ten years. Throughout this time, the Open Society Justice Initiative has monitored developments closely. This report analyzes the ECCC's record to date in fulfilling its principal goals: securing accountability for some of the most horrific crimes of the 20th century, contributing to an improved domestic justice system, and enhancing public understanding of what happened during the Khmer Rouge regime.

The results are decidedly mixed.

Over the past ten years, the ECCC has concluded one case: against the former head of the notorious Tuol Sleng prison. It has completed trial proceedings concerning one portion of charges, and begun a second trial, against the two most senior surviving Khmer Rouge leaders, Khieu Samphan and Nuon Chea. Facing open opposition at the highest levels of government against further proceedings, the Court is struggling to investigate charges against four second-tier Khmer Rouge accused.

To its credit, the Court has conducted public trials that offered positive models of vigorous defense advocacy, reasoned judicial decisions, and access for victims.

It has pioneered methods of case procedure and management new to Cambodia. Further, it has prompted public discussions about the past, and helped spark inclusion of a brief history of Khmer Rouge rule in Cambodian schools.

Still, the Court has been plagued by allegations of corruption since its inception. The number of those charged is tiny compared to the number of perpetrators. And the Court has struggled—as yet, unsuccessfully—to overcome the perception that it will bring to trial only those suspects agreed to by the Cambodian government. Perhaps not unrelatedly, the ECCC has had little visible impact on Cambodia’s continued culture of impunity for the politically connected.

Fifteen years ago, Ambassador Thomas Hammarberg, the Representative of the United Nations Secretary-General for Cambodia, underlined the core issue which beset the negotiations over the establishment of the Court, and around which the principal challenges at the ECCC have since pivoted:

The ideal model would have been an international *ad hoc* tribunal in Cambodia with judges, prosecutors and other staff appointed through a credible international mechanism.... In the end, this model was not politically possible. But for the UN to agree to participate in a ‘mixed’ tribunal, there had to be guarantees for the integrity of the process. This is fundamentally what the discussions had been all about.

The compromise *Agreement* establishing the ECCC—particularly the decision to have a majority of Cambodian rather than international judges, and a complex formula designed to solve disagreements between national and international co-prosecutors and judges—aimed to provide those “guarantees.” However, they have proven ineffective in preventing political interference in key decisions concerning whom to investigate and try.

To be sure, the Court’s impact and legacy are of greatest importance to Cambodians. And yet, mass crime and corruption know no borders. From the Central African Republic to Central America, from Syria to Ukraine, the ECCC offers lessons about international justice and the option of using regional tribunals to complement the work of the International Criminal Court in The Hague. I see four key lessons that can be drawn from the ECCC.

First, don’t delay. The long pause between the end of Khmer Rouge rule and the launch of formal investigations has meant less evidence, diminished memories, and fewer senior leaders still alive to face trial. More than 65% of Cambodians were born after the regime’s fall. Many find it hard to believe such crimes really took place. There may well be reasons to sequence prosecutions to gain a political settlement, but the costs should be clear.

Second, once trials get started, they take time and money. The initial budget for the ECCC projected a three-year operation at a cost of about \$50 million. Ten years

later, the Court is still going, and about to exceed a quarter billion dollars in total spending. Funding crises have repeatedly threatened to shut down its work.

The judicial process does not obey a political timetable. Witnesses must be identified, and, in instances of mass violence, many will need protection. Some victims will require psycho-social assistance. The process of amassing evidence, building legally sufficient cases, and defending against them takes months, if not years. Financial contributions must be planned and staggered accordingly, so that court officials don't waste precious time beseeching donors for funds whose need is entirely predictable.

Third, judicial action generates greater impact if it is rooted in a broader program of locally-owned reform in support of the rule of law. Sadly, the Khmer Rouge tribunal was not. Since its inception, political will to end widespread corruption in the judicial system has been waning. While a number of Cambodian court officials express satisfaction at having benefitted from international mentors, there has been insufficient building of systemic capacity among justice officials. As a result, the ECCC's examples of independent fact-finding and reasoned judging have not resonated more widely. Today, as in 2006 or 1996, few ordinary Cambodians have any illusion about where power in their society lies—or about a judge's or prosecutor's independent ability to challenge it.

Finally, though tempting, it is a mistake to compromise on the core principle of judicial independence. In many ways, the history of the Khmer Rouge tribunal has been a series of concessions to Hun Sen, currently in his fifth term as Cambodia's prime minister. In the 1990s, the United States, France, and Australia overruled the recommendation of UN experts that the tribunal should have an international judicial majority to guard against improper interference. More recently, no donor government has publicly challenged Phnom Penh's baseless opposition to further trials beyond those already underway. Though each effort to appease Hun Sen seemed necessary at the time, together they have undermined the tribunal's ability to provide justice that is, and appears to be, free of political influence.

The Khmer Rouge tribunal has brought a measure of accountability for some of the most heinous crimes of the 20th century. But its potential to foster greater respect for the rule of law in Cambodia has been stunted by inconsistent funding, intransigence at home, and inadequate political backing from abroad. As the world confronts mass violence in the future, the experience of the ECCC in Cambodia offers lessons worth heeding.

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New York City
Spring, 2016

I. Introduction

A. Background

The Khmer Rouge, in power in Cambodia from 1975 to 1979, was responsible for perpetrating some of the most horrific mass atrocities of the twentieth century. At least 1.7 million people—almost a quarter of the population—perished and millions more suffered great harm. The government of Cambodia and the UN created the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2006 to provide a measure of justice to victims of these crimes by prosecuting key Khmer Rouge (KR) actors. The architects of the ECCC hoped that the court could facilitate reconciliation, healing, and historical reckoning of the crimes and determine who was most responsible, advance fair and independent trial practices, and promote the rule of law in a country with a deeply flawed, non-independent legal system.

At the time this report was written, the court has concluded only one case against a single accused (Case 001). It has completed trial proceedings as to a portion of charges against two additional accused (Case 002), begun a second trial against those same accused (Case 002/2), and is still investigating charges against 4 remaining accused (Cases 003 and 004).

Unlike the situation with Cases 001 and 002, the government does not support Cases 003 and 004 moving forward. Nonetheless, judicial investigations are underway, four suspects have been preliminarily charged, and the investigating judges, or one of them, will make the decision about whether to indict or dismiss the accused when the investigations are concluded. However, even in the event of final indictments, Cases 003 and 004 may not proceed to trial because of the government's active opposition.

The compromise *Agreement* establishing the ECCC—particularly the decision to have a majority of Cambodian rather than international judges, and a complex formula designed to solve disagreements between national and international co-prosecutors and judges—was ineffective in preventing political interference in key decisions. The government supported the trials of the suspects in Cases 001 and 002, and thus largely allowed the court to operate independently (though not necessarily free of some financial corruption and control of some witnesses close to the government). Cases 003 and 004 have not proceeded with the same independence, apparently because the government does not believe the cases serve its political interests. The fact that independent investigations and fair trial standards went forward only when the interests of the government were not impeded is deeply problematic.

From the outset, the court faced challenges relating to the length of time between its creation and the regime, which is now 40 years in the past. Pol Pot and many other likely candidates for prosecution, including Ieng Sary, Ieng Thirith, and Ta Mok, died before any judgment regarding their actions could be rendered. Over 65% of the Cambodian population today was born after the regime's fall, and many young people have difficulty believing stories of the horrors of the regime. Ten years into its operations, the court is far from completing its mandate to try senior leaders and those most responsible for KR crimes. Ongoing accusations of corruption, political interference, and violations of fair trial standards have plagued the court. Funding crises have repeatedly threatened to shut down its work. It has thus far cost close to \$250 million.

In spite of these problems, the ECCC has provided a measure of long-awaited justice to the victims of Khmer Rouge atrocities. Moreover, Cambodians today know far more about the horrific crimes of the KR than would be likely without the court. Thus, despite its numerous shortcomings, there is a strong sense among many Cambodians that the ECCC is, in many respects, a worthwhile endeavor and will serve Cambodians well in the long run by providing a fundamental and long-awaited sense of justice for the atrocities of the KR.

This report attempts to examine both how the ECCC has performed, and how Cambodians perceive its performance. It seeks first to analyze the ECCC's record to date in meeting its primary goal of providing justice to the victims of the KR by establishing credible accountability for the highest level perpetrators and thus ending impunity for the worst crimes of the KR. Second, this report examines the court's record in meeting its secondary goals of contributing to an improved domestic justice system, healing and reconciliation for victims and perpetrators, and a better general understanding of what happened during the KR regime.

B. Methodology

This report has two distinct parts and primary authors. The first part (Chapters I and II) focuses on the court's compliance with international legal standards and its impact on legal professionals and the domestic rule of law system. The second part (Chapter III) addresses the views of victims and other Cambodians about the court. The report concludes by distilling broad lessons from the ECCC that might inform future hybrid tribunals.

The Open Society Justice Initiative (the Justice Initiative) was involved in early advocacy to establish the ECCC and in active trial and institution monitoring since the court's inception.¹ This report draws extensively on the Justice Initiative's monitoring of the ECCC from 2004 to the present. It also considers literature on transitional justice generally and the ECCC specifically, as well as ongoing discussions with key players at the ECCC, the UN and donor states, and Cambodian civil society actors concerned with the court's integrity and relationship to national courts. Chapter II includes information gleaned from informal interviews with Cambodian legal professionals about the impact of the court on legal and judicial reform. Chapter III focuses on the impact of the court on average Cambodians—the primary intended beneficiaries of the institution—and is based on more structured interviews with a range of Cambodian citizens.

These two parts of the report—looking at the ECCC's legal impact and its impact on victims and the broader community—make up a single whole. Heather Ryan, an international lawyer who was the Justice Initiative's ECCC monitor for eight years, wrote about legal impact, and Laura McGrew, an expert in peacebuilding who has worked in Cambodia for more than two decades and who served as the Justice Initiative's first monitor and advisor after the court was agreed upon but before it was established, wrote about the impact on Cambodians.²

The impact of any justice mechanism on a post-conflict society can be subtle and may only be visible from a long-term perspective. As the UN Office of High Commissioner of Human Rights (OHCHR) recognizes in its work on the legacy of hybrid tribunals, a court's impact should “continue even after the work of the hybrid court is complete.”³

A full understanding of the impact of a hybrid court such as the ECCC cannot be fully appreciated for years, perhaps a generation, after the conclusion of its work. Nonetheless, we outline available evidence about the court and its operations that will likely affect its long-term impact, and look for apparent short-term impacts, including those based on perceptions of ordinary Cambodians. We hope this analysis will assist those committed to the development of rule of law reform and reconciliation in Cambodia to build upon the opportunities created by the ECCC and mitigate the negative impact of the more problematic aspects of the institution, including political interference.

Justice mechanisms designed to deal with mass atrocities aspire to lofty goals: punish perpetrators, end impunity, promote healing, reconcile divided factions, establish an accurate narrative of what happened and why, deter atrocities, and move a society to a point where the rule of law is strong enough to prevent conflicts and promote fairness. The stated goals of the ECCC—“the pursuit of justice and national reconciliation, stability, peace and security”⁴ and the facilitation of “a new role model for court operations in Cambodia”⁵—set a threshold that a transitional justice mechanism probably cannot achieve even under the most favorable of conditions. In addition, hybrid courts such as the ECCC are only established in situations where national courts are flawed and unable to provide justice to the victims without international assistance. Expectations of perfection under such circumstances are unreasonable. Nonetheless, the legacy of a justice mechanism should, at the very least, reflect movement in the direction of the stated goals. How well the ECCC has or will meet its mandate and its aspirations and contribute to the needs of Cambodians is a conclusion that will be evaluated—and reevaluated—over time and with different results by different stakeholders. This report is but one step in that process.

C. Development and Operation of the ECCC

1. Establishment of the ECCC

In June 1997, when Pol Pot, the acknowledged leader of the KR regime, was still alive, co-Prime Ministers Hun Sen (himself a former KR cadre) and Norodom Ranariddh requested the assistance of the UN in setting up a war crimes tribunal to deliver justice for the nearly two million lost lives and mammoth suffering KR had caused from 1975 to 1979. The resulting court, the ECCC, was established after prolonged, contentious negotiations, by an agreement between the UN and the government of Cambodia and an enabling Cambodian law.⁶

Due to the competing demands of the government of Cambodia for a domestic court, and of the UN to protect against political interference and ensure respect for international fair trial standards, the ECCC consists of a mix of international and domestic judges and prosecutors and a complex, imperfect formula of rules and procedures. The ECCC *Agreement* dictates basic operations of the court so as to promote the UN’s insistence that the process meet international standards for fair trials.⁷ The court’s mandate is to bring to trial “senior leaders of Democratic Kampuchea” (commonly known as the KR or the DK) and “those most responsible” for international⁸ and select national crimes⁹ committed in Cambodia between April 17, 1975 and January 6, 1979. International donors provide the lion’s share of ECCC funding, with the government

of Cambodia responsible for providing or raising from donors approximately 10% of the total.

2. Structure of the ECCC

a. System of “Co”-Leadership

The ECCC is nominally a special chamber of the national courts of Cambodia, but it operates and receives funding as an independent entity. It consists of parallel Cambodian and international structures at each level of the court—judicial, prosecution, and administration—with international personnel nominated by the UN, and domestic personnel appointed by the government of Cambodia. The two sides, although intended to work together to build capacity and expertise, often operate at cross-purposes at critical junctures.¹⁰

This paper refers to officials of the court as, alternately, “Cambodian” or “international,” based not on the nationality of the appointee, but on whether the Cambodian government or the United Nations appoints him or her. Given the nature of Cambodian political control of judicial officials, many critics assume that Cambodian-appointed officials do the bidding of the government in making any significant decisions that affect government interests. International judges are assumed to be independent of pervasive political control. There are two co-prosecutors, one Cambodian and one international, with equal authority. Likewise, a Cambodian and an international co-investigating judge share authority for judicial investigations. Because of the possibility for deadlocked decisions created by this structure, a specialized pre-trial chamber with five judges was designed to resolve disputes between the co-prosecutors and the co-investigating judges.¹¹ It operates under provisions intended to safeguard the independence of the case selection and indictment processes from political interference.

The inclusion of investigating judges in the court’s processes, in addition to prosecutors, is derived from the French civil law system. In reality, however, the ECCC is a complicated *mélange* of civil law and common law practices, due to the participation of many common law staff and officials and the experience and traditions they bring to the proceedings, as well as the fact that the ECCC regularly looks to the practice of other internationalized courts for guidance. The goal of the civil law design was to promote an efficient investigation process followed by relatively short trials, both judge-driven, rather than party-driven. This goal has been elusive, with long dual investigations, first by the prosecutors and then by the investigating judges, followed by extended public trials, even in the situation where the accused essentially pled guilty.

The Trial Chamber (with five judges: three Cambodian and two international) is charged with conducting public trials. The Supreme Court Chamber (with seven judges: four Cambodian and three international) hears appeals of Trial Chamber judgments and

has limited jurisdiction for interlocutory appeals.¹² The Pre-Trial Chamber (with five judges: three Cambodian and two international) was originally designed only to resolve disputes between the co-prosecutors or the co-investigating judges; however, the courts Internal Rules, originally adopted in 2007, were subsequently modified to expand its role. Under current rules, the chamber has jurisdiction to hear appeals by the parties of decisions of the prosecutors or investigating judges during the pre-trial phase.¹³

The court was established with a dual administrative and funding structure that mirrored the dual structure in each of the judicial chambers and the office of the co-prosecutors. The dual structure lead to a situation in the day-to-day operations of the court where, to differing degrees, offices split, with international and domestic staff working independently of each other rather than jointly, undermining the goal of maximizing efficiency and the cross-cultural exchange of ideas and competencies.

Within the Office of Administration, the court has a Public Affairs Section (PAS) with responsibility for local and international media relations and general public outreach; a Victims Support Section (VSS), responsible for outreach to and support for civil parties and other victims; and a Witness and Expert Support Unit, responsible for dealing with security, logistics, and support for witnesses called before the court. The court's rules provide for victims of crimes addressed by the court to participate at trial as civil parties. Civil parties, besides being represented by their individual lawyers, are represented as a group at trial by a set of Co-Lead Lawyers—one Cambodian and one international.

The ECCC *Agreement* contains a clause allowing the UN to pull its cooperation from the court in the event that the government of Cambodia takes steps to prevent the court from functioning in accordance with its terms.¹⁴ Sometimes referred to as the “nuclear option,” this clause should give the UN leverage in pressing for reforms when issues such as allegations of corruption, political interference, or failure to follow other fair trial procedures arise. For example, the provision came into play when, in the course of drafting the Internal Rules, the Cambodian judges attempted to block international defense counsel from fully participating in representing accused persons: the international judges threatened to cease cooperation, with UN support, believing this would have been a violation of defendants international fair trial rights.¹⁵ However, the provision has been ineffective in preventing major problems that have plagued the court—most vividly political interference by the government in the investigation, arrest and indictment process.

b. Rules for Decision Making

A system of “supermajority” voting in each judicial chamber requires a majority-plus-one judge to concur in order to reach any decision.¹⁶ Thus, a decision requires four out

of five Trial Chamber judges, five out of seven Supreme Court Chamber judges, and three out of five Pre-Trial Chamber judges. The designers imposed this requirement to insure the Cambodian judges could not, by voting as a block, control all of the decisions of the court.¹⁷ Thus, for instance, the Pre-Trial Chamber could not dismiss an indictment, and the Trial Chamber could not impose a guilty verdict without the concurrence of at least one international judge.¹⁸ Intended as a bulwark against political interference, the provision in practice has also created deadlocks where the court was unable to decide a question that came before it.¹⁹

Anticipating deadlock because of the supermajority requirement, the *Agreement* provides a way forward under certain circumstances.²⁰ If the Pre-Trial Chamber cannot reach a decision on a question related to whether an investigation or a prosecution should proceed, the investigation or prosecution moves forward.²¹ This presumption is intended to prevent the Cambodian judges from prematurely ending cases against persons that the government wished to shield from prosecution. It was through this measure that Cases 003 and 004 were referred to the co-investigating judges for judicial investigation over the objection of the Cambodian judges and prosecutor.²² However, while the presumption served to move the cases forward, the rule did nothing to ensure that the Cambodian co-investigating judge or other Cambodian officials would respect the result and participate in the investigation.²³

No presumption guides the resolution of issues other than whether a prosecution or investigation of an accused person moves forward. Thus for instance, when the Pre-Trial Chamber international judges agreed that there was sufficient evidence to mandate an investigation into allegations of political interference related to the refusal of certain government officials to comply with summons issued by the court, the Cambodian judges effectively blocked them under the supermajority requirement because the question did not involve the target of the investigation.²⁴ The standoff resulted in festering accusations of political interference rather than a resolution of the issue.

3. Cases before the ECCC

The ECCC has opened investigations against ten individuals (three of whom have died), divided into four cases, designated as Cases 001 through 004.

a. Case 001: The Duch Case

Duch, born in 1942 and the youngest of those initially indicted by the court, was the warden of the infamous Tuol Sleng Prison, also known as S-21, in Phnom Penh. High-level prisoners accused of being traitors to the KR were taken to S-21, tortured for confessions, and routinely executed. Duch ran the prison with the zeal, efficiency, and the pride of a talented bureaucrat.²⁵

The trial of Duch on charges of crimes against humanity and grave breaches of the Geneva Conventions ran from March 30, 2009 to November 27, 2009. Duch cooperated in the investigation of the case, submitting to 21 interviews with the investigating judges. At trial, he offered extensive testimony on critical factual issues and, until the last days of the trial, admitted general responsibility for many of the crimes charged.²⁶ While admitting to criminal actions only when faced with documentary evidence, and generally minimizing his authority—claiming he would have been killed had he not done what he did—his participation at trial provided a unique glimpse into certain aspects of the KR regime.

The Trial Chamber delivered its written judgment on July 26, 2010, sentencing Duch to 35 years in prison, to be reduced by a credit for time served in pre-trial detention (nine years at that point) and five years for violation of his fair trial rights due to the unlawful pre-trial detention by the Cambodian Military Court.²⁷ The Supreme Court Chamber issued a final judgment after appeal on February 3, 2012, increasing the sentence to life imprisonment. By a supermajority vote with two international judges dissenting, the decision also eliminated any acknowledgement that Duch had suffered unlawful pre-trial detention. In February 2012, Duch was transferred from the ECCC detention center to Kandal Province prison to serve his sentence.

The Justice Initiative, which monitored the trial daily, as well as other observers, judged that Duch's trial met basic international standards of due process.²⁸ The trial was also heralded for pioneering progress in direct victim participation through its system of civil party participation. Millions of Cambodians observed court proceedings live on television and from the public gallery.²⁹ The trial was long given that Duch essentially conceded guilt to most of the charges,³⁰ but the fact that the case remained in the public eye for its duration may have contributed to Cambodians' absorption of the process, laws, and facts. In accordance with the very limited provisions for reparations in the court's internal rules, only nominal reparations were awarded to the victims, including listing the names of civil parties and publishing the statements of apology and remorse made by Duch.

The appeal verdict diminished the accomplishment of the Trial Chamber judgment somewhat, at least from a human rights perspective, by refusing to recognize the pre-trial detention violation. In a country where excessive pre-trial detention is a widespread problem, this weakened the positive legacy left by the Duch trial verdict and sent a troubling message to the domestic Cambodian justice sector concerning the illegal use of pre-trial detention.³¹ Nonetheless, Case 001 was a milestone for justice in Cambodia and undoubtedly a significant part of the ECCC's positive legacy to date.

b. Case 002: The Senior Leaders' Case

Case 002 had long been heralded as the ECCC's landmark case because, after the death of Pol Pot and Ta Mok, the case named the most senior living members of the KR leadership—Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith—and because of the vast number of victims that suffered from their alleged crimes.³² The indictment in the case (formally known as a “Closing Order”) contains over 400 pages of factual allegations concerning crimes against humanity, war crimes, and genocide³³ committed against minority populations.³⁴

Case 002 demonstrates the grave difficulties associated with trying elderly individuals. All four of the accused were in their late 70s or 80s when they were charged in 2007. Ieng Thirith, Khmer Rouge Minister of Social Action, was deemed mentally unfit to be tried through a series of hearings and medical examinations due to dementia.³⁵ She was severed from the proceedings before the evidence began and died in August of 2015. Ieng Thirith's husband, KR Minister of Foreign Affairs Ieng Sary, died March 14, 2013, 16 months into the trial. Prior to this, his poor health and resulting inability to remain in the courtroom for even short periods of time gave rise to extensive litigation about his fitness to stand trial, his right to be present at trial and meaningfully participate in his defense, and the impact trial delays had on the rights of other accused.³⁶ While the treatment of Ieng Thirith exemplifies adherence with fair trial rights in cases of mental incapacity, the fact that she never stood trial and her husband will never be sentenced highlight the problems in pursuing accountability for grave crimes committed decades earlier. The maxim that “justice delayed is justice denied” applies.

In September 2011, the Trial Chamber issued an order to sever the Case 002 trial into several phases with the beginning phase to include the evacuation of the population of Phnom Penh in April 1975; population evacuations of other regions of the country in late 1975 and 1976; and the execution of officials, soldiers, and civilians associated with the former Lon Nol regime at Tuol Po Chrey shortly after the KR took power in April 1975.³⁷ Intended to ensure that the Trial Chamber could reach a verdict on at least some of the vast charges in the indictment while the accused were still alive and fit to stand trial, it actually resulted in a lengthy initial trial with a narrow factual scope. The evidence portion of the first Case 002 trial lasted from November 2011 to October 2013.

The Trial Chamber's August 2014 judgment on Case 002/01 includes an extended examination of the historical development of the KR and its policies and the background and roles of Nuon Chea and Khieu Samphan in the hierarchy of the organization. The judgment details findings about the evacuation of the majority of the population of Phnom Penh in April 1975, subsequent evacuation and forced population movements between September 1975 and early 1977, and the execution of former Lon Nol soldiers and civilian officials who had surrendered and were later either killed or buried at Tuol

Po Chrey. The court concluded that 1.5–2.6 million people died as a result of KR policies and actions and that millions more suffered greatly.³⁸

The Trial Chamber unanimously found that Nuon Chea and Khieu Samphan, “through a JCE (joint criminal enterprise) committed the crimes against humanity of murder, political persecution and other inhumane acts (comprising forced transfer and attacks against human dignity) during movement of population (phase one); political persecution and other inhumane acts (comprising forced transfer and attacks against human dignity) during movement of population (phase two); and murder and extermination at Tuol Po Chrey.”³⁹ Based on findings about the singular gravity of the crimes and the absence of relevant mitigating factors, the chamber sentenced both men to life in prison.

The court found that, as a consequence of the crimes for which Nuon Chea and Khieu Samphan were convicted, the civil parties and a very large number of additional victims suffered immeasurable harm, including physical suffering, economic loss, loss of dignity, psychological trauma, and grief arising from the loss of family members or close relations. In awarding reparations to the civil parties, the Trial Chamber endorsed 12 of 14 projects requested by the Co-Lead Lawyers representing the civil parties at trial. These included the institution of a National Remembrance Day; a Public Memorials Initiative; construction of a memorial in Phnom Penh to honor victims of forced evacuations; a Testimonial Therapy Project; a project facilitating self-help groups; a project to establish permanent exhibitions in five provinces to educate the public about the Khmer Rouge; a Mobile Exhibition and Education Project related to transitional justice; the inclusion of a chapter on forced population movement and executions at Tuol Po Chrey within the Cambodian school curriculum; the construction of a Peace Learning Center; publication of a booklet on adjudicated facts and civil party participation at the ECCC; publication of two editions of the verdict in Case 002/01; and inclusion of Civil Party names on the ECCC website.

A second phase trial—designated as Case 002/02—began in October 2014 against Nuon Chea and Khieu Samphan and is expected to last two years. The scope of this trial is broad, with a range of crime sites and factual allegations including charges of genocide (against Cham Muslims and Vietnamese), forced marriage as a crime against humanity, and extensive crimes at a number of work and execution sites.⁴⁰ It encompasses much of the heart of the criminality alleged against the accused, certainly in the minds of many of the victims of the Khmer Rouge. Both accused are in their 80s and in fragile health. While the Case 002/02 trial is currently proceeding with efficiency, they may not survive with sufficient capacity to see a judgment on the charges.

The reaction in Cambodia to the unanimous judgment of guilty on the initial charges in Case 002 was positive.⁴¹ Cambodians we spoke to about the judgment expressed a feeling of relief and satisfaction, as well as a sense of closure. The judg-

ment in Case 002/01 seems to have overshadowed concerns about the limited scope of the trial and many of the general criticisms of the court such as delays, high cost, and concerns about fairness and political interference. Put into a context of an overarching goal of the court to deliver at least some long overdue accountability for KR atrocities, the judgment is a landmark accomplishment. While this report will discuss key exceptions, particularly regarding the summoning of government witnesses, the trial generally met basic fair trial standard parameters. While an appeal may identify legal errors, the trial was an important display of both accountability and fair trial processes rarely seen in Cambodia.

From a legacy perspective, Case 002 trials highlight the problem with placing so much emphasis on a case against two accused to deliver justice for the deaths of up to two million people nearly 40 years ago. Unrealistic domestic and international justice expectations as well as the Cambodian government's interference made partial failure inevitable. If no further trial phases conclude in Case 002, the accounting for crimes committed by the KR will be relatively limited. Under these circumstances, the argument of the accused that, because of their notoriety and the court's limited number of prosecutions, the court was merely affirming a public perception of their guilt rather than independently examining the evidence, carries weight.⁴²

Both accused filed appeals to the Trial Chamber judgment,⁴³ and the prosecutor appealed the chambers refusal to more broadly apply the concept of JCE to the facts.⁴⁴ The basic arguments of the accused on appeal are that the right to an independent tribunal was violated because the Trial Chamber was deeply biased; the right to an effective defense was violated because the defense had insufficient time to and opportunity to question witnesses and the court declined to summon CPP government officials Heng Samrin, Ouk Bunchhoeun, and other requested witnesses; that the Trial Chamber decision was insufficiently reasoned and failed to address key arguments; that the rights of Nuon Chea and Khieu Samphan to be informed of the charges against them was infringed because the Chamber's severance order was not clear as to which charges were encompassed, and that the Trial Chamber relied on facts outside the scope of the severance order in arriving at its judgment.⁴⁵

The SCC scheduled oral arguments on appeal issues for November 17, but vacated the hearing on the same day because counsel for Nuon Chea declined to participate—declaring the process a farce. The SCC ordered that standby counsel be appointed to represent Nuon Chea during the appeal. It is unclear how much delay will result from this problem. Any delay is significant given the age and the fragility of the accused. If either dies before final appellate proceedings are complete, the impact of the Trial Chamber judgment against them will be diminished.

c. *Cases 003 and 004*

Cases 003 and 004 involve the judicial investigation of four remaining suspects for KR atrocities ranging from genocide (Case 004 only) to war crimes and crimes against humanity (both cases).⁴⁶ The suspects are KR officials who operated at the zone level. They are designated as “persons most responsible” for KR crimes under the jurisdictional mandate of the court. Although not alleged to be part of the central command of the Khmer Rouge, like Khieu Samphan and Nuon Chea, they are charged with having significant authority for criminal actions taken at the zone level of the organization. The Cambodian government opposes these cases, senior government officials have expressly stated on numerous occasions that Cases 003 and 004 will not go ahead, and Cambodian officials of the court refuse to cooperate in the investigations.⁴⁷ While the government has publicly stated that pursuing Cases 003 and 004 could compromise political stability in Cambodia, most court observers reject it as a smokescreen for the real concern that the cases, which involve cadre with connections to the ruling Cambodian People’s Party (CPP), may embarrass the party and its leader, Hun Sen.⁴⁸

To date, four persons have been charged and publically named as accused in the cases. Im Chaem was charged in Case 004 *in absentia* with a series of crimes against humanity committed at Phnom Trayoung security center and Spean Sreng worksite. In the same case, Ao An has been charged with the crimes against humanity committed at Kok Pring execution site, Tuol Beng security center, and Wat Au Trakuon security center. Former KR Navy Commander Meas Muth was charged first *in absentia*, and later *in person* in Case 003 with crimes against humanity and war crimes allegedly committed at Wat Enta Nhien security center, Kampong Som, Kratie, S-21 security center, and against Vietnamese, Thai, and other foreigners. Most recently, on December 9, 2015, Yim Tith, former acting Secretary to the Northwest Zone during the KR régime, was charged with a wide range of crimes against humanity including murder, extermination, enslavement, deportation, imprisonment, torture and forced marriage, genocide, and war crimes. .Suspect Sou Met, alleged to have been Commander of the Royal Cambodian Armed Forces in Region 5 and advisor to the Armed Forces Chief of Staff, died in June 2013.

Obstacles, many of which indicate political interference, have marked the investigation of these cases. The original co-prosecutors, Robert Petit and Chea Leang, disagreed about whether to refer the cases for formal judicial investigation and submitted the disagreement to the Pre-Trial Chamber for resolution. In mid-2009, the Pre-Trial Chamber split along international/Cambodian lines, with the Cambodian judges siding with the Cambodian prosecutor to abandon the cases and the international judges siding with the international prosecutor to pursue them.⁴⁹ The failure of the judges to reach a supermajority decision triggered the presumption that the cases would move forward to the judicial the investigation stage.

The initial co-investigating judges, Marcel Lemonde and You Bunleng, essentially ignored the cases for several years while they pursued the investigation in Case 002. When the Case 002 judicial investigation was complete, Judge Lemonde resigned and the reserve international co-investigating judge, Siegfried Blunk, replaced him, with only Cases 003 and 004 in his workload. The investigation that ensued was mired in claims of political interference and controversy, including allegations that Blunk failed to meet his legal and ethical obligations.⁵⁰ In June 2011, a number of Judge Blunk's international staff (including legal advisors, consultants, and at least one investigator) quit in protest over the judges' decision to conclude the Case 003 investigation before any meaningful investigation had taken place. Blunk resigned his post amid accusations of investigatory misconduct and government interference.⁵¹

Next, the reserve co-international investigating judge, Laurent Kasper-Ansermet, stepped up to investigate Cases 003 and 004, as the *Agreement* mandates. Both his Cambodian counterpart and the Cambodian Supreme Council of the Magistracy, the body charged under the *Agreement* with confirming the appointment of international judges, refused to recognize his authority.⁵² Nonetheless, Kasper-Ansermet issued an order reopening the investigation in Case 003.⁵³ After months of being blocked in his attempt to investigate Cases 003 and 004, Kasper-Ansermet resigned the position and published a statement detailing incidents of interference with his work by his Cambodian counterpart and other Cambodian court officials. In his note entitled "Egregious Dysfunctions with the ECCC," he concluded that "there exists within the ECCC such serious irregularities, dysfunctions and violations of proper procedure that endanger and impede due process of law, and affect, as they have since our arrival into office, the proper conduct of the investigation in Case Files 003 and 004."⁵⁴

Mark Harmon, who has extensive high-level prosecution experience at the International Criminal Tribunal for the former Yugoslavia (ICTY), was appointed as the fourth international co-investigating judge in July 2012. After staffing up his office, Harmon began active investigation of both Case 003 and 004. However, his Cambodian counterpart, You Bunleng, and the Cambodian staff continue to refuse to assist with the investigations.⁵⁵ While the lack of government cooperation and statements of disapproval of the cases has unquestionably undermined public confidence in the investigatory process and reinforced concerns about government manipulation of the Cambodian staff of the court; it has also likely affected the quality of the investigation, the response of witnesses, and the quality of evidence uncovered. Harmon submitted his resignation from his post in the summer of 2015. Reserve International Co-Investigation Judge Michael Bohlander, from Germany, replaced Harmon in August 2015.

Whereas suspects were formally charged in Cases 001 and 002 shortly after the investigations opened, and their lawyers allowed access to the case file and to participate in the investigation from its earliest stages, the court denied the lawyers for the charged

persons in Cases 003 and 004 such access and rights of participation until many years into the investigation.⁵⁶

Two of the suspects appeared voluntarily before the court for the required proceeding to read the charges (and then were released to return home with no order for pre-trial detention.) Two others were charged *in absentia* because the judicial police refused to carry out arrest warrants to bring them to court. The judicial police refusal to execute the warrants was in violation of the *Agreement*, which requires the government of Cambodia to cause the judicial police to comply with the co-investigating judges' request for assistance without undue delay.⁵⁷ Judge Harmon made information about the failure to execute the warrants public in June of 2015. Unfortunately, the UN, the court's international officials, and the donors to the ECCC all refrained from publicly condemning this violation and the blatant evidence it represents of political interference for many months. The UN engaged in private discussions with the government of Cambodia about the violation of the *Agreement* and included a reference to it in a public report to the UN General Assembly on September 30, 2015.⁵⁸ However, the government of Cambodia never remedied the violation by causing the judicial police execute the arrest warrants. Instead, without explanation, one of the accused, Meas Muth, subject to an outstanding arrest warrant appeared voluntarily at the court for charging on December 14, 2015 on a reduced list of crimes. While this action did not cure the violation of the *Agreement*, it did make the matter of executing the warrant moot for the time being. It remains to be seen if government cooperation in the cases will be forthcoming in the future if, for instance, arrests are required to secure the presence of any accused at trial if indictments are issued.

The international investigating judge has announced that he will complete his investigation and decision making in the cases by the end of 2016. When this happens, the prosecutors, civil parties, and suspects will have an opportunity to request additional investigations and appeal rulings before a closing order (equivalent of an indictment) or a notice of dismissal is finally issued. If the international judge determines that the evidence justifies sending any of the accused for trial and the Cambodian judge disagrees, the opposing approaches will likely be raised to the Pre-Trial Chamber. If the Pre-Trial Chamber is unable to resolve the issue with a supermajority decision, the presumption in the *Agreement* that the prosecution should move forward *may* prevail.⁵⁹ Such an appeal process is likely to take the cases well into 2017 before a trial could begin if an indictment is issued.⁶⁰ However, if the Cambodian and international judges of the Trial Chamber continue to disagree about if and how to proceed with the cases, or if the judicial police refuse to arrest the accused for any trial, there may be no method for moving forward to a credible legal conclusion.

The apparent ongoing government interference into the progress of Cases 003 and 004, particularly in the face of delayed and tepid responses from the UN and the

international officials of the court, has an ongoing impact on the legacy and legitimacy of the entire court—well beyond Cases 003 and 004. It generates cynicism and basic distrust of the institution. Honest acknowledgment of the lack of Cambodian political will and the presence of political interference involved in these cases would better serve the UN, the court, and the victims. The ongoing investigations might still prove of value to Cambodians with such acknowledgement, if the court and the UN ensure the information that the international investigation has gathered becomes available to researchers and journalists. Care must be taken that such release respects the rights of the accused and the security of witnesses, but the investigations have entailed much effort and cost, and their results should not be buried by the state.

II. The ECCC's Record in Meeting Justice Goals

A. Fostering Accountability and Ending Impunity

1. Record of the ECCC in Demonstrating Independent Accountability and Ending Impunity

The primary function of the court is to provide justice through accountability for gross and systematic human rights violations, thereby bringing an end to wholesale impunity.⁶¹ Most international or hybrid courts are mandated to prosecute high-level political or military leaders, not mid- to lower-level offenders, even though the lowest status offenders tend to be the physical perpetrators of crimes. In evaluating the success of the ECCC, it is necessary to look at the extent to which it has brought to account surviving perpetrators considered most responsible for atrocities, and the extent to which such prosecutions are contributing to the creation of a broader culture of accountability in Cambodia. The success of the ECCC on these basic measures is mixed.

The jurisdiction of the ECCC was intentionally narrow. David Scheffer, a key negotiator of the ECCC *Agreement* on behalf of the United States, stated: "This small set of individuals [targeted for prosecution] reflects the original purpose of the ECCC, which always has been to investigate and bring to justice the top leadership of the Pol Pot regime and notorious atrocity lords of the period. It also reflects the limited capacity and resources of the ECCC to undertake investigative and trial work."⁶² Many of the most significant leaders of the Khmer Rouge were already dead when the court was established 30 years after the regime took power. Pol Pot died in 1998 and Ta Mok,

a senior henchman of the regime, died in custody in 2005 before coming under the jurisdiction of the ECCC. The advanced age of the living alleged senior perpetrators of crimes argued for proceedings that could be concluded quickly.

Donor states originally envisioned a three-year tribunal that would cost around \$59 million.⁶³ While an unreasonably low estimate even at the time, it was in keeping with the hope to establish a tribunal with limited scope. As other international or hybrid tribunals have demonstrated, political interest often minimizes the jurisdiction of such courts.⁶⁴ The temporal jurisdiction was limited to April 17, 1975, when the Khmer Rouge took control of Phnom Penh, to January 6, 1979, when Vietnamese soldiers entered Phnom Penh and drove the KR leadership into the jungle. While strong arguments can be made that international crimes were committed in Cambodia on a massive scale before the jurisdictional period began, it was politically inconceivable that the court's major advocates, including the United States and France, would have supported a court empowered to consider criminal liability for such pre-April 1975 actions. A common criticism of the ECCC, as well as other war crimes tribunals, is that the limited temporal jurisdiction of the court eliminates the possibility of looking at a broader range of factors that contributed to the crimes. With respect to the KR crimes, these included, for instance, looking at the role of the U.S. bombing of Cambodia that ended in 1973.⁶⁵

Beyond the narrow formal jurisdiction of the court, internal Cambodian politics has limited its reach so as to prevent investigations or trials that touch those currently in power. Pervasive governmental interference, particularly with respect to Cases 003 and 004 and the failure of government officials to appear as witnesses in Case 002, demonstrated vividly that those with political power and influence in Cambodia are immune from prosecution—an essential demonstration of impunity. These factors contribute to a negative legacy for the court, in that they reinforce existing cynicism that those with power can easily escape judicial oversight.

While recently acknowledging the importance of the proceedings against Duch, Nuon Chea, and Khieu Sampan, *Japan Times* editorialized this subject:

There should be no doubt that the three convictions gained thus far are fair and just. But to suggest that those defendants—along with Ieng Sary, Ieng Thirith, and Pol Pot, “Brother Number One” who died in 1998 before he could be brought to justice—should alone shoulder responsibility for the crimes and inhumanities committed against the Cambodian People is absurd. The current investigations [Cases 003 and 004] are reportedly focusing on senior cadres who implemented the leadership's decisions, yet even to expand the net to that size would not suffice.⁶⁶

Domestic prosecutions often step in to provide accountability for those an interna-

tionalized tribunal that focuses on senior perpetrators has not prosecuted. In Cambodia, however, it is extremely unlikely, given the stated objections and political interests of the current government, that domestic prosecution of mid- or lower-level perpetrators will follow the close of the ECCC. This demonstrates the limits of the government commitment to ending impunity.

Blatant governmental attempts to influence who should come before the ECCC have a grave impact on the court's legacy for impunity. The CPP regularly uses the justice system to punish political opponents and to secure impunity for political allies.⁶⁷ In this context, government interference in ECCC cases further entrenches already-existing perceptions that the justice system exists to protect the politically powerful. In this, the court has the opposite effect of its intent. A Cambodian defense counsel working in the national system succinctly made the point in a 2014 interview: "I am disappointed in the court. It does not demonstrate that 'leaders cannot escape judgment' because so few who committed crimes were prosecuted, and those with power today know how to escape the evidence, and the UN was unable to prevent that."

Considering the various examples of political manipulation of the current Cambodian justice system, it is difficult to see that the ECCC has had any positive effect on Cambodia's culture of impunity for the politically connected. Cambodian news in 2012, 2013, and 2014 was rife with examples of politically motivated prosecutions.⁶⁸ A Cambodian lawyer in private practice who formerly worked at the ECCC summarized the situation in 2014: "The problem of the legal system in Cambodia is too big for ECCC to fix.... The ECCC has no effect on the abuse of power by the current government.... Some judges would like to do the right thing, but are under a lot of pressure and are not willing to do the right thing." Many other legal professionals interviewed expressed similar discouragement with the government's role in continued impunity in Cambodia.

2. Positive Impact of Accountability Record

Despite evident flaws of the ECCC in terms of delivering broad accountability for KR crimes, at high numbers in available surveys Cambodians say they are pleased to see at least some individuals held accountable for atrocities of the KR period. The second half of this report will explore this evidence in more detail. Many Cambodians generally hold the court in high regard because the Duch and senior leaders' cases did end impunity for some of the highest-level perpetrators still alive⁶⁹ While interviews with legal professionals who watch the court more closely, and from different perspectives, reveal a far more critical view, they also generally agree that, on the whole, the court has been good for Cambodia because it has held at least some key persons accountable for the KR atrocities. They view this as valuable and also see the court as making a positive contribution to the healing of victims and to a better understanding of KR-era history.⁷⁰

Average Cambodians may ignore the obvious shortcomings of the ECCC for several reasons. One is that they had such low initial expectations for the court in terms of independence and procedural fairness, given the record of domestic courts with respect to those parameters, that the ECCC's flaws still put it above expectations of basic fairness. Relative to the average Cambodian domestic court, the level of procedural justice and compliance with fair trial standards at the ECCC is high. Cambodians may never have expected the government to allow the court to operate free of its interference and, therefore, do not judge the court harshly when political interference is demonstrated. An ECCC defense lawyer points out that legal professionals have higher expectations than people who lack that expertise: "the non-legal person...do[es] not have as high expectations and *any* justice is seen as positive." Their interest is primarily in seeing cases against the accused go to judgment, and not the details of the process or the other markers of legitimacy that are the focus of much of the analytical writing about the court.

Thus, in spite of its numerous flaws, there is early evidence that the ECCC has successfully imparted a sense of accountability for KR crimes among a significant portion of the population. Its failure to provide broader legal accountability may be of critical importance to its ability to promote reform of the domestic judicial system, but average Cambodians have nonetheless gained a general sense of accountability for KR-era atrocities because of it.⁷¹ However, if the court is limited to providing accountability that affirms the claim that only the most senior leadership played a significant role in the planning and commission of KR atrocities, it denies Cambodians a full understanding of the role of the cadre below the most senior leadership. Allowing Cases 003 and 004 to move to conclusion through a public process might begin to provide a more accurate picture of the KR regime.⁷² In addition, by barely exceeding the expectations of average Cambodians, the court limits its ability to spur them to demand a judicial system that comports more closely with rule of law principles than the current system.

B. Meeting International Fair Trial Standards

Article 13 of the ECCC *Agreement* states that the rights of the accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) shall be respected throughout the trial process. Article 14 of the ICCPR outlines such concepts as: the right to equality before the law; the right to a fair and public hearing by a competent, independent, and impartial tribunal; and the right to presumption of innocence as well as other minimum fair trial guarantees.

The range of fair trial concepts encompassed by Articles 14 and 15 of the ICCPR appear explicitly and/or by reference in the founding documents of the ECCC (the *Agreement* and the *Law*)⁷³ and are also referred to in the *Internal Rules*.⁷⁴ Without ques-

tion, the protection of these international fair trial standards primarily prompted international involvement in the court. Indeed, in negotiations between the government of Cambodia and the UN about the formation of the ECCC, fair trial standards was a central criteria for UN involvement.⁷⁵

Whether the ECCC is judged as meeting international fair trial standards is, like its success in providing basic accountability for past wrongs, a threshold benchmark for assessment of its success. In terms of the legacy of the court for rule of law development, failure to meet these basic standards will diminish its ability to provide a credible model for domestic rule of law reform.

The quality of justice the ECCC has delivered, including the degree to which it respects the fair trial rights of those brought before it, is notably higher than the quality the Cambodian domestic justice sector delivers. As one lawyer working as a defense counsel in national courts summarized simply: “As a model court it is not perfect, but it is better than the national court.” In part, this reflects scrutiny by the media, the international community, and the NGO sector. The capacity-building opportunities the ECCC offers to Cambodian judges, lawyers, and administrators working alongside international counterparts, as well as the level of financial resourcing the ECCC receives in contrast to the Cambodian justice sector may also influence its superiority to the domestic court. Having internationally assigned judges on the ECCC, many with years of experience working in fair and independent judicial systems, unquestionably contributes to its relatively high standard of justice.

The ECCC is also far more transparent in its decision making than domestic Cambodian courts, where legal reasoning is rarely available or, if available, incomplete or questionable, especially in politically controversial cases. For example, the ECCC has delivered notable decisions that accord with domestic and international standards concerning the requirements for ordering pre-trial detention or finding an accused person physically and mentally capable of standing trial. Domestic Cambodian courts rarely deal effectively with these issues. By addressing them, the ECCC has the potential to contribute to awareness that an accused person has the right, and his counsel has the duty, to raise fair trial issues before appropriate courts.

Where accused persons are often unrepresented in domestic cases, or assigned counsel only shortly before their trial,⁷⁶ international and Cambodian ECCC defense counsel have presented vigorous defenses on behalf of their clients (particularly in Case 002). Indeed, at times counsel has been reprimanded for unethical actions.⁷⁷ A significant portion of the evidence admitted before the ECCC, as well as interlocutory decisions and trial and appeal judgments rendered by the ECCC on legal and procedural issues, stand up to basic scrutiny.⁷⁸ Even in decisions the Justice Initiative has questioned in relation to human rights issues (such as in the case of the Duch appeal verdict), the reasoning is adequately based on fact and law.⁷⁹

Nonetheless, defense counsel in Case 002 and court observers have raised challenges to the fair trial rights of the accused that bear serious consideration. The most serious challenges to the court's record on meeting international fair trial standards is that it has not provided a fair and impartial tribunal⁸⁰ or fully respected the presumption of innocence.

1. Right to Be Tried by a Fair and Independent Tribunal

The requirements of independence, impartiality, and integrity of judges of the ECCC, as well as their high moral character and their possession of adequate qualifications, are enshrined in the core documents of the ECCC. In particular, in Article 3.3 of the *ECCC Agreement*,⁸¹ Article 10 (new) of the *ECCC Law*,⁸² and Articles 2.1 and 7.1 of the ECCC's Code of Judicial Ethics.⁸³

The purpose of these requirements is to ensure that a judge makes decisions based solely on the facts and applicable law of the cases before him or her. They exist to protect the rights of individuals who come before the courts, whether an accused, a victim, or a witness. They also reinforce public confidence that the court will fulfill the purpose and functions for which it was established. This contributes not only to a public perception that justice is being done in the particular cases which come before the court, but to the ongoing promotion and respect for the rule of law in the judicial system within which the court operates.

Should questions arise about the independence or impartiality of an ECCC judicial officer, the ECCC *Internal Rules* provide mechanisms by which parties can seek appropriate relief. Rules 34 and 35 set out the two principle mechanisms, dealing with challenges of judicial bias and interference with the administration of justice, respectively.⁸⁴ In interpreting Rule 34, the ECCC has adopted the ICTY test for judicial bias, namely the "reasonable observer" test.⁸⁵ Although the threshold is not particularly high, its practical application at the ECCC has so far proved insurmountable. The ECCC chambers have stated that the legal requirements for judicial appointments articulated in the various ECCC laws create a "presumption of impartiality" attaching to all judges. In reality, extensive evidence of political control of the Cambodian domestic judicial system, from which they come and to which they will return, belies this claim, but has been ignored.

Although the language of Rule 35 ("interference with the administration of justice") does not expressly concern the conduct of judicial officers, the Supreme Court Chamber has issued two decisions that recognize that a Rule 35 inquiry could address improper conduct of judicial officers, including acting in response to political interference.⁸⁶ However, it has imposed a high threshold—"knowing and willful" interference with the administration of justice—rather than using the language of Rule 34, which other international courts have adopted for removal of a judge: an "appearance of bias."

Given that the court has never even determined a judge has exceeded the threshold of “appearance of bias” in connection with allegations that judges acted under political interference, it is difficult to conceive of a set of circumstances wherein the judges would find that the higher threshold could be satisfied.

a. Judicial Bias

A prevalent question about the ECCC’s ability to deliver fair trials concerns the freedom of its judges, including its investigating judges, from general bias against the accused. Some 20 motions have come before the ECCC that have questioned the judicial independence, impartiality, or integrity of ECCC judges.⁸⁷ Motions claiming judicial bias have related to judges in all chambers, plus the investigating judges, and refer to both international and Cambodian judges. All of the public motions have been brought by the defense of the accused in Case 002. Examples of the alleged conduct giving rise to complaints of judicial bias include:

- That all judges of the Trial Chamber are unable to determine issues in a current case (Case 002) afresh because of findings they have made in a previous case (Case 001) with some factual overlap;⁸⁸
- That the president of the Trial Chamber admitted to a documentary filmmaker that he had “accepted cash gratuities from grateful litigants” while president of the Battambang provincial court, prior to the ECCC’s establishment;⁸⁹
- That the court’s initial international co-investigating judge was biased by reason of his express preference for inculpatory over exculpatory evidence in the judicial investigation;⁹⁰

The fundamental rationale of the various decisions of the court rejecting all of the challenges to judges on the basis of general bias was that judges are “presumed” to operate independently and impartially and that the bar for finding judicial bias is set very high.⁹¹ Little additional analysis is offered in the decisions.

b. Political Interference

Case 001 against Duch was relatively free of claims of interference with judicial decision making. Indeed, since the case seemed, until its final days, to be essentially a drawn out guilty verdict, there was relatively little controversy about judicial independence.

In contrast, two major categories of political interference with judicial decision making have been made in connection with Case 002. The first is direct interference. These allegations concern the refusal of six senior government officials to appear in response to subpoenas to give testimony in the case’s investigation,⁹² and the fact that

the Trial Chamber decided not to call two of the witnesses despite the assertion by the accused that their testimony was critical.⁹³

The international co-investigating judge in Case 002 (Marcel Lemonde) issued subpoenas to the six officials, and the Cambodian Minister of Information immediately responded that “the government’s position is they should not give testimony,” and that if foreign officials were not satisfied with that position, they could “pack up their clothes and go home.”⁹⁴ Each of the witnesses refused to appear before the investigating judges, and the judges made no efforts to enforce the subpoenas. Likewise, the Trial Chamber did not issue subpoenas to any of these witnesses in response to repeated requests by the accused that at least one of the witnesses was critical.⁹⁵

Nuon Chea’s lawyers argued that these government officials, some of whom were high-level KR officers during the time relevant to the charges against him, were among the very few people in the country who had firsthand information about details supporting his defense and that their testimony may provide important exculpatory evidence.⁹⁶ This claim obviously calls for scrutiny, but without more detailed knowledge of the potential testimony of the witnesses, it is difficult to reject it outright. The international co-prosecutor agreed that the testimony of at least some of these witnesses was relevant to the investigation.⁹⁷ With evidence of clear political involvement and motive to protect witnesses in high government positions from potentially embarrassing questioning, the court’s refusal to secure the testimony of these witnesses, or to investigate the role of the government in their failure to appear, clearly violates standards of fair trials.

The second type of interference alleged in Case 002 relates to evidence from the investigation in Cases 003 and 004. Nuon Chea points to evidence that the Cambodian government does not want these cases to move forward and has acted to prevent their timely and effective investigation, in support of his claim of violation of his fair trial rights in Case 002.⁹⁸ His counsel argues that “if there is strong direct and undisputed evidence that the main investigative body of an institution is open to (and acts upon) direct outside influence into the conduct of investigations, *all* the investigations of such and investigative body are inherently suspect, especially those regarding politically sensitive cases, and especially in cases that are factually closely linked to one another [as Cases 002, 003, and 004 are].”⁹⁹ Further, they argue that “all Cambodian officials at the ECCC are, in the end beholden to the [government], and are not free to perform their duties in a truly independent fashion.”¹⁰⁰ The defense claim is that, while the apparent motivation for the government interference in Case 002 and Cases 003 and 004 may be different—to quash Cases 003 and 004 and to obtain convictions in Case 002—the point is that a consistent adherence to government wishes on the part of Cambodian judicial officials infringes basic fair trial rights.¹⁰¹

The allegations of political interference have produced extensive and convoluted litigation at the ECCC. The co-prosecutors, the co-investigating judges, the Pre-Trial

Chamber, the Trial Chamber, and the Supreme Court Chamber have each had the opportunity, but have refused to deal substantively or directly with evidence of political interference. Typical rationales for this position include 1) that the judges each take an oath to be fair and independent and, therefore, presumably would not be subject to political interference;¹⁰² 2) a finding of inadequate showing of a “tangible impact...on the fairness” of the case, regardless of whether interference exists or not;¹⁰³ 3) a finding that purported interference related to the investigation of Cases 003 and 004 is not relevant to Case 002; 4) a finding that the investigating judges or the Pre-Trial Chamber have already dealt with similar claims, in spite of the fact that neither body dealt definitively with the substance of the claims;¹⁰⁴ or 5) simple refusal to address interference.¹⁰⁵

Some of the decisions in the above categories are unanimous rulings of chambers of the court¹⁰⁶ or by the co-investigating judges;¹⁰⁷ others are split decisions in which the international component found that addressing evidence of interference required further investigation or action, but the Cambodian majority outvoted them.¹⁰⁸ A review of the numerous decisions that address allegations of political interference provides support for defense counsel’s contention that the court has brushed the problem of political interference aside because it is too difficult to address, and because acknowledging the problems would fundamentally discredit the entire court.

The political interference evidence in the Case 002 trial may not have tangibly damaged the accused’s fair trial right to present exculpatory evidence. Nuon Chea’s claims with respect to specific exculpatory evidence or other damage from political interference are nonspecific. Without a finding of specific harm, a violation of fair trial rights might result in a remedy such as a reduction in sentence if the accused are found guilty, or compensation if the accused are found not guilty.¹⁰⁹ However, without an open investigation into interference and its impact, it’s difficult to be confident. Political interference has been far more prominent in Cases 03 and 004, of course, but the suspects have little motivation to complain, as the interference has generally been in their interest.

That the court did not provide a judicial framework for analyzing allegations of judicial bias or misconduct is not only unfortunate for the reputation of the court, but also for the court’s ability to be a model for the domestic system. As any analysis of the judicial system in Cambodia reveals, problems relating to judicial impartiality and independence are endemic. The ECCC’s essential dismissal of such challenges without extensive discussion is a lost opportunity to provide a useful framework or jurisprudence for lawyers to pursue in the national context.

2. Right to Presumption of Innocence

The accused in Case 002 argued strongly that the court did not respect the right to the presumption of innocence in significant ways. First, they argued that the fact that the

court tried only a small number of “pre-determined” accused demonstrates that the court condemned them as guilty before the trial began. In addition, the limitations on the court’s temporal jurisdiction so as to eliminate consideration of circumstances and involvement of other parties that occurred both before and after the 1975–1979 timeframe opens the court to an argument that the results were not designed to probe conflicting evidence or uncover a truth that was not already assumed to be factual or that took place in a larger context. This situation imposes a burden on the court to guard the rights of the accused scrupulously to the presumption of innocence before the public, so as not to support the picture of a pre-determined result in each case. The public and visible role of defense counsel and the procedural safeguards of the public trials have, to a large degree, accomplished this.

However, accused parties have raised additional concerns about the presumption of innocence before the court. During the course of the 002/01 trial, Prime Minister Hun Sen called Nuon Chea a perpetrator of genocide to the Vietnamese media.¹¹⁰ Nuon Chea filed an objection, and the Trial Chamber acknowledged that the prime minister’s remarks were “incompatible with the presumption of innocence,” and issued a public reminder of the need for public officials to avoid such comments.¹¹¹ It also stated that these remarks would not influence its proceedings.

An additional presumption of innocence concern raised by Nuon Chea’s defense is that the judges failed to live up to their obligation to seek out the truth and impartially consider both exculpatory and inculpatory evidence in the course of the judicial investigation.¹¹² They argue that Case 002 was not investigated so as to *critically* examine the criminal responsibility of the accused, which they dispute, arguing that they acted without criminal intent and so as to benefit the people of Cambodia.¹¹³ Rather, they assert that the investigation acted only to confirm a preconceived, biased narrative of the KR that serves the interest of the current political regime and the international community that supported the court. The Trial Chamber and the Supreme Court rejected these claims in rulings issued prior to the close of the trial.¹¹⁴

C. Promoting Access to Justice for Victims: Civil Party Participation

The ECCC is a pioneer in direct participation of victims in international criminal trials. Indeed, it was the first court of its kind to implement a system of civil party participation. Combined with the court’s physical location in Cambodia, this makes the court significantly more accessible to KR victims. Implementation of the victim participation system at the ECCC was difficult and flawed, yet the civil party participation system

has contributed positively to the legacy and impact of the court. At the very least, it has brought a large number of people into close contact with the court. In general, civil parties report that they feel positive about their experience and inclusion, and that they had some voice in the process. They serve as ambassadors to their families and communities to extend knowledge about the work of the court.

A fundamental reason for the establishment of an international criminal justice process is to provide access to justice for victims of mass atrocity crimes. Yet, the notion of full civil party participation was not part of the original plan of the government or of the UN when the structure of the ECCC was negotiated. Reflecting on this, David Scheffer, a key diplomat negotiating on behalf of the U.S. government to establish the court, noted:

The ECCC was never conceived by those who negotiated its creation as an instrument of direct relief for the victims, although the protection and use of victims as *witnesses* in the investigations and trials is addressed in detail. The victims' numbers are simply too colossal and the mandate and resources of the ECCC far too limited to address the individual needs, including that award of reparations, for so many victims.¹¹⁵

Nonetheless, when the judges drafted the court's first internal rules in early 2007, they looked to Cambodian domestic law and included provisions to allow victims of crimes under the jurisdiction of the court to participate as civil parties, with rights roughly comparable to the prosecution and the defense, including the ability to seek reparations.¹¹⁶ Under these rules, civil parties have the right, for instance, to request the co-investigating judges perform investigation acts, to participate in provisional detention hearings, and to enjoy most of the other rights normally granted to the accused and the prosecutors during investigation and trial.¹¹⁷ In a major concession to the practical hurdle presented by the massive numbers of and losses by victims of the KR, civil parties were limited to seeking only collective and moral reparations against the accused.¹¹⁸

In Case 001, 90 civil parties participated in the trial, 22 presented testimony to the court, and 67 received collective and moral (as opposed to financial) reparations following Duch's conviction. The Trial Chamber's reparation award included only publicly listing the names of all accepted civil parties and the name of any family member who died at S-21 prison, and ordering a compilation of all statements of apology and acknowledgments of responsibility made by Duch.¹¹⁹

Following the Case 001 trial, the ECCC judges significantly amended the *Internal Rules* with respect to civil party participation, so as to address some of the problems experienced during the first trial and in anticipation of a much larger number of civil parties in Case 002—with its multiple accused and much larger crime base. Under the

new rules, civil parties were *required* to be represented by counsel at all stages under a two-tiered system. Civil parties were individually represented by counsel of their choice through the investigative stage of the case. Generally, they joined with other civil parties with similar interests and sought representation as a group through one of the NGOs actively assisting victims interested in participating as civil parties. The court's VSS had one team of lawyers available to represent those civil parties unable to join one of the groups represented by NGO lawyers.

The revised rules mandated that a pair of co-lead lawyers—one international and one Cambodian—would collectively represent civil parties at trial. The individual civil party lawyers were relegated at trial to advising these lawyers, unless they specifically asked another lawyer to step in for a particular task. A complex system for consultation and developing requests for moral and collective reparations was established. The rules expanded the court's authority to make reparation awards using the assets of the accused (all of whom claimed to be indigent), to include projects that were funded prior to any judgment by donors.¹²⁰

In Case 002/01, 3,866 victims of the KR regime were initially accepted as civil parties with a direct stake in the case and the hope of receiving collective and moral reparations following any conclusive finding of guilt. Thirty-one testified at the trial.

Much has been written about the changing details and implications of the victim participation process at the ECCC, including its impact on the rights of the accused and the efficiency of the proceedings.¹²¹ Dramatic changes in the rules after the conclusion of the first trial, unwieldy numbers, insufficient financial support for outreach and legal representation, additional trial time, concerns of the defense about the role of civil parties at trial, and frustration with the inadequacy of reparations have marked discussion of the ECCC system with controversy and much dissatisfaction.¹²² While there was admittedly much for the court and indeed the international community to learn in establishing a civil party participation scheme for such mass crimes essentially from scratch, and there were serious flaws in the system, the participants themselves expressed general satisfaction with their experience.

1. Surveys of Civil Party Satisfaction

Several surveys of civil party participants have attempted to gauge the nature of and satisfaction with the experience. Such work provides an important glimpse into the experience and attitudes of a group of Cambodians who, because they both chose and had the opportunity to participate in the process, received more detailed information and had a more intense firsthand experience with the ECCC than most Cambodians. Although they represent a select and small sample of victims of the Khmer Rouge, and an even smaller sample of the Cambodian public, their views can provide a concentrated

look at the success of the experiment of providing direct victim participation in a trial for mass atrocities.

Surveys of civil party attitudes were conducted at the conclusion of Case 001¹²³ and shortly before the first phase trial of Case 002.¹²⁴ In addition, two significant general population-based surveys were conducted by the Human Rights Center of the University of California, Berkeley—one before the conclusion of the Case 001 trial,¹²⁵ and one after the conclusion of the trial.¹²⁶ Together, the surveys provide some contrast between the attitudes of civil parties and Cambodians who did not participate as civil parties, and among civil parties over time.

Interviews with all of the Cambodian civil parties in Case 001 revealed generally positive attitudes, accompanied by some negative findings, including “about the impact of the trial on their acceptance of loss and reaching closure, on their forgiveness of the perpetrators, or whether the trial had improved the rule of law.”¹²⁷ In contrast, the initial survey results of Case 002 civil party participants that the NGO Cambodian Human Rights and Development Association (ADHOC) undertook to evaluate the success of its program to provide outreach and support to civil parties were more uniformly positive.¹²⁸

Improvements in the overall civil party process between Case 001 and Case 002 may help explain the increased positive results, and may be a good indication that the court and related parties learned from the Case 001 experience and provided better communication and a more positive process to the civil parties in Case 002. However, there is too little information to draw such a conclusion with confidence, as the design of the Case 001 and Case 002 surveys differed. An additional explanation may be that the survey of the Case 001 civil parties was completed shortly after the judgment, when many civil parties expressed disappointment with the initial sentence given to Duch, the chambers’ decision to reject 23 of the civil parties at the conclusion of the trial, and the extremely limited reparations award. Finally, it is possible that with time the expectations of civil parties have become more realistic and therefore their views of the accomplishments of the court more positive. This later result may be due to the extensive work that NGOs, civil party lawyers, the court itself, did to provide meaningful opportunities for Case 002 civil parties to learn about the court and take part in activities related to dealing with the KR crimes.

2. Impact of Civil Party Participation on Proceedings

Civil party participation potentially satisfies a number of important goals. The object is to bring a court closer to those affected by the crimes at issue and increase the likelihood that victims will be satisfied that justice has been done. Involving victims potentially provides them some measure of healing by giving them a voice in the process and an opportunity to tell their stories.¹²⁹ However, there is always a risk that civil parties will

be disappointed in the outcome of their involvement. For instance, it was determined early on that financial reparations, generally a goal of civil party participation in the domestic regime, were not financially or logistically feasible for the ECCC. This decision remained a challenge for the court and NGOs working with civil parties in managing the expectations of victims, many of who hoped for financial reparations.

A challenge with even limited civil party participation in an atrocity trial is that criminal legal proceedings are generally focused on the accused and the rights of the accused. Criminal trials do not provide an ideal forum for victims to tell their stories beyond the limited extent that the story relates directly to the accusations brought by the prosecution and the accused's role in those alleged crimes. At the ECCC, this problem played out dramatically because of the massive number of victims, and the need for the court to handle the trials as efficiently as possible, so as to guard the rights of the accused not to be faced with evidence that they cannot challenge or that is not relevant to the charges against them. The advanced age of the accused and their fragile health put additional pressure on the court to move through the trial quickly.

The testimony the civil parties were able to provide at trial was constrained by time and subject matter. Nonetheless, the Trial Chamber gave civil parties that testified somewhat more latitude than other fact witnesses. In the Case 001 trial, some civil parties were allowed to address Duch directly and question him about the fate of loved ones who were killed or disappeared.¹³⁰ This created a unique and meaningful opportunity for a person who had suffered the loss of a loved one. Other civil parties who chose not to or were not able to testify at trial were, nonetheless, able to tell their stories at some point in the process to their lawyers, representatives of the victim's unit of the court, or to the investigating judges. This too was an opportunity many victims of atrocities crave but never have.

In addition to the ability to tell their stories and discuss their losses in the context of the proceedings, civil parties were generally treated with considerable respect by the court and, sometimes, even the accused. They benefited from special outreach programs sponsored by the court and by NGOs that provided relatively in-depth information about the proceedings at the ECCC. They had opportunities to attend the trial proceedings and sit in the actual courtroom with their lawyers and the accused (as opposed to sitting in the public gallery section separated from the actual courtroom by sheets of glass). Many civil parties also received psychological assistance from NGOs in dealing with post-traumatic stress and other difficulties related to KR atrocities. The attention, services, and opportunities that the civil parties were able to take advantage of made the proceedings a more meaningful and constructive experience.¹³¹

Significantly, the civil parties were also able to influence the content of the proceedings in Case 002 in important ways. While civil parties are not able to directly shape the charges brought against accused persons, they can ask the prosecutors to

investigate and consider charges based on submitted facts. In Case 002, groups of civil parties and victims were successful in convincing the prosecutor to expand the investigation to include claims related to forced marriage, which claims were ultimately included in the judicial investigation and the indictment.¹³² Likewise, civil parties were active in submitting requests for investigative actions related to the crime of genocide against Khmer Krom (indigenous Khmer people from in and near southern Vietnam) and Vietnamese.¹³³

The presence of the court led to many additional programs and opportunities for victims to tell their stories, learn about the court, and receive some services for ongoing trauma.¹³⁴ Civil parties that testified in court in some respects stood in for other victims who suffered similarly but were unable or unwilling to participate in the process. To the extent that their testimony was broadcast on television or otherwise covered in media, they served to bring the court closer to a broader number of victims who could identify with their losses. The civil parties that participated in the trials served as focal points in their families and communities to inform others about the proceedings and extend and enhance general outreach about the court.

Cambodian NGOs implemented active programs to support civil parties with extensive training, information, capacity building, and psychological support and tools because of the ECCC. To the extent that civil parties have developed knowledge, skills, and the confidence to bring proactive leadership about the court and other aspects of social change back to their communities, it is primarily because of this NGO work. Civil party participation without intense NGO support would likely have resulted in grave frustration on the part of participants.

It is apparent that adding a system of civil party participation to the already cumbersome structure of the ECCC was problematic in many respects. It caused difficulties, delays, and added expense. The system was not ultimately satisfactory to many victims. Nevertheless, on the whole, the ECCC's commitment to extend the role of victims as participants in the proceedings did add to the court's positive impact for Cambodians. The prosecutors and investigating judges expanded investigations and, ultimately, charges against the accused based on the interests of groups of victims whose voice had not previously been heard. A significant number of people from all over the country had an opportunity to tell stories they had long kept hidden in a receptive context, and to observe, learn about, and participate in the proceedings intended for their benefit. While the number of civil parties before the ECCC represent only a fraction of the total number of victims of the KR living today, they served as worthy representatives in the courtroom and may take the benefits of that participation back to their communities and families, thus magnifying the advantages of their participation.

As discussed further below, a number of Cambodian lawyers gained experience and skill from their representation of civil parties that they may be able to bring to the

national legal system. It remains to be seen whether this progress will serve as a foundation to enhance the goals of providing justice, a sense of rehabilitation and healing, and respect for rule of law processes in Cambodia. Sustained funding for and efforts of NGOs committed to building on the foundation established by the ECCC will be critical to long-term impact.

D. Prosecuting Crimes of Gender-Based Violence

Appropriate attention to sexual and gender-based violence, as well as gender parity within the institution, is imperative for the legitimacy of courts. As the *OHCHR Handbook on Hybrid Legacy* notes, “strong policies both on prosecuting gender crimes and on gender equality in employment may bring about a culture shift in societies where women may enjoy a lower social status.”¹³⁵ The ECCC’s administrative and prosecution statistics reveal grim deficiencies in both regards.¹³⁶ However, there are recent signs of increased attention to the prosecution of crimes involving gender violence, albeit belatedly: charges of forced marriage and rape in the context of forced marriage are included in the second phase Case 002 trial against Nuon Chea and Khieu Samphan, and the international co-prosecutor has requested that the Case 004 judicial investigation currently underway include sexual violence more broadly.

1. Gender Violence in the Cambodian Context

Cambodian culture commonly accepts domestic violence and the subjugation of women.¹³⁷ Data shows that many rapists in current-day Cambodia escape prosecution by making compensation payments to the victim or her family. Local authorities or court officials who take a slice of the money for themselves often broker these out-of-court settlements. Young, unmarried women who are raped are sometimes pressured or forced by their family and local officials to marry their rapist. Even if the victim pursues a criminal complaint, perpetrators can evade conviction because of the corruption in courts. Evidence suggests while rape carries long sentences in general, only poor rapists are convicted; rich or well-connected rapists generally escape punishment.¹³⁸

While the myth exists that agents of the KR regime did not commit rape, a growing body of evidence shows that Cambodian women suffered the kind of sexually violent atrocities commonly endemic during armed conflict. Reports, such as the 2011 report by the Cambodia Defender’s Project, show that women experienced “gang and mass rapes, rapes in KR installations and cooperatives, rapes with foreign objects, rape through sexual exploitation and sexual slavery, attempted rape [...]”¹³⁹ Similar reports provide evidence that women were sexually humiliated in public, sexually mutilated, and subject

to the display of their body parts at or near KR installations. The rape of women by KR cadres was commonplace immediately prior to execution, and rape was a common feature of the “re-education” process.¹⁴⁰ Research indicates sexual violence experienced by ethnic minorities groups, including Vietnamese, Khmer Krom, and Khmer Islam and Cham, was equally horrific.¹⁴¹ Another report of the Cambodia Defender’s Project finds that KR agents committed “forced marriage and forced sex, rape (including gang rape, mass rape and rape before execution), survival sex, sexual slavery, mutilation, sexual mockery and other abuses.”¹⁴² A briefing paper prepared for the ECCC concludes that a “growing body of evidence suggests sexual crimes under the KR were a daily reality for many women; such acts were seldom punished and implicitly endorsed by an ‘enemy policy;’ and victim-survivors continue to suffer from trauma, discrimination and social stigma even until today.”¹⁴³ While the research and public data available that finds gender-based violence common during the KR reign is limited in terms of numbers of people interviewed and geographical locations covered, it is consistent, credible, and certainly sufficient to mandate that much deeper, more widespread investigation into such crimes be conducted.

Given that sexual violence survivors of the Khmer Rouge have gone for nearly four decades without real acknowledgement of their suffering, the court has an important opportunity to play a role in providing justice and ensuring that the historical narrative of the KR crimes includes sexual violence. Prosecution by the ECCC will also signal that sexual violence is an extremely grave crime worthy of investigation, prosecution, and punishment—a significant contribution in a country that generally tolerates sexualized violence.

2. Prosecuting Sexual Violence at the ECCC

The Law on Establishment of the Extraordinary Chambers, Article 5, states that the “Extraordinary Chambers shall have the power to bring to trial all suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.”¹⁴⁴ Crimes against humanity are defined as including rape.¹⁴⁵ Despite having jurisdiction, various organs of the ECCC have continually limited the scope of when and under what circumstances the court will hear evidence relating to sex crimes. As a result, many types of sexual or gender-based violence have been unnecessarily excluded from the court’s consideration. To date, the ECCC has produced a negative legacy of minimizing attention to sexually violent crimes and undermining their gravity and pervasiveness.¹⁴⁶

In May of 2012, then-UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Margot Wallström publicly criticized the ECCC for its neglect of sexual violence. As she noted, while starvation, execution, and torture of millions under the Khmer Rouge is widely known and accepted, the types of crimes women

suffered at the hands of KR perpetrators have largely been disregarded.¹⁴⁷ Wallström stated that “crimes of sexual violence have only been marginally taken up by the ECCC, and experiences of sexual crimes have not been integrated into the court’s strategies, whether forensic, investigative, or prosecutorial.”¹⁴⁸

Wallström’s statements triggered a series of reactions from the international prosecutors of the ECCC, most of whom claimed that sex crimes were not part of the policy of the Khmer Rouge or that their own offices were not to blame for the failures.¹⁴⁹

Civil party lawyers and gender experts argued persuasively that prosecutors and investigating judges failed to properly prioritize gender violence in their investigation strategy, did not seek sufficient assistance from trained female investigators and gender experts, misinterpreted the KR prohibition against “moral offences,” and ignored the growing body of evidence women who came forward in response to NGO activities around gender crimes supplied of sexual violence, particularly rape, during the KR regime.¹⁵⁰ Much of this criticism acknowledges that the guilt of the accused for gender-based violence crimes cannot be assumed and that further focused investigation and evidence is needed.

Perhaps in response to this criticism, two important developments in early 2014 have focused attention on gender crimes. First, forced marriage as a crime against humanity has been included in the list of crimes to be addressed in the second-phase trial of Nuon Chea and Khieu Sampan. Second, the current international prosecutor (Nicholas Koumjian) requested the expansion of the investigation in Case 004 to include allegations of forced marriage and, significantly, of rape and other gender-based violence outside of the context of forced marriage.¹⁵¹

a. Case 001

Despite multiple testimonies on the occurrences of rape at S-21,¹⁵² Duch was only charged with and convicted of one instance of rape, having essentially raised and confessed to the incident during the judicial investigation.¹⁵³ In sentencing Duch, the Trial Chamber categorized rape as a subset of the crime against humanity of torture rather than as an independent crime against humanity.¹⁵⁴ The prosecutors appealed, arguing that the Trial Chamber erred in not convicting Duch of rape as a distinct crime against humanity.¹⁵⁵ The Supreme Court Chamber rejected the appeal and concluded that rape could not be classified as an independent crime against humanity under customary international law from 1975–1979, the ECCC’s temporal jurisdiction. It maintained this stance despite the recognition of rape as an international crime and a crime against humanity since World War II.¹⁵⁶ The Pre-Trial Chamber made a similar ruling in Case 002 when Ieng Sary raised the same issue in connection with charges of rape in the context of forced marriage.¹⁵⁷

b. Case 002

The Closing Order (indictment) for Case 002 describes evidence of forced marriages and of rapes at cooperatives and security centers.¹⁵⁸ Although acknowledging that rapes had occurred in many other contexts, the co-investigating judges limited the gender-based charges against the accused to forced marriage, and to rape only in the context of such marriages. Rape was applicable in forced marriages because the consummation of the marriages was instrumental to the Khmer Rouge's goal of enforced procreation and population increases. The judges concluded that, because of the Khmer Rouge's official policy to prevent rape and punish perpetrators, the crime could not be prosecuted outside of the context of forced marriage, despite overwhelming evidence that the policy failed to prevent rape.¹⁵⁹

While the policy existed, testimonies collected by NGOs and projects such as the Women's Hearings on Gender-Based Violence¹⁶⁰ reveal that in some locations KR officials routinely ignored it.¹⁶¹ Available evidence suggests that conclusions of the prosecutors and investigating judges about the rape of women under the Khmer Rouge may have been drawn based upon insufficient investigation and data and preconceived notions of gender justice, including that sexual violence is not as egregious as other crimes.

The Trial Chamber's severance order in Case 002, which segmented the Case 002 Closing Order into smaller portions to be tried sequentially, exacerbated its problematic legacy in relation to gender-based crimes.¹⁶² By virtue of this order, phase one of Case 002 did not include any allegations related to forced marriage or rape in the context of forced marriage. This is significant because victims of forced marriage are the second largest composition of victims for the Case 002 civil parties.¹⁶³ Unless the second-phase trial in Case 002 concludes before the death or incapacity of the remaining two accused, the court may not ever try to conclusion even forced marriage or rape in the context of forced marriage. This would make the ECCC the sole ad hoc tribunal addressing war crimes that failed to include sexual violence.

c. Cases 003 and 004

The Introductory Submission filed by the international co-prosecutors for Cases 003 and 004 did not include sexual violence allegations.¹⁶⁴ The current international co-prosecutor's 2014 supplemental submission to add allegations of rape—both inside and outside of forced marriages—to Case 004 could finally provide justice to victims of sexual violence, assuming an adequate judicial inquiry addresses the crimes they suffered and gives investigation into it equal priority to that of other international crimes. While the result of these investigations cannot be predicted and remain confidential, including these neglected crimes in the submission is historically significant.

3. Administrative and Leadership Gaps in Prioritizing Gender Issues

The 2012 Baseline Gender Study, “Gender Sensitivity in Transitional Justice Processes in Cambodia,” authored by Theresa de Langis, identified numerous flaws in the court’s approach to gender-related issues, including failures of leadership and administration, which may well have contributed to the court’s ongoing failure to investigate and prosecute gender-based violence.¹⁶⁵ The report was based on interviews with decision-making representatives in all departments of the ECCC except Administration.

On the positive side, many lower-level ECCC staff attended the “First International Gender Justice Conference on Prosecuting Gender-Based Violence During the Khmer Rouge Regime,” which the Cambodian Defenders Project (CDP) convened in November 2010. The training reviewed lessons learned from other tribunals and the ICC regarding sexual violence investigations and prosecutions.¹⁶⁶ CDP conducted numerous other non-judicial activities advancing the rights of victims of sexual violence by the Khmer Rouge.¹⁶⁷ Further, the request by ECCC co-prosecutors that investigating judges investigate instances of forced marriage and rape in the context of forced marriage represents a significant adherence to recommendations of civil parties and NGOs.

While not entirely negative, the Baseline Study and the Justice Initiative’s own interviews support the conclusion that the ECCC fell short of meeting international standards for gender sensitivity and awareness because it failed to develop and implement global policy to prioritize dealing with gender crimes under circumstances where both the evidentiary record and the domestic situation demanded such attention.¹⁶⁸

4. Extra-Judicial Approaches to Gender Violence

The ECCC’s unsatisfactory response to sexual violence prompted various extra-judicial measures to mitigate the problem. On December 7 and 8, 2011, representatives from UN agencies, international and local NGOs, female civil parties, and student volunteers attended the “Women’s Hearing: True Voices of Women during the Khmer Rouge Regime on Sexual Violence,”¹⁶⁹ organized by the CDP. The hearings entailed victim and witness testimony regarding the prevalent sexual violence during the Democratic Kampuchea and presentations on the historic background of the KR regime, a sexual violence study, applicable law, and UN Security Council Resolutions. The Women’s Hearing was a very successful initiative that provided the first public platform for Cambodian sexual violence victims, past and current.

Following these testimonies and presentations, a panel issued its findings and recommendations. The panel found that women suffered various forms of sexual violence committed by perpetrators from all levels within the Khmer Rouge who have never been held accountable. These hearings evidenced sexual violence as an integral part of KR *de facto* policy; it violated numerous international agreements and is a crime

under international law. Based on its findings, the panel recommended that the ECCC investigate and prosecute sexual violence by the Khmer Rouge, mandate that the court's VSS develop non-judicial mechanisms incorporating the experiences of witnesses and survivors of sexual violence and providing for gender-sensitive reparations, and enhance gender competence at the ECCC. Follow-up hearings addressing these issues on a regional and "next-generation" basis occurred in 2012 and 2013.¹⁷⁰

A related project designed outside the court to address sexual violence during the KR regime is the Cambodian Women's Oral History Project. The project collects life story oral testimony by Cambodian women on surviving the KR genocide, including as victims of widespread sexual and gender-based violence. Testimonials will be preserved for historical purposes and public access, with excerpts posted online to reach global audiences.¹⁷¹ This informative NGO-led project would likely have not occurred without the establishment of the ECCC, yet it was also the court's failure to adequately investigate and prosecute gender crimes that led to the project.

E. Contribution to the Development of the Rule of Law in Cambodia

There are numerous reasons to doubt that the current government of Cambodia is serious about advancing a rule of law reform agenda.¹⁷² Advances in rule of law reform in Cambodia have proven elusive over the last decades despite the efforts of many activists and millions of dollars invested by donors.¹⁷³ Yet, Cambodian government representatives regularly state that contributing to the development of effective rule of law reform is a goal of the ECCC.¹⁷⁴ The UN and international donors who support the court have named the goal specifically.¹⁷⁵ Cambodian NGOs have consistently expressed rule of law reform as a basis of their support of the court.¹⁷⁶ The literature on hybrid courts as a tool to deal with mass atrocities lists it as a prominent goal justifying the establishment of hybrid tribunals in the country where atrocities have occurred.¹⁷⁷ The hope of hybrid tribunals is that they will provide capacity building for local legal professionals, provide a model that demonstrates accountability for the legal community and the broader population, and create a demand for real accountability from a population.¹⁷⁸

Any court's impact on rule of law development emerges over the long term; it involves a cultural shift attributable to a variety of social and political factors. Below, we attempt to identify signs of the impact of the ECCC on rule of law development in Cambodia, describe some of the affirmative steps the court and others have taken to maximize positive impacts, and outline what interviewed legal professionals and others in Cambodia say about the current reality of and potential for positive

impact. We conclude that the impact of the ECCC on rule of law reform in Cambodia is, and is likely to remain, extremely modest for several reasons:

- There is currently no political will within the current government for significant judicial or rule of law reform;
- Sustained funding, not currently made available by the government or donors, is needed to support reform of the judicial and rule of law systems;¹⁷⁹
- A culture of pervasive corruption and influence peddling in the judiciary inhibits reform efforts;
- The skills, experience, and education of many legal professionals must be significantly raised before many legal reforms will be accepted or can be implemented; and
- The ever-present problem of political interference in decisions at the ECCC may serve to “consolidate the belief that political interference in legal institutions is the status quo in Cambodia,”¹⁸⁰ rather than promote demand from the public for an independent judiciary.

1. The Rule of Law Environment in Cambodia

At the time of the creation of the ECCC, its designers and supporters hoped that the ECCC would be a lever for change in the domestic legal system, which is a common goal for hybrid tribunals. There is little debate that substantive rule of law reform in Cambodia has not advanced significantly in the last 25 years under the current political leadership. Cambodian judges have no independence. As the Cambodian Center for Human Rights (CCHR) in its 2013 Report on Judicial Reform summarized, “Criminal investigations—which in Cambodia are court-led—have been selective and inconsistent, creating a climate in which the rule of law is absent. In such an environment, it is impossible for the people of Cambodia to have trust or confidence in their judicial system, and it is widely regarded with suspicion and fear instead of being seen as an instrument whereby disputes and accusations can be dealt with peacefully and fairly.”¹⁸¹

The 2013 report of the UN Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, echoes the CCHR report:

Overall, the situation of the judiciary in Cambodia has not fundamentally changed since 2010. Despite some progress, the pace of judicial reform remains very slow. The challenges are the same, namely lack of independence, problems of capacity, lack of resources, widespread corruption, all resulting in a lack of confidence by the general public in the ability of the court system to provide effective remedies when human rights violations occur.¹⁸²

The conclusions of domestic and international NGOs, and the evaluations of donors that have poured huge amounts of money into judicial and legal reform projects, are equally discouraging. For instance, an extensive 2012 evaluation of 14 years of Australian assistance for law and justice reform in Cambodia concludes:

[Development] work with the judicial system has made little progress.... Many of the higher level objectives in the law and justice agenda—such as creating an independent judiciary or a democratic and accountable police service—run counter to the fundamental interests of the ruling party and are unlikely to progress.... A wide range of posts, including judges, can be purchased for a price determined by the rent-seeking opportunities they offer.¹⁸³

In spite of these grim evaluations, the ECCC's process has been so superior to the existing domestic system of justice that the model principles, practices, or values it has demonstrated may yet influence the domestic system. In addition, as detailed below, evidence exists of modest, but positive effects.

2. Rule of Law Legacy Efforts

The OHCHR acknowledges that the goal of creating a positive impact on a domestic court system through a hybrid tribunal is undermined because courts do not attach the responsibility to particular actors within the court.¹⁸⁴ International or hybrid courts rarely provide funding for or prioritize such an impact, even though this goal plays an important role in motivating their formation.¹⁸⁵ Court officials, often stretched thin to keep up with their legal work, typically view spending time promoting legacy impacts on the domestic courts as a luxury out of their reach.¹⁸⁶ Nonetheless, a Legacy Working Group was formed at the court, and individuals from the ECCC have made significant personal efforts and given generously of time and energy in support of legacy endeavors. Without significant funding or support, however, it did not make more than preliminary efforts. Without a sustained, coordinated approach or leadership to support legal legacy efforts, the group accomplished little.

3. Rule of Law Legacy Projects Originating Outside of the ECCC

Many of the domestic NGOs that supported the establishment and the work of the court did so in part out of the hope that it would lead to reform and advancement of the domestic legal system. The existence of the ECCC spurred NGOs to initiate projects related in some way to justice and the rule of law. For example, the Cambodian Human Rights Action Committee (CHRAC) organized two major conferences to address the legacy of the ECCC.¹⁸⁷ The reports of both conferences emphasized the need for both

institutional reform led by the government and legal and judicial capacity building developed by ECCC staff sharing their expanded knowledge. The reports were long on the potential for positive impact from the ECCC on the domestic system, but short on concrete evidence of progress.

The Cambodian office of the OHCHR has been active in promoting reform of the Cambodian legal system. It has undertaken a series of activities designed to use the presence and work of the ECCC as a tool in its rule of law work. At various times, stakeholders in the domestic legal community, including the Bar Association of the Kingdom of Cambodia, the Lawyer Training School, the Royal School for Judges and Magistrates, and domestic court judges and officials, have cooperated in this effort. Projects include judicial round tables designed to engage lawyers, prosecutors, and judges from the ECCC with domestic legal professionals; to exchange knowledge on issues including pre-trial detention standards, fair trial rights, and application of the Civil Procedure Code; to work with the Court of Appeal to speed up its processes, eliminate case backlog, and prioritize cases; and to design a fair trial rights course that has become mandatory at the Lawyers' Training Center.

4. Areas of Positive ECCC Impact on Domestic Rule of Law Systems

Despite the significant foundational and practical differences between the ECCC and the domestic courts, there are areas where the domestic courts could immediately benefit from the practices and capacity-building efforts of the ECCC. Some of the more important areas of *potential* and *actual* impact are outlined below, addressed from the perspectives of Cambodian legal professionals concerned about legal reform.

a. General Professional Capacity Building

An advantage of locating a hybrid court in the country where crimes were committed is the opportunity to include national staff working alongside experienced internationals at all levels. This should increase the general capacity of local staff to operate more effectively when they return to their domestic positions, and they will bring ideas and skills that can be passed on to others. The success of this idea depends on the talent, leadership, and motivation of the individuals involved, and the openness of the domestic system to allow them to use new skills and ideas. ECCC Cambodian staff came from a variety of positions throughout the domestic judicial system and could, theoretically, have broad impact on their return.

Reports of both Cambodian and international staff at various levels of the court indicate that there was little systematic effort at capacity building and that the split nature of the national and the international sides of the court further undermined capacity-building opportunities for Cambodian staff. Training efforts were left to

the initiative of individuals at the court and individual mentoring relationships that developed between national and international staff. Under heavy workloads and time constraints, international staff sometimes report, “It is easier just to do it myself,” than to work in partnership with a less experienced colleague. The failure to systematically promote capacity building of staff was a significant lost opportunity for promoting positive impact by the court.

However, Cambodian staff at the ECCC who were interviewed generally expressed gratitude for generous mentoring from their international colleagues. They stated that they have learned much from their experience and do have additional skills and ideas that would be useful to their work in the national system. Unfortunately, several Cambodian staff who returned to work in the domestic system report that neither their colleagues nor their superiors are much interested in exploring new practices based on the ECCC, though several expressed hope for slow incremental change over time.

b. Increased Respect for Defense Rights

The ECCC, seeking to ensure compliance with international fair trial standards, emphasized the critical role of defense counsel in the proceedings. Well-qualified national and international defense counsel played a prominent and public role, rigorously arguing in favor of their clients’ rights. Their interventions, even when the court rejected them, were generally treated with respect and given due consideration. This is in contrast to the situation in domestic courts, where few accused have access to defense counsel. Where there is representation in national courts, counsel generally are not allowed or sufficiently experienced to intervene effectively on behalf of their clients.

The core budget of the ECCC included sufficient funds for a professionally staffed Defense Support Section and for payment of defense counsel and support staff. The highly public role that ECCC defense counsel played in the proceedings has the potential to influence the domestic system about the right and need of all accused to competent defense counsel for serious criminal proceedings, regardless of their economic capacity. Several Cambodian professionals interviewed mentioned increased public awareness of the need for active defense counsel as a positive impact of the court.

c. Promoting Reasoned and Written Decisions

In most courts in Cambodia, judges do not issue either written or reasoned decisions. The ECCC rules and practice recognized that fair legal proceedings require that judges explain the legal and factual basis for their decisions in writing and, generally, make such decisions public. This practice serves the purpose of allowing the parties and the public to understand the decision, and creates a record for review on appeal.

Establishing the requirement and expectation of written and reasoned decisions in the Cambodian courts would be an important step in the development of modern judicial processes. The President of the Cambodia Court of Appeals, who is also the ECCC Cambodian co-investigation judge, has already made a move in this direction, by issuing a directive to judges that he will not accept decisions that are not generated in written form from a computer.

d. Promoting Increased Transparency

While the ECCC should have been more transparent in many respects,¹⁸⁸ it is far more transparent in its processes than the domestic courts in Cambodia. The domestic system does not uniformly make court dates and judgments public and does not require prosecutors to advise accused persons in advance of the witnesses or evidence against them. Often judges do not explain judgments and legal decisions to either the parties or the public. The concern that off-the-record deals often resolve criminal charges is pervasive. The ECCC employs a higher standard for transparency that may lead legal professionals to demand and expect better from their courts.

e. Modeling Court Management Practices and Tools

Largely because of the experience of international staff and the considerably larger budget of the ECCC, it employed court and case management tools that are far more sophisticated than those used in domestic courts. Some Cambodian courts, especially those in more rural areas, lack functioning computers and established systems to keep track of the status and progress of cases, detention, or other important issues. Even those courts that have computer systems may not use them. While both funding and capacity limitations drive this deficiency, the exposure of Cambodian legal professionals at the ECCC to more sophisticated systems has triggered an interest and willingness to advocate for modern court administration tools.¹⁸⁹

Again, advances made and planned in this regard in the National Court of Appeals are a striking example. When the ECCC began, the Court of Appeals had a seven-year backlog of cases, and a single outdated courtroom. In 2012, the Court of Appeals opened an additional building with two new courtrooms and upgraded facilities for the court clerks. The number of appeal judges has increased, and appeal cases are now heard within one or two years of initiation. The court has a new computerized system to register and manage cases and greatly enhanced ability to monitor issues previously ignored, such as the length of pre-trial detention. All decisions of the court must now be reasoned and written—rather than merely noted. The resources provided to the court and the pay of judges has increased significantly. Lawyers report they have been given additional time to argue their cases effectively. The President of the Court of Appeals,

who, as noted above, is also the Cambodian co-investigating judge of the ECCC, drove these management improvements, and he acknowledges a debt to the ECCC for them.

Court management practices and tools is an area of positive impact that gives legal reform activists hope that the government, despite its reluctance to allow reform in some critical areas, will consider some kinds of technical reform as a benefit and not as a challenge to its hold on power.

f. Jurisprudence and Substantive Legal Precedent

While much of the jurisprudence of the ECCC concerns international law and process unique to the court, many aspects of both substantive and procedural rulings could be directly applicable to Cambodian legal proceedings. For example, the ruling of the Trial Chamber in the Duch case on the human rights concerns related to excessive pre-trial detention, an extensive problem in Cambodia, is a compelling precedent. Excessive detention in Cambodia, as the CCHR notes, “is imposed in an alarmingly high number of cases.”¹⁹⁰ Even though the Supreme Court Chamber reversed the result of that ruling on the ground that the violation could not be attributed to—and therefore considered by—the ECCC, the ruling stood for a period and received some attention.¹⁹¹ Thus despite its reversal, the Trial Chamber’s ruling may exert influence domestically.¹⁹²

Beyond the overturned ruling in the Duch case, ECCC decisions at the level of the investigating judges, the Trial Chamber, the Pre-Trial Chamber, and the Supreme Court Chamber in both Cases 001 and 002 provide numerous examples of how to analyze pre-trial detention issues consistent with both Cambodian procedural law and international fair trial standards and best practices. The ECCC has annotated these decisions and made them available to Cambodian lawyers and judges as an example of the kind of practice they should use when arguing about or ruling on pre-trial detention issues. In fact, some domestic judges are leading the development of checklists and protocols based on the principles of these decisions to guide the entire process of detention decisions in Cambodian courts. Reform in how national courts look at pre-trial detention may prove to be an enduring legacy success of the ECCC. National judges from the ECCC have played a leadership role in reforming pre-trial detention procedures to better match the international standards applied at the ECCC. Training around the country on reformed guidelines has been conducted, in association with the OHCHR, with judges from the ECCC taking a lead role.

The Trial Chamber in Case 002/02 has also been asked to address whether torture-tainted evidence can be used in a trial. Both the prosecution and the defense argue that such evidence is admissible, but only for reasons other than proving the guilt of a tortured person.¹⁹³ Should the Trial Chamber rule that such evidence should never be admissible, the decision has the same potential to influence domestic proceedings as its ruling with respect to pre-trial detention.

Further extension of the reform process, in which Cambodian judges adopt reforms modeled on the ECCC, would broaden the positive legacy influence of the ECCC. Unfortunately, counter pressures diminish hope in this respect. Pre-trial detention addresses fundamental fair trial rights issues, but does not directly challenge the existing power structures. It also diminishes the prison population, which is fiscally responsible. Thus, it is less likely to trigger strong resistance from the ruling party than many other areas of judicial reform, such as directly addressing judicial independence. Supporting such reform is a low-cost way for the government to garner international approval, and it may not be possible to extend to other needed reform.

g. Role of Civil Parties in Criminal Proceedings

The active role civil parties and their lawyers play in the proceedings may serve as a powerful example that victims can use criminal proceedings to tell their story in court, and to some extent, influence the charges and evidence. While the role of civil parties was controversial at the ECCC, it did give victims a much stronger voice in criminal proceedings than they currently have in domestic courts. The fact that articulate lawyers able to advocate for their clients represent civil parties at the ECCC also sets the ECCC apart from many domestic proceedings and demonstrates the role and importance of legal representation. Through these legal professionals or the awareness of the public, it may influence the domestic system.

h. Legal Argument in Court

In the domestic courts, defense and civil party counsel—when they are present—often do not speak forcefully, knowledgeably, or effectively on behalf of their clients. Part of the reason for this is they are not trained or encouraged to do so, and judges often do not tolerate appropriate interventions. The practice of defense counsel in the ECCC provided an example of lawyers willing and capable of insisting that the court consider interventions related to their clients' interests. This provided a public demonstration of how lawyers, in representing the best interest of their clients, and indeed having an obligation to, challenge judges to consider relevant facts, principles (including human rights principles), and legal arguments. While lawyers cannot always expect the court to accept their interventions, it remains imperative to make them. Counsel at the ECCC representing the prosecution, the civil parties, and the accused were generally well-prepared to make credible arguments and were courageous in making them even when it appeared unlikely that the court would accept the argument.

i. *Forum for Justice and Fair Trial Issues*

One step removed from legal reform is the potential impact of a hybrid tribunal in prompting a forum for discussion of and advocacy for justice and fair trial issues. As one legal scholar summarized:

A second kind of domestic capacity building is also crucially important, and that is empowering civil society—individuals and groups—to insist upon justice and accountability from domestic legal and political institutions. We can call this the *demand side* of justice on the ground. Building the rule of law is as much about strengthening public demand and confidence in justice as it is about building better legal institutions. If the public has little confidence or belief in a developing justice system, they are unlikely to turn to it to resolve disputes or to give any degree of loyalty to the ongoing project of building the rule of law.¹⁹⁴

The human rights and development NGO community in Cambodia took an active part in promoting and publicizing fair trial issues in the country.¹⁹⁵ They have worked closely with civil parties and other actors to raise the profile of basic fair trial issues. While legal professionals we spoke with mentioned some success with this effort, it is too early to tell if the court, likely in combination with other political pressures in the country, will have an impact on increasing demand by Cambodians for a better justice system.

F. Cambodian Legal Professionals' Views on the Impact of the ECCC on Cambodia's Legal System

Over the course of monitoring the ECCC, as well as in more focused interviews in March and August of 2014, the Justice Initiative interviewed legal professionals—lawyers, judges, law professors, and human rights leaders—about their perceptions of ECCC's impact on the national legal system.¹⁹⁶ This is not a representative cross-section of legal professionals, as most of those interviewed either had some involvement with the ECCC or a strong interest in its work. Overall, the comments of legal professionals clustered around seven major topics:

1. **Current Judicial System Is Broken and Will Not Be Fixed by the ECCC**

As a group, interviewees agree that the current judicial system in Cambodia is “broken” and operates to serve politically powerful people. Many expressed aspirations for change,

but could not point to meaningful measurable change from the court's presence yet. Their views were surprisingly consistent. Most legal professionals are skeptical that there will be improvements in the domestic rule of law environment in the short term. They agree this does not suggest that the ECCC is a failure, but rather the extremely low starting place of the Cambodian legal system in terms of capacity, education, and resources. While the ECCC could and should have done more to integrate national legal professionals into its work, the major factors limiting optimism about impact of the ECCC on the national system relate to the lack of political will or room for reform in a system controlled by corruption and political coercion. While the consensus presents a generally pessimistic view of positive impacts on the current national system, there are some signs of hope. We outline below some of the general themes of consensus, and provide comments from local lawyers.

A common view of Cambodian professionals we interviewed was that, until basic power structures in Cambodia change, substantive change in the rule of law situation is unlikely. As one lawyer summarized: "There are two things that the government does to cement control in the county. First, it controls the military and the police. Second, it controls the judiciary to keep dissentients under their control." Similarly, a legal professional observed: "The problem of the legal system in Cambodia is too big for ECCC to fix. The [ECCC] has no effect on the abuse of power by the current government. The rule of law is not working in Cambodia—abuse of power at the highest level is getting worse."

In spite of their opinion that it has modest effects, nearly all of the professionals we spoke to stated that the court, on balance, is good for average Cambodians. They cited the impact of increasing Cambodians' understanding of history, individual healing, and learning something about their rights. Legal professionals express gratitude that the court had, at long last, provided some accountability for KR atrocities, and the belief that this accountability was important to most of the affected population.

2. New Skills Developed, but Not Always Useful in Cambodian Courts

The ECCC has improved the legal skills of its Cambodian staff, especially younger staff. Current and past legal staff of the court were generally pleased with the efforts of international colleagues to assist them in learning new skills. For instance, an ECCC civil party lawyer stated: "I have increased skill in writing motions and arguing international standards. This gives me more leeway, and I am more willing to stand up and object before the judge. I learned from internationals about preparing more extensive written submissions, how to challenge judge's decisions, and how to use human rights language." Legal professionals note the value of this, but acknowledge that the state of the legal system limit the utility of these skills.

A national court prosecutor who was pleased with how much he learned at the ECCC reported: “ECCC decisions are useful for my work on issues such as describing fair trial rights, concern for the health of the accused, and the opportunity of defense counsel to talk freely and of accused to remain silent.” Similarly, but with a caveat, a lawyer with the prosecutors’ office reported, “I learned about good procedures and how to use language. However, when I raise new issues or present argument at [my court], the judges generally ignore me and legal reasoning is rejected. The problem is not just political control, but [powerful] court officials that do not allow chamber members to make independent decisions.”

Indeed, a majority of former national staff of the ECCC that we interviewed was pessimistic about using skills and knowledge in the local system, stating, for example: “Overall, [the ECCC] has been good for Cambodians but not that good for the judiciary. Other than [one ECCC judge with authority in the national system], it is hard to see others with influence who are willing or trying to take advantage of ECCC lessons.” A defense lawyer concluded: “There is no effect on rule of law yet from the ECCC. Cambodia needs change from above to get there. There is, however, some increased space to interpret the law.”

Defense lawyers and civil party lawyers expressed greater freedom in being able to use new skills in the national system than judges and prosecutors. Several saw defense lawyers as the vanguards of rule of law change, but many more emphasized that reform would not come absent significant political change. An ECCC defense lawyer noted: “The fact that the ECCC was in force during a time when the CCPC [Cambodia Criminal Procedure Code] was new may be a good thing as it will allow international input into how the code is interpreted.” A lawyer with the ECCC, now in private practice, said that: “The ECCC follows the Criminal Procedure Code (CPC) better than national courts. If the ECCC example is to have any effect, it must be driven by defense counsel that demand that the CPC be followed and that fair trial rights be observed.” He also noted, “Some cases are not political and lawyers have more leeway in using tools [modeled on the ECCC practice] such as cross-examination and explaining how CPC works.”

Several individuals expressed the belief that individual lawyers and judges acting with increased skill have an ethical obligation to try to put new ideas into force in order to prepare the ground for a time when there is political will for reform of the system. This idea was strongest among those who had been defense and civil party lawyers with the ECCC. One defense lawyer stated: “The only option for a lawyer to use skills from the ECCC to change the system is to be an individual model and to gain the confidence of others in the way you act.” Another defense lawyer stressed that, “Lawyers are burdened by an overly hierarchical and rule bound system that takes time to dismantle even if political will, interference, and corruption are dealt with. Lawyers are the levers for

change, however, and defense counsel must challenge what judges say.” Making such challenges, however, will take great courage and tenacity.

However, legal professionals generally did not see themselves as catalysts for change. An ECCC defense lawyer echoed the view of many that as a result of working in the ECCC, “maybe lawyers will speak up in court a little more, be a little less passive, use rules of the Criminal Procedure Code that conflict with practice a little more often. But lawyer activism generally gets squashed. In the current system, judges still punish lawyers that challenge them.” An ECCC defense lawyer said his experience showed that “clients often do not want an aggressive approach. They want to pay the judge. If a lawyer challenges judges strongly he does not get future clients.”

Domestically, legal professionals have not created organized efforts to promote reform in the legal system in accordance with good practices from the ECCC or elsewhere. Cambodian judges have not been permitted to form a judges association to advocate for reform. The government tightly controls the country’s bar association to prevent it from becoming a vehicle for organized political activity.¹⁹⁷ The Justice Initiative has no knowledge of concerted efforts for reform coming from grassroots legal professionals, other than those involved in human rights NGOs. While there are individuals within the system with some power to act—like the president of the Court of Appeals—most judges and lawyers we spoke with felt they had no such power. They referred, instead, to the need for policy change from above before they could personally act to promote change. A typical view: “Even though it is not perfect, the ECCC is a tool for learning many skills.... We need concrete action by government for real change. Individuals can do what they can but there is not any support for policy change.”

None of the interviewees described a positive change in the domestic legal system beyond increased skill and understanding. None reported a positive impact on the core problems of an extremely hierarchal and rule-bound system grounded in corruption, favoritism, and political control, and they considered the increased skills and knowledge the ECCC had given to legal professionals almost useless. They did express limited optimism that key leaders within the national system would effect administrative improvements because of their experience with the ECCC.

3. Educating Cambodians about their Legal Rights

Interviewees felt that the ECCC has had some success in educating Cambodians about the fundamental legal right to demand a lawyer in legal proceedings. One lawyer noted: “The ECCC may be effective in increasing demand among young people because of tools like Facebook and other social media. They see the ECCC and ask ‘why is it not applied to current leaders?’” This lawyer and human rights activist believed that, “The ECCC has: first, been effective in getting Cambodians to pay attention to the KR history;

second, enhanced a process of closure for some; third, highlighted some fair trial rights; and fourth, possibly provided some capacity building for individuals. Cambodians now have a choice about whether to use [this knowledge].”

Generally, the legal professionals we spoke to identified an increased willingness of Cambodian citizens to speak out against wrongs in areas such as land concessions and workers’ rights, but doubt the ECCC has driven this development.¹⁹⁸ Rather, they believe direct attacks on individual lives and income have created pressure. One lawyer in private practice expressed the general consensus: “People demonstrate [politically] today because [government] actions are affecting their livelihood, not because of the example of the court.” Nonetheless, legal professionals mentioned that the ECCC seems at least to promote a broader understanding of the general concept of accountability and may help to more strongly embed the concept into public dialogue.

4. Laying the Groundwork for Future Reform

The expanded skills that lawyers and judges who worked at the ECCC learned might be useful in the future if and when increased political will leads to the reform of the rule of law in Cambodia. One lawyer stated: “The defense and investigation capacity from the ECCC are very important in terms of prompting change in the national system.” She has worked several years on staff at the ECCC, and she says, “I learned a lot from the ECCC experience about procedure and international concepts. Someday we may be able to use this knowledge in Cambodia.” Another former ECCC staff lawyer stated: “Cambodian practitioners want to change but they have too much to do and they have strong habits that are difficult to change. I believe that gradually there will be some political space to change. But it is not clear who will drive the change. The ECCC is like putting a small rock into a big sea.” A national court judge and former lawyer at the ECCC summarized the views of numerous practitioners: “In 10 years maybe there will be some improvement, but not now.” Clearly, the changes won’t be soon or easy: “The new, young judges are not a cause for hope for change—they are very corrupt. Political connections and money are what get them their jobs. Maybe in 20 years someone can pick up the lessons from the KRT.”

5. Political Interference Undermines the ECCC’s Status as a Model for National Courts

The ECCC’s ability to operate as a positive model for the national system is limited because it is seen as operating under political control. “Those in power are protected and courts are not a place to confront protection from abuses of power,” a human rights activist committed to judicial reform stated, adding: “The justice system operates in the service of the politically powerful. That is not to say that the executive controls every

decision but when they have an interest in the outcome they are able to control the system. But even where the powerful have no interest, the system is plagued by corruption, lack of capacity, and not enough funding.”

6. Inadequate International Response to Political Interference

While interviewees attributed the lack of political will for legal reform primarily to the current Cambodian government, many Cambodian legal practitioners also placed blame for the ongoing problems of political interference on the UN and the internationals, including donors, involved with the court. If these entities were to stand up more strongly to political interference by the Cambodian government at the ECCC, it could effect change in the domestic system. A national court officer lamented:

The UN is very weak with respect to 003 and 004. I have had discussions with colleagues about how the UN was not strong enough to insist on 003 and 004 or the 002 subpoenas [of high-level government officials]. The UN kept silent and compromised the reputation of the court. The UN is susceptible to the government wishes and is fulfilling the government’s goal. The moment the UN accepted that the court would be in Cambodia knowing that the judges were not independent, it had already compromised too much. If UN is subservient to the government, how do you expect us to fight for justice?

An ECCC defense lawyer stated: “The court has not had much effect on ending impunity. The worst thing about the court was the lack of independence, the best was the internal rules, case file management, and transparency.”

7. Lack of Optimism about the New Generation of Legal Professionals

A disturbing theme among several interviewees was the belief that new lawyers are corrupt.¹⁹⁹ A Cambodian judge working at the ECCC stated, “Access to the judicial offices is still tightly politically controlled. Positions are given to those with political connections and with money.” While the Cambodian Bar Association and the Royal School for Judges and Prosecutors claim that they have tightened their admission process to limit corruption and political influence, some professionals we interviewed were skeptical. A common theme among legal professionals was that the younger generation of lawyers and judges were equally tied into the system of corruption, patron loyalty, and power consolidation as the older generation. An ECCC defense lawyer expressed a common view: “The new generation of lawyers is more open to new ideas, but still entrenched in the current system because of the unfair way they get their posts.”

G. Failure of Mechanisms to Hold the ECCC Accountable

In addition to the lack of independence of Cambodian officials from political interference, there are also several institutional deficiencies that contribute to weaknesses of the ECCC and limit its ability to meet its goals and leave a progressive lasting impact.

1. Failure to Hold Legal Officials Accountable

Neither the UN nor the Cambodian government had adequate accountability mechanisms in place to deal with problems of political interference, corruption, and capacity. As a guardian of minimum international standards, the UN had the responsibility to ensure fair and independent trial standards were enforced. It did not always succeed. For instance, when international co-investigation judge Siegfried Blunk began taking legal steps that resulted in the resignation of long-term senior staff in 2011 the UN failed to respond appropriately.²⁰⁰ Blunk also resigned, and the vacancies were filled, but the court lost valuable time and credibility as a result of the UN's failure to act. A UN mechanism that ensures that judges and other senior officials appointed to internationalized tribunals are adequately vetted, receive in-depth training, and are held to enforceable standards of competence would enhance the operation of the ECCC. Judges in international courts should be held to minimum standards, just as judges in most domestic courts are.²⁰¹

2. Divided and Weak Institutional Leadership

The compromise structure of joint leadership between Cambodians and international officials was meant to satisfy the Cambodian need to organize the tribunal as a “Cambodian court,” and the UN's interest in protecting international standards. The structure resulted in divided leadership on most issues—even those unrelated to international standards. This led to a malaise in leadership at many levels in the ECCC—neither Cambodian nor international officials were willing or able to step up with immediate planning or action when, for instance, logistical questions deadlocked the timely planning for a second phase trial in Case 002.

3. Failure of the UN (and Donors) to Consistently Insist that the ECCC Remedy Problems

Because of its partnership role in the ECCC,²⁰² the UN has a paramount responsibility to address the major challenges facing the ECCC, including corruption and political interference. A core reason for UN involvement in the court, in addition to funding via

donor states, is to ensure that the court operates within minimum fair trial standards. The UN has two ultimate tools at its disposal to address major problems threatening the independence of the ECCC. First, the *Agreement* contained a “Withdrawal of Cooperation” clause that provided:

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.²⁰³

This clause compels the UN to stop cooperation with the ECCC if the government of Cambodia takes action that causes the court not to function in accordance with international fair trial and related standards incorporated into the *Agreement*.

The UN and international donors also control the purse strings for the vast majority of the funding of the court. Certainly the leverage this provides must be used carefully so as not to interfere with the legitimate independence of the court, but corruption and interference by government officials affects the court in significant ways. Ultimately, the UN did appoint a series of special experts to the Secretary-General to advise on ECCC issues, including corruption and interference, although a great deal of their time has been spent on funding issues.

a. Corruption Related to Cambodian Staff Salaries

Beginning in 2007, in part through allegations made public by the Justice Initiative, it became apparent that a corruption scheme involving senior Cambodian officials requiring local staff of the ECCC to pay over as much as a third of their salary in exchange for having received their job was widespread. Staff came forward in spite of a lack of whistleblower protections. The Cambodian and the UN response to this and related problems concerning the hiring of favored and well-connected persons for the national staff was slow and inadequate.²⁰⁴ While some donors to the court threatened to withhold funding absent a resolution, others, including Australia, Japan, and France, continued to fund without any resolution of the issue. In fact, several donor representatives told the Justice Initiative that our expectations were unreasonable because, “this is Cambodia,” and that continued efforts to seek a remedy to the problem could only damage the court.

The UN attempted to address corruption at the court months after allegations came to light and only after media coverage became intense. As noted above, it finally appointed a series of special advisors to deal with the corruption scandal and issues

related to suspect Cambodian hiring practices. After long and difficult negotiations, the government finally agreed to appoint an “independent” counselor to receive complaints from staff about corruption and related issues, and to remove (under the guise of extended “sick leave”) the Cambodian Director of Administrative who was implicated in the scheme. While this provided a veneer of action, in fact the counselor was a government official whose independence was not trusted by the staff.

Although conversations with staff at the ECCC indicate that the endemic and systematic corruption problems that plagued the early years of the court have significantly subsided, staff report that the traditional system of Cambodian patronage for jobs and other advantages remains.²⁰⁵ Absent a real commitment by the UN or many of the donors to prevent corruption—including by providing whistleblower protection for staff—it seems likely to continue.

b. Political Interference and Lack of Judicial Independence

In the face of evidence of government interference in Cases 003 and 004, the UN has publicly taken the position that the situation was a matter generally to be dealt with by the judicial officers of the court, and relegated its own role to expressing concern and stating the need for compliance with international standards without seeking to enforce such compliance. The UN and its agents have attempted diplomatic steps behind closed doors to reduce political control of the court, but it has had little effect.

For example, after the tenures of two international co-investigating judges in Cases 003 and 004 ended in resignations blamed largely on political interference, the UN never indicated it conducted any investigation. Rather, it appointed two additional international investigating judges to work on the cases, even though it was clear that they would receive no assistance from their Cambodian counterpart. The judges, first Mark Harmon and subsequently, Michael Bohlander, have proven experience and integrity, and pressing forward on the investigations of these cases may well be appropriate. UN and ECCC staff interviewed expressed the hope that, at a minimum, the one-sided investigations in Cases 003 and 004 will provide information about the crimes that can somehow be useful to the Cambodian people, even if the case is not allowed to go to trial. Nonetheless, the inability of the UN to combat political interference in the cases prevents a more satisfying result.

The court risks producing a negative impact, not solely because Cambodians are not allowed to operate with proper judicial independence, but also because the internationals—while articulating a commitment to oppose political interference—collude in diminishing hope for a judicial system that protects against the abuse of power. As one commentator emphasized:

Yet apart from general statements of concern when controversial issues arise, the UN has not exercised its voice with any authority. The UN's silence on what responsibility, if any, it may have for following up on ECCC irregularities, is disconcerting. The UN is there to set the bar for a reason. The UN's capability to shape the credibility of the ECCC through the international legitimacy it gives or withholds should not be underestimated. This legitimacy is premised upon a state's respect for human rights norms and accountability for human rights atrocities. The need for states to attain international legitimacy through respect for human rights and rule of law is important to their standing in the international community. When these standards are not met and/or human rights are flouted, the UN is within its prerogative to demonstrate its dissatisfaction by withholding its approval, and consequently, the international credibility, that the party seeks. As UN/RGC (Royal Government of Cambodia) negotiations indicated, the cachet that comes with international legitimacy is what Cambodia seeks from the UN's participation—actual or perceived. The catch is that this participation must be on the RGC's terms. To this end, the UN has great normative advantage that it can exercise vis-à-vis the ECCC. But the UN has not utilized this resource, or any other. Its relative complacency in response to the ECCC's problems speaks volumes about a real lack of ownership in these courts. [Citations omitted.]²⁰⁶

4. The Structures of the Court and their Impact on Political Interference

As noted previously, many of the most cumbersome structures of the court, including the system of “co’s” at every senior level, the Cambodian majority on each judicial chamber with the supermajority voting requirement to balance power, and the limited system of presumptions to deal with deadlocked decisions, were designed with the idea that political interference in the court was highly probable. Not only did these “protections” often prove ineffective, they also added considerable complexity and delay to the proceedings. More troubling is the concern raised that these very protections made it easier for the court and the UN to avoid dealing with interference issues.²⁰⁷

For example, when the defense team for Nuon Chea raised issues about the need for an investigation into apparent political interference with the appearance of witnesses before the co-investigating judges, the international investigating judge, after ruling that the testimony of the witnesses was important, made no effort to enforce the summonses or to investigate the problem of political interference. When the issue was raised to the Pre-Trial Chamber, the two international judges ruled that the facts supported ordering an investigation. The three Cambodian judges ruled against that action. As a result, there was no supermajority vote for either position, and the default outcome was inaction. A similar result occurred at the Trial Chamber level when the

judges responded to requests to call two of the witnesses at trial.²⁰⁸ The court split down international and Cambodian lines with the default result (as opposed to a reasoned decision) that the witnesses were not called and the fair trial issues raised were punted to the Supreme Court. Although there was no reasoned resolution to the credible allegations of interference, chambers of the court and the UN were able to avoid addressing the matter by saying that other units of the court had adequately dealt with it, when this was not in fact the case.²⁰⁹

The supermajority provision has allowed Cases 003/004 to move forward, and these investigations have continued for over six years, but it remains to be seen if the cases can be brought to a credible legal conclusion in the face of Cambodian political interests. Regardless, it is indisputable that the supermajority rule and co-leadership provisions of the *ECCC Agreement* did not effectively prevent political interference. In fact these provisions allowed the court remain toothless in responding to political interference and have made it easier for the UN and international officials to avoid a leadership role in responding to political interference.

III. Reconstruction and Healing: The Impact of the ECCC on Ordinary Cambodians

This chapter considers a goal of the ECCC—as stated by both the UN and the Royal Government of Cambodia—to make a contribution to the reconstruction and healing of society. This goal is premised on the belief that an important part of societal reconstruction in Cambodia can occur through greater understanding of the KR history and increased confidence in the judicial system and the rule of law.

Cambodians from all walks of life have shared many hours of their time to contribute to this chapter about the domestic impact of the ECCC. The Justice Initiative interviewed 109 Cambodians in order to make this assessment.²¹⁰ We found that almost all of our interviewees—all but six—considered the ECCC a positive force in Cambodian society. Many made strong pleas for the remaining proceedings to go forward and conclude quickly before the aging defendants pass away. They expressed heartfelt views that the court could assist victims in healing, and that it was crucial for the next generation to learn about the crimes of the Khmer Rouge and who was most responsible. A key finding of this research was that the ECCC has facilitated public debate on the Khmer Rouge period, and many see it as an important step toward healing the war-torn society. The vast majority, 80 of the 95 interviewees we asked, wanted Case 002 to continue.²¹¹ However, views about Cases 003 and 004 were more tepid. Of the 49 who were asked, 29 desired continuation, 14 did not, and six were ambivalent.

As several research studies conducted over the past 15 years have shown, Cambodians have cried out for the truth: to know why Khmer killed Khmer—or sometimes

whether mysterious forces behind the KR are to blame for the mayhem that occurred under the regime. Most of the rural Cambodians interviewed have little understanding of judicial processes, yet they deeply desire to hear the accused persons speak, confess, and apologize. Many remain traumatized by and angry about the Khmer Rouge atrocities. Cambodians hope, sometimes unrealistically, that the ECCC can address each of these issues.

A. Political, Economic, and Psychosocial Context

Political, economic, and psychosocial issues prevalent in Cambodia have a bearing on how the ECCC has impacted the average Cambodian.

1. Political Issues

When asked about the impact of the ECCC, a majority of interviewees spoke about their lack of trust in the government, including a general lack of confidence, concern about corruption, fear of speaking about the KR, and an assumption that the government was trying to block the ECCC through intentional delays, lack of cooperation, and refusal to provide funds resulting in salary disputes. A number repeated conspiracy theories, blaming others such as China, Vietnam, and the United States for Khmer Rouge atrocities. When asked about what they had heard about the ECCC, interviewees most often mentioned news about government interference, delays, and corruption. The majority felt that the government controlled the ECCC. This statement is representative: “the ECCC is under the command of the government leaders. So I think it is not independent.”²¹²

NGO interviewees regularly mentioned corruption as a problem at the ECCC: “There is clear evidence that in spite of the ECCC being an important institution with great historical value, it is being used as a source of corruption money. Each Cambodian employee has to pay a percentage to Deputy Prime Minister Sok An, and this is a shame! They can take money from other sources! But they should leave this alone, this should be a source of pride for us, this mixed tribunal, it is important for our past history!”²¹³ Corruption is endemic in Cambodia; it is ranked 160th out of 175 countries by Transparency International,²¹⁴ and allegations of corruption related to Cambodian salaries at the ECCC have clearly damaged the reputation of the court.

Although the ECCC has not targeted members of the current government for prosecution, interviewees expressed the opinion that because some senior members were involved with the Khmer Rouge, they are actively blocking the work of the court because they fear prosecution: “We Khmer want justice like all people in the world. But

if the ECCC continues it will affect all the high [level] people who work in the government now, so how can we find justice? Go ahead and do Cases 002, 003, 4, 5, whatever number you want, the court cannot find the truth because all of the people who will be responsible for mistakes are working for government.”²¹⁵

Both the literature and interviews for this chapter indicated that Cambodians much preferred international trials to domestic ones, due to the deep mistrust of the national judiciary.²¹⁶ Although the research protocol did not specifically ask about the role of international experts in the ECCC, many interviewees brought up the importance of their participation, such as this expatriate NGO worker: “What I see from the civil parties is that they trust the ECCC more than the national courts, because of the presence of internationals—this is a very important subject as they also want international lawyers...if the ECCC had been a national court, without the presence of internationals, they would not trust it at all, even if it were a special chamber.”²¹⁷

A common complaint was that the trials had taken too long and cost too much: “I open my ears all the time to listen to the Cambodian public especially through coffee or noodle shop debate, especially when they are interested in the ECCC, and many people reflect on why the international standards of justice are so expensive. They see that the ECCC was established in 2006, but now it has already spent \$200 million just to finish the Duch Case 001, when compared to provincial courts...[that] can conduct a few trials for a few cases.”

2. Economic and Social Issues

Although economic indicators about Cambodia have improved in recent years, with gross national income per capita increasing from \$2,250 in 2008 to \$2,890 in 2013, life expectancy has remained almost the same.²¹⁸ The percentage of the population living below the poverty line decreased from 34% in 2007 to 21% in 2011,²¹⁹ with 90% of the poor living in the countryside.²²⁰ However, pundits observe that Cambodia’s high growth rate (8% between 2004 and 2012)²²¹ is benefiting the business elites with close ties to the government, rather than the ordinary Cambodians.²²² The situation in the countryside is grim. A large number of the rural interviewees spoke about their difficulties in making a living and obtaining health services, and explained that many young and middle-aged family members were away working in Thailand. A survey conducted by the International Republican Institute echoed these perceptions, in that although improvements in roads, schools, and health clinics were noted (observed by 74%, 58%, and 34%, respectively), only 9% of the 2,000 respondents felt that there was less poverty.²²³

An ECCC international staff person who often visited a Cambodian family in the countryside summed up the issue: “They don’t know much about the ECCC and don’t show a great deal of interest...because daily life is such a struggle.”²²⁴

3. Psychosocial Issues

The wounds of the Khmer Rouge period run deep. Several older interviewees became emotional when talking about the past. But when asked if they wished to stop the interview, they declined, saying they wanted their stories heard. A commune chief stated: “I follow the ECCC because it is important for all the people, especially for the victims, because so many millions of people who lost family suffer so much.”²²⁵ While some interviewees indicated their suffering diminished over time, others remained upset. One mental health worker observed: “Even though it is more than 30 years ago, people still have some sort of reaction, especially emotional.... They are still dealing with their own traumatic experiences although they focus more on their daily life, and on following Buddhist practices and making merit.... A torture survivor is not easily healed; suffering is painful and is still there.”²²⁶ A participant in a youth group acknowledged the contradictions between the suffering caused by remembering, but the necessity of doing so in order to seek justice: “Maybe the ECCC can bring justice, because if we don’t find justice this regime could happen again. But in their hearts, the victims are still suffering.”²²⁷

Interviews indicated a great deal of anguish suffered by former Khmer Rouge cadre as well, many of whom also lost family members at the whim of the regime and were in constant fear of being killed during the regime: “I lost 13 members of my family; my older sister and all her children are gone. They arrested her and took her—I don’t know where or why. It was so difficult, she was in a different village, so we cannot know what happened as everything was so confused at that time.”²²⁸

Many described anger, their own or others’. For example, a young interviewee observed: “When Nuon Chea is on TV, the elders get a red face, and their whole body is filled with revenge. They feel like it has happened again, and they feel angry.”²²⁹ Another claimed the anger although he too was born after 1979: “If I saw a KR leader, maybe I would beat him. I know about this story and I am very angry; I feel that I hold a grudge because I learned from the past, I am angry! If I saw him face-to-face I would not let him go, but would fight him. I want to know why he did this!”²³⁰

B. Civil Society Efforts to Increase the Impact of the ECCC

Increasingly, the architects of hybrid courts seek to incorporate robust outreach and the participation of both victims and other local participants in their operations, because they see these elements as critical to success. Civil society engagement in these activities is necessary, and the role of civil society is seen as a crucial element in the success of

transitional justice mechanisms.²³¹ On their own initiative, civil society groups took the lead in filling gaps around outreach, victim participation, and capacity building. This section focuses on interviews with international and local NGOs, including from the UN and ECCC, and civil parties.²³² Many interviewees stressed that they felt that the activities of entities such as NGOs *around* the ECCC had a greater impact on society than the court itself.

Prior to the civil war in Cambodia, civil society and NGOs were weak, only appearing in force with the advent of the United Nations Transitional Authority in Cambodia (UNTAC) beginning in 1992. A set of NGOs working on transitional justice, including several prominent human rights organizations along with some smaller human rights, youth, and social development organizations, coalesced in mid-2000. The relationship between the government and NGOs, especially the human rights organizations, has been, and remains, fraught with mistrust.²³³

Interviewees saw the space the ECCC creates for a variety of NGOs to expand activities dealing with the past as very important.²³⁴ The majority of interviewees felt that this had more impact than the ECCC itself. For example, one NGO worker stated: “Many issues have benefited from being under the umbrella of this ECCC spotlight that made it less taboo to look at these things, such as the work that YfP [Youth for Peace] did on memorialization, and that CDP [Cambodian Defenders Project] did on gender research.”²³⁵ Similarly, this expatriate NGO worker explained: “I can’t speak for ordinary Cambodians, but from my perspective the side-industry that sprung up of civil society organizations or NGOs has had some positive benefit on the society as a whole. With the court in this country, it has been a bit easier for civil society to try to do projects like an annotated criminal code.”²³⁶

Civil society organizations received credit for an expansion of activities related to social healing, as indicated by this NGO worker: “The ECCC is giving an opportunity to civil society. While the ECCC goes on by itself in the criminal justice process more or less giving impact through historical facts and records illuminating the dark history of the KR, the work of civil society, which is working in the field of restorative justice, is doing more about social healing, community reconciliation, and prevention mechanisms.... Without the ECCC, we would not have had the opportunity to do these projects because the society might have been more closed, not this open, so it would have been more difficult to work. The ECCC opened peoples’ minds so we can see where we can go to deepen education and explore issues of restorative justice.”²³⁷

Likewise, a commune chief described an NGO program that promoted reconciliation and stated that the NGO work was important because it “helped us share information and work on reconciliation between the victims and the perpetrators. If we compare before and after, the victims and the perpetrators when they saw each other’s faces felt angry, but now they have a better understanding of each other. They have shared

their experiences, and see that there were rules and that the perpetrators had to follow orders—[the NGO] gave a space for them to talk. I know things have improved, because now when they see each other they embrace each other.”²³⁸

Several respondents highlighted the importance of the 2011 Women’s Hearings, which the CDP, an NGO, organized, and which probably would not have occurred without the impetus of the ECCC. In providing an opportunity for women survivors of sexual and gender-based violence during the Khmer Rouge regime to give testimony about their experiences, the hearings provided significant education to the public about gender crimes. In 2012, the hearings included voices of women throughout Southeast Asia; and in 2013, they focused on engaging the younger generation.²³⁹ An expatriate NGO worker noted: “The Women’s Hearings were fabulous, and one of the better things that have occurred as a result of the ECCC—both as a parallel process and the way it was organized.... These hearings were a positive legacy of the ECCC, but does the ECCC get the credit? Only because it was an opening created by the existence of the ECCC. At these hearings, victims were able to say what they wished, versus their testimony in court which [did not provide that opportunity].”²⁴⁰ The Women’s Hearings filled a void the ECCC had left, which marginalized sex crimes, including forced marriage and rape.

The same expatriate NGO worker commented on the space the ECCC created to develop new programs and activities, including films: “The ECCC triggered a lot of activities, and of course the existence of the ECCC allowed NGOs to run programs such as on dialogue, health, etc. For example, the film *Red Wedding* was created by a young Cambodian female filmmaker, and I asked her why she did this film; she said she had heard about the issue of forced marriage from the ECCC and decided to make the film about it. This is just one example.”²⁴¹

Many interviewees described the ECCC as having had an impact on opening public debate in civil society. Several interviewees felt that the ECCC had increased public and community dialogue on the Khmer Rouge, the past, and reconciliation. Several went further, feeling that the space for general political dialogue and freedom of expression opened because of the presence of the ECCC had expanded even beyond the court. For example, in late 2013, prominent journalist Elizabeth Becker wrote that the ECCC was one of the ties to the world that had helped Cambodians “open space to demonstrate a broader vision...and create ‘building blocks for free and fair elections.’”²⁴²

Thierry Cruvellier, an experienced international tribunal reporter, observed, “this very limited judicial enterprise, and the momentum that the Duch trial created, has been decisive in allowing, for the first time, a national public debate on the Khmer Rouge era.”²⁴³ A long-term expatriate NGO worker emphasized: “Public space for talking about the past has changed tremendously.”²⁴⁴ Another NGO worker stated: “One

very important impact on society, is that people now realize that the establishment of the ECCC has created a space to look back to the past. Most of the Cambodian population went through a lot of hardship during the KR regime and they wanted to forget the past, but now they understand this is not totally right—now they see that sometimes the past has to be discussed and it has to be dealt with. Having the court, we see that the past should not just be forgotten, but discussed.”²⁴⁵

This journalist also observed: “Another impact of this court is that more people are talking about it—especially when the ECCC goes out to the provinces to meet the people. Then they and the people have interaction, they are talking about it, they are telling stories, and they are viewing videos.”²⁴⁶ An NGO worker involved in public outreach programs believed that the ECCC influenced public discourse: “I conducted public forums with the villagers in remote areas in 24 provinces, and after the presentations I asked the villagers why they speak about their past experiences and they said partly because of the ECCC, which encourages them to talk about this. I also observed this increasing discussion in the family.”²⁴⁷

Some interviewees spoke about the increase in public dialogue around the ECCC as being related to reconciliation. Youk Chhang, director of the Documentation Center of Cambodia (DC-Cam), observed in a newspaper interview: “This dialogue that we are seeing today did not exist 15 years ago... the tribunal has finally put the Khmer Rouge into the public sphere, creating a public debate that is nationwide. Everywhere there is shared joy, suspicion, sorrow, hope. It’s the single issue that has encouraged a culture of dialogue that has not yet existed in Cambodian society—and that means that the debate on the ground is more constructive than the debate in the court. People are finally defining and reflecting on the meaning of justice and the notion of reconciliation.”²⁴⁸ On a related note, an NGO worker brought up the relationship between public discourse and healing: “From a psychological perspective, the processing of the past, working through it by sharing, talking about it, and putting it out to the public and not keeping it [in] your mind or in the nuclear family, is definitely something that the tribunal achieved—creating some sort of public discourse about pain and guilt.”²⁴⁹

This teacher, who worked in a former KR stronghold, noted another impact related to the generalizability of guilt often assigned to all Cambodians associated with the Khmer Rouge: “The ECCC opened a space for talking, a general political space which wouldn’t have existed if it weren’t for the ECCC. People used to be ashamed, especially the former KR, but now they can speak in public, and before [it] was only quietly at night in the dark but now people speak openly in the daytime.”²⁵⁰

C. Seeking Justice from the ECCC

1. A Majority Supports the Court and Wants the ECCC to Continue

Surveys of Cambodians indicate that roughly 76% of Cambodians believed that the ECCC would give justice to the victims.²⁵¹ Cambodians have expressed a profound disappointment with domestic courts. Indeed, in a recent survey by the International Republican Institute, when asked which issue was the most important to push Cambodia toward a free and fair democracy, the most common answer (23% of respondents) was a fair and independent judiciary (free speech ranked second at 22%).²⁵² Other observers of Cambodian society have also reflected on the importance of justice for the population. Former DC-Cam and ECCC employee, Huy Vannak, for example, observed: “Justice is important for victims of the Khmer Rouge. Only when justice prevails can they put their suffering behind them and move on.”²⁵³ Almost every interviewee spoke about justice when asked about the ECCC’s impact, and related it to a variety of other topics, such as acknowledging the crimes, respect for the rule of law, ending impunity, and ensuring such crimes will “never again” occur. Some related justice to hearing the “truth” from the accused persons and witnesses.

The majority of interviewees wanted Case 002/02 to go forward, and for it to continue as soon as possible, before suspects die. At the same time, most also acknowledged a reduction of interest in the court over time. They cited the lack of television and radio reporting, a time shortage, the need to focus on daily living, and fatigue due to the lengthy and complicated trial process for this reduction.

The vast majority of Cambodians interviewed were very supportive of the ECCC. This teacher was representative: “I think that the ECCC, this mixed national–international court, is a good thing for Cambodia, so that we can stop the impunity. It can give a message to the next generation of leaders, that when someone does something wrong and they at first escape from their mistakes, eventually they have to be responsible and will not be let out of jail. Even though the Pol Pot regime happened more than 30 years ago, the ECCC trials are still happening. The next generations should know this.”²⁵⁴ A commune chief stated: “I follow the ECCC because it is important for all people, especially for the victims because so many millions of people who lost family suffer so much.”²⁵⁵ Many interviewees felt that if the court determines “who was right and who was wrong” then the ECCC can have a positive impact on society.²⁵⁶

While interviewees stated strongly that the ECCC would bring justice, they described “justice” differently. Some referenced life sentences.²⁵⁷ Many desired assurance that the crimes would not be repeated. Indeed, an accused perpetrator who had been a low-level KR official stated that he supported the ECCC: “I have heard a little bit about the ECCC. Yes it is a good idea! It is important to try the leaders so that people

don't do like this again, and do not let the Pol Pot regime happen again."²⁵⁸ A former teacher agreed that the ECCC was important "so we don't let this problem come back again, or these wrong acts return. Also so the next generation does not return to the past."²⁵⁹ Others highlighted the court's role in correcting the historical record: "The ECCC teaches us about history of Cambodia and not to let our society allow genocide of Khmer to happen again. If there were no ECCC, the next generation would not know that Khmer killed Khmer in the past."²⁶⁰

The strength of desire for the ECCC varied, and people's statements often encompassed contradictions. This 40-year-old teacher expressed conflicting feelings about justice, trials, and punishment: "Duch was executing orders but not creating policy. Nuon Chea and Khieu Samphan created the culture of the KR but I don't know how much justice will occur by putting them in jail and declaring them criminals until they get sick and die. I don't think justice brings life to the many who were killed. But I agree it is needed to say that these people have to be judged because they did very bad things to the population and they made this country miserable, they are responsible. But the cost is too high."²⁶¹

Interviewees such as this former village chief linked justice to the ECCC's effects in reducing suffering: "[T]he ECCC has found very good justice, as it has allowed some people to reduce their suffering, it is very good. It is good justice, because it was a clear trial of the perpetrators, and it was fair for the victims."²⁶² The reduction of suffering was also related to holding perpetrators responsible for their crimes, in the view of members of this rural focus group: "Those who are victims or have family who were victims, have some relief of suffering from the ECCC, because the perpetrators will be responsible for what they did wrong, and they will no longer be allowed to live freely in the future."²⁶³

Even this long-time KR soldier thought that the ECCC was useful for society: "The ECCC brings justice. I visited the ECCC, Choeung Ek, and Tuol Sleng—when I saw all those places where they tortured people and tied them down, and so many other kinds of torture in all those pictures and photos, my tears were falling like rain. During the KR regime, [the KR authorities] didn't let us see what was really happening; I only saw the real situation when I went to those places, and saw with my own eyes what had happened in the past."²⁶⁴

Two of the four civil parties interviewed expressed their strong desire to continue the proceedings: "I'd like to push and keep going on these cases until they finish because it's already in the schedule of the court. Even Cases 003 and 004, they should continue. It is important to be an example or model for the future. If we finish the trials only halfway this is not good."²⁶⁵ But another elderly male civil party expressed frustration with the process in spite of his desire to have it continue: "The ECCC is difficult to follow, it is complicated, and difficult for me to understand. But there is no

need to wait for a judgment on 002/01 [before starting 002/02]! We did such a deep investigation already and have everything in order to start the trial! No need to wait! If we wait, this will be happening more and more slowly!... And about Case 003 and 004, this is very, very slow! Nuon Chea and Khieu Samphan will die like Ieng Sary, and then we cannot collect evidence from them, and the ECCC will be nonsense, and we cannot finish the trial.”²⁶⁶

Many Cambodians expressed concern about the length of investigations and trials.²⁶⁷ For example, when asked if he wanted to give any advice to the ECCC, this elderly male farmer exclaimed: “Do whatever is needed to make it very fast!! Those two people are still there—Nuon Chea and Khieu Samphan—but we don’t know what day they will die, and where the evidence will go, and we need to know their secret things before they are lost.”²⁶⁸ Similarly, a middle-aged farmer said: “The most important thing is to do it quickly! If it takes too long all the perpetrators will die and if it takes more than ten years it loses value, and if it doesn’t succeed, there is nothing left.”²⁶⁹

No matter the educational level or physical location of the interviewees, there was a common feeling from many interviewees that the court should hold senior leaders accountable for the crimes of the KR period. An international ECCC staff person felt that accountability was an important factor in people’s satisfaction with the ECCC: “At least part of the victim population feels some satisfaction that there is some kind of accountability process. Although some people believe it is too late, many people still feel accountability is important.”²⁷⁰ Many also felt the leaders should accept responsibility for the crimes of the regime.

Some interviewees expressed a desire that all trials would result in confessions, as Duch did in Case 001; they expressed frustration that the leaders in Case 002 were not taking responsibility for their actions.²⁷¹

a. Case 001: Duch

As Chapter I noted, the trial of Duch (Case 001) was significant in several characteristics—dramatic evidence, active participation of Duch, and widely broadcast—which increased its impact on Cambodian society. Indeed, many interviewees spoke more positively about Case 001 than Case 002, even though the Senior Leaders trial was ongoing at the time of the research. For example, this elderly farmer was happy that Duch received a life sentence: “Duch was already tried, and at first they gave him 35 years but then they decided that was too short so they put a longer life sentence. I agree with the final sentence of Duch and am satisfied.”²⁷²

Many Cambodians expressed dismay about Duch’s initial sentence, which they perceived as short, even though 35 years was essentially a life sentence to the elderly prisoner. Thus, they expressed satisfaction that the court increased the sentence to life

imprisonment.²⁷³ But some interviewees argued Duch merited a death sentence, such as this civil party: “There are some negative effects of the ECCC—we wonder why the judges give only 35 years in prison...that is not acceptable for his mistakes of killing that many millions of people, 35 years, it is not enough. That was not justice for the victims, my thought is that he killed so many and was so cruel, he killed more than 12,000. He should have received a death sentence, but our law has no death penalty.”²⁷⁴

In spite of these negative comments concerning the sentencing, the general feelings about Case 001 were positive, and many people knew clearly who the defendant was and had watched the proceedings on television.

b. Case 002

In contrast to Case 001, interviewees had less knowledge about Case 002, and were more negative about it, though the majority of interviewees still wanted the case to go forward (80 of the 95 interviewees who were asked). Most respondents were not aware that Case 002 had been split into two parts. This journalist suggested several reasons why views of Case 002 were less positive: “For Case 002, we have less impact than Case 001—maybe it is too long, so people are tired of it. Also, Case 002 is not like the Duch trial, because although Duch was the main actor for Tuol Sleng prison, for Case 002 the leaders were in higher positions and are not the ones who directly killed. Thus, some people say those leaders are not the ones who killed people, they are old, and they are politicians not the killers, but Duch everybody knows he is the real killer. Maybe there is some fascination because he did say that he ordered killing.”²⁷⁵

Like many Cambodians, this former KR soldier did know the cases had been separated, and wanted Case 002 to go beyond the first trial: “They should continue [Case 002/02], for Nuon Chea and Khieu Samphan. It is a good idea because there are many more stories that will arise in this case, so we can know more about the KR regime—they violated human rights, forced people to work, forced children to be soldiers, and there was starvation.”²⁷⁶ Several interviewees mentioned that failing to complete Case 002/02 would diminish or undermine the court. For example, a government official said: “My idea is they must finish the trial, because if it is done just halfway and stops, it will have no value, and no effect. If it stops in the middle, it will negatively affect the next generation. Khmer leaders or those in other countries will see the leaders living freely without punishment, and they can dare to continue to do these atrocities again, even with such terrible crimes like genocide.”²⁷⁷

The minority of interviewees who did not want Case 002/02 to continue (14 out of 95) focused largely on the length of time that the trial has taken, the age of the accused persons, the belief that government interference has tainted the court, and the idea that money could go best toward other uses. A female farmer stated: “I don’t know, I am of

the next [younger] generation, I think that the perpetrators are getting older and older and will die soon, what can be the benefit after they try these perpetrators? When they were younger, then this should have started.”²⁷⁸ A civil party member who still desired individual reparations but did not want Case 002/02 to continue expressed dismay with the whole process: “The only justice achieved was that they imprisoned Duch in the jail at Kendal Province. It is partial justice, about 50%, not complete justice. In spite of the mixed national and international tribunal, and national and international law, the civil parties have not received individual reparations, so the ECCC is not a model for the world, nor for the nation.”²⁷⁹

c. *Cases 003 and 004 and Beyond*

Many Cambodians interviewed had not heard about Cases 003 and 004. Among those who had, or whom the interviewers informed of the investigation, interviewees expressed mixed views as to whether they should progress, with 29 of the 49 interviewees wanting it to go forward, including some who felt strongly that it should. Fourteen did not want them to go forward, while six were not sure. (Only 49 of the 122 interviewees were asked about Cases 003/004, due to either lack of time in the interview or their lack of knowledge about the ECCC.) Survivors of Khmer Rouge atrocities who did not want these cases to proceed expressed exhaustion over the court’s proceedings, and often felt enough money and effort had been spent. Those who were concerned about government interference thought it would be useless to move ahead, since the government had already indicated its opposition to these subsequent cases.

Yet some survivors felt strongly that Cases 003/004 must go forward,²⁸⁰ including this young Cham teacher, who stressed: “Yes they MUST do it! They should dig and dig to find who holds the main responsibility.”²⁸¹ Some interviewees wanted to go *beyond* Cases 003 and 004. For example, this monk emphasized: “The state and international community should do everything to dig deeply; if they just try 001, 002, 003—where are the rest of the people who were involved?”²⁸² A journalist suggested that Cases 003 and 004 may have more meaning for ordinary Cambodians than Cases 001 and 002, because the suspects in these cases were closer to or participated in the actual killing: “They should do Cases 003 and 004, those are the ones who gave the orders and did killing with their own hands. They received orders from the top, and gave orders below—they are also the chiefs and they know everyone. They were in meetings together with those leaders from the top.”²⁸³

A handful of interviewees feared progress in Cases 003 and 004 could incite violence. For example, a village chief living near a former KR stronghold said: “I have heard that the government will not allow these cases to go forward. And in my opinion, I don’t want them to, I am afraid another war could happen, and am afraid that it will

be related to some high-level people [currently in power], and am afraid that if it continues, we could see problems.”²⁸⁴ A retired government soldier, who also lives near a former KR stronghold, feared war: “No they should not continue with Cases 003 and 004, because the lower-level people who were involved to commit crimes will rise up and start a war.”²⁸⁵

Although several former KR cadres supported moving forward with Cases 003 and 004,²⁸⁶ most of the former KR cadre interviewed did not want to go beyond Case 002. Those living in the former KR strongholds feared repercussions in their communities, against their leaders, or even to themselves. For example, this former KR commune leader stated: “If the ECCC tries the lower-level leaders, people will be confused. And for those lower-level leaders, if they don’t know news about the ECCC, they will think it is time for them to be tried, they will feel afraid, and there could be conflict, or they could be involved in committing crimes. For Nuon Chea and Khieu Samphan, yes, it can go ahead, but for the lower level, they should not do it.”²⁸⁷ One former KR interviewee mentioned that proceeding with Cases 003 and 004 would risk reducing chances for community reconciliation and social cohesion.²⁸⁸

Across interview groups, people expressed the fear that Cases 003 and 004 might incite revenge and hatred. This view seems to reflect confusion about who would be tried. For example, an elderly male farmer stated: “From what I hear, if they do the next step down, we can have some problems with those below. It is better to just do the central-level leaders, because if they do below, they could have problems of grudges and revenge coming up: one person has many relatives, and it could spread through them.”²⁸⁹ An elderly, retired teacher felt the same: “If they continue Cases 003 and 004, or even 005 and 006, the stories will not be finished and will cause more arguing. People tell me that near the border of Thailand the former KR are very strong, and if they continue Cases 003 and 004, violence can happen again.”²⁹⁰

2. Seeking Improved Respect for the Rule of Law

As described in Chapter II, reform in the justice sector has been problematic, due to lack of political will and funding for reform; corruption and political interference; and a lack of skills, experience, and education amongst legal professionals. These problems also limit the impact of the ECCC. Nonetheless, many Cambodians interviewed in this research are hopeful that the ECCC will have positive effects on the judiciary and legal system in Cambodia. They lack trust in the national court system, however, and mistrust the government in general, which tempers their hope. They see little chance for immediate effects on the national system in the present politically controlled environment. But even some critics of the ECCC harbored hope about the potential impact of the court on rule of law and the national court system. A long-time human rights activist

was positive: “The court itself is a treasure of resources, a treasure trove of experiences and of rule of law—so much can come from it to help us to become more civilized; it is up to us [Cambodians].”²⁹¹

Some were more hopeful. For example, a former KR soldier stated: “The national courts must try hard to learn from [the] ECCC! So that the international laws are correlated with the national law, and harmonized.”²⁹² A commune chief stated that he felt that international standards were having some effect in national courts: “The ECCC has had some positive effects on the national courts—the international judges, and the international laws and standards, can be a model for national courts to follow. This is our hope.”²⁹³

Other interviewees expressed concerns that the delays would make such an impact impossible, such as this village chief: “If the ECCC can try the perpetrators and find out who are the top leaders, then it can influence the national courts. But if the ECCC takes such a long, long time and cannot try the leaders, this will not be a good model, and people will never trust the courts at all.”²⁹⁴

Others, particularly the more educated interviewees, described the ECCC as a symbol of reduced impunity and referenced deterrence as a goal, like this civil party member, who stated: “The ECCC could show all the leaders in the world who think they have high rank, that...they cannot escape from the law. They have to punish by the law in order to make them remember not to do it again or do anything against the law.”²⁹⁵ A commune chief stated: “The ECCC has had effects on society; it can show people that if the leaders in the future make a mistake, they cannot escape from their faults. And also the people have belief in the ECCC...the victims lost their family and now the law tries to try the leaders, to find justice.”²⁹⁶ A former KR soldier and NGO volunteer expressed a similar view: “Yes, the ECCC has a lot of effects on society, to show justice to society, so that the leaders in the future don’t follow these past methods of the past leaders. They know if they kill so many people like this, or even if one person dies, then they have to take responsibility. I suffer so much when Khmer kill Khmer.”²⁹⁷ This village chief spoke strongly about the importance of the court: “The ECCC does have impact because the people can see that the leaders are judged and those who do wrong get punished.... The leaders in the various regimes have to be careful to lead the people well. When Khmer kill Khmer, our country cannot develop because the people feel too much revenge against each other.”²⁹⁸

However, one observer felt that many ordinary Cambodians were unable to link the ECCC’s efforts to ensure accountability with current acts of impunity: “The ECCC is dealing with decades-old crimes, and people do not connect or reflect on the ECCC. They look at the ECCC like a theatre, which is talking about old stories, and the public does not make the connection between themselves, the ECCC, and with the fresh or current crimes.”²⁹⁹

D. Awareness of the ECCC and Its Impact on the Media

Although outreach is critical to ensure that the victim-survivors affected by justice mechanisms (especially international and hybrid courts) understand the purpose of the process and are kept informed, neither the design of the court nor its ongoing activities have prioritized outreach. The lack of funding for outreach has been a deficiency of the ECCC, and has greatly diminished the impact of the court on ordinary Cambodians, particularly those outside Phnom Penh.

Both the ECCC itself, through the PAS and the VSS, conducted outreach activities alongside various NGOs working with and around the ECCC.³⁰⁰ While the PAS and some of the NGOs conducted general outreach, the PAS was specifically responsible for media information, and the VSS and some NGOs provided information to the civil parties. Activities related to outreach have included general information sharing about the ECCC with the public (lectures, discussions, radio, television, films); training for groups, such as lawyers, youth, schools, and universities; and human rights and genocide education. In addition, the ECCC and DC-Cam have conducted specific outreach to seek sources for documenting KR crimes. The ECCC and various NGOs have engaged in campaigns to recruit civil parties and to inform, train, and obtain feedback from them. Various individuals have taken on outreach, such as Tuol Sleng survivors Vann Nath, Chum Mey, and Bou Meng, who have all published memoirs describing their experiences and who give public speeches about the Khmer Rouge crimes.³⁰¹

As in most other tribunals, efforts at outreach were inadequate, both structurally and financially.³⁰² The nature of the court as a hybrid court with joint participation by Cambodian and international judges has plagued the ECCC's outreach activities. The creation of the two separate, but overlapping, units of the PAS and VSS also caused confusion and inefficiency. While the PAS has created a user-friendly and detailed listing of information on the ECCC website, this information is not accessible to rural populations, and many interviewees reported that PAS's outreach to rural areas was inadequate. Civil society actors have taken on most of the outreach in the countryside, but these efforts have not been well-coordinated, comprehensive, or sufficient.

The task of ECCC outreach is huge in Cambodia, a country where education levels are low, infrastructure (roads and communication systems) poor, and there is scant understanding of how the judiciary or even government should work. Cultural issues also hamper information sharing, as the systems of hierarchy and patronage dictate who feels comfortable speaking to whom. A survey conducted in 2012 indicated that the main sources of information about the court are family members, friends, and neighbors, with a lesser role attributable to media and the authorities.³⁰³ Nonetheless,

several observers felt that the outreach process of the ECCC has had a positive impact, in that knowledge of the ECCC process has increased over time, although the depth of that knowledge may be limited.³⁰⁴

1. Knowledge of the ECCC

Most interviewees reported they received very little news about the ECCC—either from television or radio—and amongst the few who did, most expressed profound mistrust of government media. Meetings local authorities held in rural areas remain an important source of news about the ECCC, mainly due to lack of information from other sources. On television, families preferred to watch movies or cartoons, and many reported they no longer had radios. Social media was becoming more popular (especially Facebook), especially amongst youth; yet, at an International Republican Institute study conducted in October 2013, only 6% of respondents went online to access the Internet.³⁰⁵

Knowledge about the day-to-day proceedings and progress of the ECCC remains low, in part because people have little time or energy to stay abreast of current news, often due to poverty. Although newspapers in English regularly cover ECCC proceedings, the average Cambodian does not read English, and few get their news from English-language papers such as the *Cambodian Daily* or *Phnom Penh Post*. An NGO worker observed: “Especially people in the rural areas are not as impressed with the ECCC proceedings— they are busy with their livelihoods.”³⁰⁶ There is also little news broadcast on television or radio about the ECCC or KR history, and many people were not interested in watching the news. Amongst the non-NGO interviewees, only one or two had seen anything about the ECCC on television over the last few months. A few remembered some stories in the last six months,³⁰⁷ but the content was often related to the problems of the court—the corruption, the lack of funds, the delayed salaries. News of constant problems in the court made people less interested in watching the news.³⁰⁸

Many interviewees commented upon the lack of television coverage of Case 002, especially in comparison to the wide coverage of Case 001. Several interviewees surmised that different levels of government participation (i.e., great interest in Case 001, but not in Case 002) created the discrepancies. This NGO worker observed: “The population has little knowledge of Case 002. The government was very much involved in Case 001, disseminating information, etc.—Duch was the perfect poster boy. But once you remove that government attention, it becomes very difficult for Cambodians who rely on government media to know what is happening. Also, Case 002 became so complicated, first with the severance order, and confusions about reparations. An ADHOC survey of civil parties showed that a significant number of civil parties still believed they were entitled to monetary compensation, and they didn’t understand the link between conviction and reparations—and if we can’t even do clear outreach to the

group of people who are directly linked with the court, then how can ordinary Cambodians understand?”³⁰⁹

This expatriate NGO worker felt that although Case 002 had not been well publicized, overall, live broadcasting of Case 001 had expanded public space for dialogue: “Public space for talking about the past has changed tremendously.... The turning point was the live broadcasting of the trial. CTN [Cambodia Television Network] had up to 5.3 million viewers every week, and television made a huge impact. I think that made the big difference and at that time there was more openness. Case 002 never reached the same level of publicity...documents were not translated, it was very difficult to follow, the funding for the ‘facing justice’ program was only for the beginning, and then there was nothing broadcast at all.”³¹⁰

PAS reported that 153,363 people had visited the ECCC between 2009 and June 2014.³¹¹ These numbers are quite impressive, especially as compared to other international courts, which have reported far fewer visitors. Of the nine interviewees who had visited the court (among the 94 who do not work for organizations that bring them to the court as part of their work), they described their visits, typically a single day, as too short. They felt that the ECCC staff did not fully answer their questions. These reviews may reflect fatigue—interviewees traveled on a long bus ride to the court, and some were taken to the memorials in Tuol Sleng and Choeung Ek as well. Additionally, being in a large and unfamiliar city might have influenced their experience. Interviewees also feel that outreach messages have been unclear. As this expatriate NGO worker noted: “The court programs, although they have brought many thousands of visitors to the court, are in my opinion a measure that is not sufficient. The villagers have to get up at 2:00 a.m. and are tired when they arrive; they sleep when they are there; they see things they can’t follow; and they aren’t informed about what is going on. It would be better to bring ten people who are multipliers, who can talk about their experiences and who can follow more about the court proceedings, so they really understand. The ECCC is looking more at numbers instead of quality—just counting numbers doesn’t say anything about the impact.”³¹² An international organization staff person noted: “The PAS gives a lot of statistics and numbers of people that have visited the ECCC...but these rural people sit in the court, then are rushed to S-21 and then they go home—what is the purpose? The defense lawyers have asked them to explain better to people what ‘innocent before proven guilty’ means, but they seem to be hamstrung by the political situation.”³¹³

2. Impact of the ECCC on Cambodian Media

The local media in Cambodia lacks independence, and suffers from corruption, bias, and government interference. Yet many interviewees credit the ECCC with effecting

positive changes in the media as an institution. Both local and international media have gained knowledge about legal and judicial reform and international tribunals, which has resulted in greater public discussion of the KR specifically and Cambodian history in general. Local media was considered to have become more professional and open to new ideas.

This NGO worker felt that the media has become more nuanced, within the limitations of the current political system: “The media has been influenced to become more professional because of the ECCC. They have learned how to look at different angles and perspectives—not only from the victims, but also from the perpetrators. Although the media is still generally just a propaganda tool for political parties, with the ECCC some journalists have begun to cover more issues, though this change won’t happen overnight.”³¹⁴ An international ECCC staff person noted that the media, including local government media, reports regularly on the ECCC, thus increasing public knowledge and debate: “In terms of media there are more journalists now looking at what happened during the KR period, and of course covering the court proceedings. What is interesting is that even the government media is reporting regularly about the court. So in that sense, there seems to have been some kind of maturing process. In the past, we believed that the CPP controlled the media.... I think it has definitely been an opening of the media to the past and what is going on currently in the court. Even Radio Bayon, owned by the Prime Minister’s daughter, has reported about Cases 003 and 004 and how people can apply to become civil parties. I don’t think that would have happened five years ago. Actually Cases 003 and 004 are very interesting even in the court, at least on the national level. It was taboo to talk about and people tended to pretend that it doesn’t exist and it will go away. Maybe they have finally figured out that it is inevitable?”³¹⁵

Thus, while outreach activities are extremely important to increase the impact of justice mechanisms, a lack of resources, as well as limitations in coordination and messaging coming from the ECCC, have hampered these activities. Nonetheless, interviewees see improvements in the media in the direction of independence from the state.

E. Contributing to History, Truth, and Memory

Whether international criminal tribunals (or hybrid tribunals) contribute to a historical reckoning, truth telling, and memory is debatable. Increasingly, researchers have concluded that transitional justice mechanisms do contribute by creating coherent narrations of the past.³¹⁶ The ECCC has a particularly daunting task, as it is taking place more than three decades after the mass violence occurred, with both defendants and

witnesses in advanced years. Yet it is also located inside the country where the crimes were committed, lending support to the importance of public debate on history. Interviewees in this research in general felt that the ECCC will make important contributions to history and truth telling, and that public memorialization efforts have been increasing due to its presence.

Thierry Cruvellier noted the importance of the ECCC's contribution to history and memory: "In 2009, while the Duch trial was ending, a short history of Pol Pot's Democratic Kampuchea was finally introduced in the history curriculum. For 30 years, that history had not been officially taught in Cambodia."³¹⁷ The work Cruvellier references was in fact a notable achievement, in which DC-Cam wrote a history textbook with accompanying teachers' guide and has worked with the Ministry of Education to include KR history in the high school curriculum. Similarly, an elderly monk commented: "The ECCC contributed a lot to truth and history so far, because there are a lot of witnesses, and a lot of documents that people can use to write history for survivors, their children, and for humanity."³¹⁸

1. The Historical Record

Interviewees praised the historical records the ECCC will leave, such as this NGO worker: "Presumably leftover documents from the courts and the case files will be great sources for students to do research on the KR history, and not limited only to legal research. I think the ECCC also provides history about the KR that had not yet been uncovered—for example, we never knew what S-21 stood for, before the Duch hearing... [T]he ECCC has provided part of the historical truth to the public."³¹⁹ This expatriate staff of an international organization stated: "Another positive impact is that many witnesses at the ECCC spoke about the importance of historical records. The many thousands of documents will be very interesting to academics.... [T]hese facts are a mosaic of Cambodian history about which we can investigate more about the past. The court provided an important motivation for people to talk about the past. At first, they were a little bit scared to see what would happen, but then they came to trust the court and they talked openly. If there were no court, who knows if they ever would have spoken."³²⁰

On the potential for greater truth telling by the court, the same woman commented on the potential and the practical limitations: "The ECCC contributes to history and truth telling. People, especially victims, can take the stand, and perpetrators too, and tell their stories. Although it is very directed and specific, but they did quite well, the victims, civil parties, and victims' witnesses, all were able to have 20–25 sessions of statements speaking of suffering and nobody could object. Those were so powerful... and very symbolic, an experience of the nation."³²¹

2. Truth and Truth Telling

Whether or not international tribunals (or even domestic trials) can actually discover the “truth” is debatable.³²² Thierry Cruvellier notes that truth-seeking is one of the key expectations of tribunals, yet is rarely achieved.³²³ Previous research demonstrates that many Cambodians have a strong desire for the court to seek the truth and that they believe reconciliation requires it.³²⁴ Despite the low level of knowledge about the ECCC (especially outside of Case 001), most interviewees indicated that the ECCC was making an important contribution to truth telling, and generally felt at least partially satisfied.³²⁵ This teacher felt a great deal of information was revealed: “I think the ECCC can show a lot of the truth. I think 90% according to my knowledge it has shown the reality, and they record back to us what has really happened.”³²⁶ This young monk felt that the ECCC was able to find at least some truth to satisfy the victims: “No, I don’t think there is any negative impact of the ECCC, as it can, for the most part, enlighten us about justice and truth, and it is a kind of light that makes people satisfied.”³²⁷

Many interviewees expressed dissatisfaction that accused persons did not tell the full truth, confess, or apologize. However, this civil party felt that even without confessions—which have only been a part of Case 001—people watching the trial can still listen to and weigh the evidence for themselves: “Even though the accused have only told about 20% of the truth I think, we can still hear from lawyers, judges, civil parties, and we have heard enough of the evidence to know the whole truth. I believe that the ECCC can collect the truth if and only if internationals are involved. I will wait and see 002/02, because this case must move quickly because we have waited a long time already.... Yes, in Case 001 Duch did tell the truth, about 70%, which was very good, not completely 100%, but I more am proud of Duch for telling more truth than the others.”³²⁸

Many interviewees felt the truth would reduce victims’ suffering, and some felt partial truths curtailed the court’s benefit to victims. A farmer commented: “Although my heart is no longer hot, the ECCC can reduce some feelings of the victims of the KR regime. But it is not enough to reduce all the suffering of all the people. Because, firstly, the ECCC has only limited jurisdiction from 1975–79. Secondly, those close to the senior leaders, are not talking—how about the others who participated with them, where are they?”³²⁹

3. Memory and Memorialization

Cambodians place a strong emphasis on honoring their ancestors, which reaches its great expression in a celebration of ancestors every September—*Pchum Ben*—where they visit their local Buddhist temples and those of their ancestors to “feed the wandering souls.” The secret killings of hundreds of thousands of Cambodians by Khmer Rouge and deaths that occurred in unknown locations make such traditional ceremo-

nies impossible. Cambodia has 19,733 gravesites of killing fields and mass worksites, and 196 KR prison sites where torture and killings occurred and hundreds of thousands died.³³⁰ The descendants cannot determine where their own ancestors were buried to memorialize them. Thus, Cambodians increasingly seek memorialization projects as important aspects of peacebuilding, justice, reconciliation, and reparations.³³¹

Many interviewees emphasized the importance of memorials, and a survey of civil parties showed a preference for them as reparation projects over any other measure.³³² Youth involved with NGO memorialization projects spoke about the importance of the memorials, and the need to directly see the bones and other evidence, in order to believe. As one young person said, “If we did not have this place, or the bones and evidence here, we would not believe about the KR.”³³³

The majority of interviewees felt that the ECCC was making important contributions to history, truth, and memory in Cambodia. Although this work is still relatively undeveloped, the recent civil party participation in the ECCC and related moral and collective reparations awards are already serving to educate the public about these topics, and working toward healing and social reconstruction in Cambodia.

F. Contributing to Reconciliation and Healing

Observers and designers of transitional justice mechanisms increasingly consider reconciliation an important area of impact, although they often define reconciliation in disparate ways. UN and government statements made during the creation of the ECCC expressed high expectations that the ECCC would bring about reconciliation and healing to the Cambodian people. Cambodians such as the KR expert Vannak Huy had similar expectations, as he wrote: “The tribunal itself brings many benefits to survivors in terms of psychological and emotional healing.”³³⁴ Many interviewees brought up reconciliation-related topics when asked general questions about the impact of the ECCC. They felt that the presence of the ECCC was contributing to reducing suffering of victims or healing, reducing anger, acknowledgement and ending silences, dialogue and mutual understanding, victim–perpetrator relationship-building, and reducing the generalization of guilt. To this last point, they attributed improved social cohesion by counteracting the view that all KR were perpetrators. The majority of the comments about reconciliation, however, were related to NGO activities rather than to direct activities of the ECCC itself.

Reconciliation is a long-term process, and far from over in Cambodia. This NGO worker noticed that his employer’s efforts with communities revealed persistent need for reconciliation: “We do some film screenings and invite mostly base people, and they

suggest that we do the same with the neighboring communities, as there are still many former KR in some areas who need to work on this problem.”³³⁵

A trial of the very top surviving leaders, happening far away in the capital city, with little connection to local communities, cannot automatically create reconciliation at the local level. But interviewees’ comments suggest that the ECCC, through the NGO activities it has made possible, has made a difference and will continue to do so.

G. Contributing to Mental Health and Mental Health Services

A study published in the *Journal of the American Medical Association* estimates that 11.2% of Cambodians suffer from posttraumatic stress disorder (PTSD) due to the KR regime and surrounding civil wars.³³⁶ Yet mental health services are woefully lacking. The Transcultural Psychosocial Organization (TPO) is the main mental health organization in Cambodia. It has projects providing services to civil parties and others at the ECCC, including what the organization terms “testimonial therapy.”³³⁷

Interviewees widely praised TPO services. An NGO worker noted: “So many survivors and civil parties have no chance to testify during the proceedings, though they very much wish to be asked to tell what has happened to them, what they went through, and the impact of the KR period on them. As we know, the court cannot bring them all to testify, [but] testimonial therapy allows them to express their suffering outside the court and creates a space for victims of human rights violations to express suffering in a healing process combined with Buddhist concepts. Research is being done with control groups to see which methods work best, but there are problems to obtain enough funding, so many civil parties are not included.”³³⁸

Some interviewees spoke about the effect of the ECCC on the improvement of institutions providing mental health services. For example, an interviewee from the German Federal Enterprise for International Cooperation credited the court as “one of the birth places or starting points of mental health services—though, of course, TPO and Social Services of Cambodia had existed before. But through the ECCC, psychosocial support of victims and civil parties has been delivered and accepted, and the stigma that you are an idiot, or stupid, or have mental problems is being reduced.... Training occurred through the [ECCC] project, which was very important for young students to become well trained and who can then occupy positions not only for TPO, but for other institutions that need it. The Ministry of Health is rethinking and discussing how to make more serious efforts with the university, the Ministry of Education, and others.” An NGO worker agreed: “Participants have mentioned the importance of integration of

psychosocial support during the proceedings, and this will be part of the justice found for the survivors.”³³⁹

The NGO worker reported changes in behavior of judicial staff at the ECCC as a result of the presence of mental health services. He expressed hope that the psychosocial support that civil parties received during the ECCC proceedings could be a model for the national judicial system: “There could be benefits in two ways: the domestic court can learn that psychological support is important, and that integration of psychological support can also bring more meaningful justice for the victims and for the perpetrators as well.... Unfortunately, there are still limitations of understanding of staff in domestic courts concerning psychological conditions, not only to understand the impact of torture on the client, but it is also important that the court staff look back at their work experience and change their perspective and behavior toward those people.... Recommendations were made to the trial chamber through the witness support unit, as to how to talk to victims and show empathy toward them, and the behavior of most judges has changed already. Also, when they see that a victim or witness is having difficulty, they call for TPO to sit next to them, which shows they are aware of their needs for help during the questioning.”³⁴⁰

Other interviewees noted that, as much as mental health services would create a long-lasting positive legacy, the services were inadequate. An expatriate NGO worker commented: “They had five or six people from TPO during the hearings, during their testimony, but when they finish their testimony, there is no ongoing support as was offered during the Duch trial.”³⁴¹ An international ECCC staff person was also concerned about the lack of mental health services at the court and in the future, but said that bringing this deficiency to light was an important impact: “If anyone was in doubt, this court process has documented the complete lack of mental health support service in Cambodia; other than that, there is not too much impact. I’m worried personally, although I’m not a professional, that we created traumatic moments for people without being able to provide the necessary follow-up. While all the civil parties will get counseling while at the court, after that there is limited access. But there are also people who have not been testifying but watching the proceedings who may have had traumatic flashbacks. To the extent that the ECCC has had an impact, at least it has documented the need to expand mental health services.”³⁴²

H. Contributions from Civil Party Participation

A report of the Red Cross found that civil parties are, in general, positive about their participation in the ECCC. Research done with civil parties in Case 001 indicated 22 out of 23 thought the trial was fair, with some commenting they felt respected by the

court.³⁴³ A study that appeared in the *Journal of Human Rights Practice*, unsurprisingly, found that civil parties whose applications the court denied felt the court would give them minimal help reaching closure or forgiving the Khmer Rouge; they also felt there would be less impact on the rule of law.³⁴⁴ Civil party participation also had some negative consequences for the ECCC, as participation caused difficulties, delays, and greater expense during the process.

In the context of international courts, civil parties often serve as information-sharing ambassadors. Interviewees spoke about increases in confidence, knowledge, rights, access to information, and networks as a result of their participation in the process. Nonetheless, the majority of people interviewed in the countryside were generally unaware of civil parties.

Several NGO interviewees referenced empowering civil parties through knowledge and access to information, as well as network expansion. As one NGO worker commented: “One important thing about the civil party process is that it creates a space for the survivors in the old generation to have a chance to seek justice for their family and themselves, and they feel there is some sort of justice. They have learned about the legal proceedings, how to apply, what is the role of civil parties, and so on. But most important is they have learned how to find resources that are available for them out there if they have a problem, and how to find a lawyer—okay, I can contact this person or go to this place, or know these people. Also, I think that the civil parties can learn from the past, form their own networks, and support each other well. The civil party process has opened up history for the general population and increased access for the general public to the court.”³⁴⁵ This NGO worker had similarly positive observations: “I think the greatest impact of the ECCC is for the civil parties, as it has allowed the people to join the ECCC process where they had their own rights, claims, and legal representatives. Now they can understand the process, and when they do, this helps them so they don’t feel disappointed when something happens that doesn’t meet their expectations in this legal process. They have learned about the role of lawyers, defenders, etc., and also have other NGO workers who consult with them a lot, such as TPO’s testimonial therapy and other NGO work—this all contributes to the impact of the ECCC.”³⁴⁶ Several interviewees spoke about the presence of the ECCC as having a role in empowering civil parties, such as another NGO worker, who said: “There are certain individuals who have grown through that experience as they understand the process, and there may be room to use that more, to have a different voice vis-à-vis the commune chiefs, or even the courts. When people are called to appear, they now know something about fair trial rights, for example.”³⁴⁷

Several interviewees mentioned that civil parties are already able to access other legal avenues for redress of crimes in today’s society: “Mobilization of victims due to the high visibility of civil party participation helped people to identify legal avenues for redress of crimes against them or their families. Certainly for Cases 003/004, there

has been a good response for the call for civil parties, though the impact of all of this is difficult to quantify.”³⁴⁸ This civil party explained how he was now also able to face domestic courts: “No, I have never been to a local court, but now I have listened to them, know them, and understand them. I am now brave enough to go everywhere, because of the ECCC. In my whole life, it is only the KR leaders who took me to the jail, even though I didn’t make any mistake.... I have learned a lot about how not to be afraid to face the judge when I have done nothing wrong.”³⁴⁹

While civil parties may have benefited from the ECCC more than any other sector of Cambodian society, several problems with the civil party process were reported, including lawyers having too many clients, and civil parties having a low level of knowledge about the judicial process. This ECCC international staff person observed: “The civil party process has had a significant impact for civil parties, though some positive and some negative. There has been a lot of variance across the groups, so it really depends on how they got into the process, and who is representing them—not only from a legal perspective, but also from the perspective of the intermediary organizations. Some have been more active and maintained relations better than others.”³⁵⁰ Another expatriate NGO worker felt that civil parties don’t always have necessary information about what the case is about, stating that “one woman said, ‘what about the one who killed my brother, he is well-off and has a car, and what about the one who took all my jewelry?’.... What I’ve seen from the civil parties is a big lack of understanding about what the court can do for them, and quite a high level of frustration.”³⁵¹

Although the civil party system is often held up as a model for other courts, as it significantly increased victim participation in the ECCC, an issue being debated in civil society is that there are many other victim-survivors who have not been able to become civil parties for a variety of reasons, including lack of access to the complaint process, barriers to filling out complaint forms, and lack of application to specific details of the ECCC indictment. Yet they too have suffered. A journalist noted: “About the impact of the ECCC, the answer is positive and negative. We can say yes because *some* victims have been able to participate in this process, but no, because the majority of victims are not participating. There are millions of victims, but only a few thousand made complaints to the ECCC.”³⁵²

Among experts in transitional justice, it is widely assumed that reparations are important to heal and reconstruct society.³⁵³ Through the ECCC, civil parties are eligible for collective and moral reparations only. For Case 001, reparations included listing civil party names in the judgment and publishing Duch’s apologies. For Case 002/01, the ECCC’s lead co-lawyer’s section and the VSS created 13 reparations projects based upon surveys and consultations with civil parties and others. Of these, 12 received funding.³⁵⁴ The civil parties interviewed knew more about reparations than other interviewees. This civil party interviewee noted: “There are collective and moral reparations, but not

individual. I am in the process of planning a stupa and plan to write the names of all the people [i.e., on the walls of the structure] who died here. Also there are [areas] in various provinces where many people were killed, so that during New Year's and Pchum Ben ceremonies people can go pray... When the court gives that money, we will be very happy."³⁵⁵

The lack of individual reparations was a disappointment for some. One civil party explained: "I have presented my civil party complaint, and I joined a regional workshop organized by ADHOC, which discussed the topics of reparations—the objectives, how the survivors get them. If I talk about the reparations, nothing can replace what we lost, including our parents and children, but they still have great value.... But the civil parties are very disappointed in the ECCC because they did not provide individual reparations."³⁵⁶

The long-term impact of the court's reparations and the full execution of the court's orders will not be known for years, or perhaps decades.

I. Perceived Negative Impacts

Only a handful of ordinary Cambodians we interviewed disparaged the ECCC as mostly negative—or potentially negative—in terms of its impact on individuals, society, and institutions. The sections above on political context, justice, and rule of law cover most of the issues these interviewees referenced, including the negative effects of corruption, perceptions of government interference, long trial process and delays reducing trust in the ECCC and the national courts, lack of transparency and information, mistrust about who was behind the KR leaders, and lack of understanding of the legal process leading to unrealistic expectations (for example, expectations of confessions and apologies).

Interviewees with a negative view of the court typically felt that if the court did not finish before the accused passed away, then the final result would be negative.³⁵⁷ Some had harbored high expectations for the court that it has not met. An ECCC staff member summed it up this way: "One negative impact is that the ECCC has not been able to meet the expectations that have been much higher than what we have managed to deliver, in terms of the time factor, as we had expected would go faster. Also, the problem is that now that we have one defendant found mentally unfit, and one deceased, this means that some expectations have not been met. Also many victims had higher expectations about what it meant to be a civil party to the proceedings. Because of these reasons, I think some people may be only partly satisfied with the court.... [T]here have also been negative effects on some civil parties, due to disappointment or anger with the process but especially when applicants have been denied."³⁵⁸ Nonetheless, most reports of negative impact of the ECCC to date deemed the impact as negligible.

IV. Lessons from the ECCC for Future Hybrid Tribunals

It is essential to avoid failed accountability attempts in situations where atrocity crimes and impunity have occurred. Accountability efforts that fail to meet international standards, particularly for independence, and fail to meet the expectations of the population for justice, further victimize already traumatized populations and entrench impunity. Unwillingness to heed fundamental lessons from prior and existing hybrid tribunals is not excusable.

Discussions of the value of establishing hybrid tribunals to address impunity for mass atrocities and violations of international criminal law are underway in a variety of places, including Sri Lanka and the Central African Republic. The design of these tribunals must be guided by the unique circumstances of the conflicts that gave rise to their need and to the political and legal situations in which they will operate. But it is also important that future courts incorporate important lessons learned by other hybrid tribunals that have struggled to succeed in addressing patterns of impunity.

The ECCC is not a model for other hybrid tribunals to replicate, yet it offers valuable lessons. Both because of and in spite of its problems, those involved in developing hybrid tribunals elsewhere can benefit from the experience of the ECCC.

First, there are certain pre-conditions that should be met if a hybrid court is to have a chance at success. These include:

- Security sector reform and vetting following conflict. This is a minimal measure necessary for a court to be able to protect officials and witnesses.
- Incorporation into domestic law of an adequate legal framework to try crimes of international complexity.

- Acceptable legislation eliminating amnesty and immunity from prosecution applicable to persons on all sides of the conflict.

Although the ECCC was shaped by a variety of historical and contextual factors, broad lessons may be distilled from its experience to inform possible future hybrid tribunals:

Domestic political will is essential. A sustained domestic political commitment to holding fair trials that are marked by judicial independence and compliance with international standards is a threshold criterion for a successful hybrid tribunal.

Secure funding. Securing commitments for adequate long-term funding is necessary for a stable and independent court. Reliance on voluntary funding from international donors that must be secured on a yearly basis is a grossly inefficient and dangerous funding strategy.

The UN must commit to protecting international standards. A successful hybrid tribunal requires the explicit commitment of the United Nations (and key donor/advocating States) to upholding international fair trial standards, including judicial independence. The UN and donor states must also commit to taking effective remedial action to correct any failings in this regard.

Prioritize the selection and training of judges and court staff. A robust selection process for judges and senior staff must be instituted to ensure the capacity to efficiently perform the court's work, to advance freedom from political interference, and to avoid the participation of persons involved in past human rights abuses. Ongoing training is also essential to both the quality of a hybrid court's work and the goal of building the capacity of domestic participants.

Fund competent defense counsel. Securing and funding international defense counsel for accused persons is essential to maintaining international standards in a flawed or under-developed domestic system.

Build domestic capacity. Building needed domestic legal capacity is viewed as a goal and an advantage of hybrid tribunals. The goal of domestic capacity-building should be worked into the design of the court, including dedicated funding and clear lines of responsibility at high levels within the court.

Articulate a prosecution strategy. In circumstances where domestic trust of the judicial system is limited, it is critical that the prosecutor develop and articulate a prosecution strategy that is objective and evenhanded so as to minimize any actual or appearance of political manipulation or motivation in choices about who is targeted for prosecution.

Ensure security, including witness and victim protection. Measures for the security of court officials, witnesses, and victims must be prioritized and based on adequate statutory protections. Expertly-trained security professionals and a well-funded security program are necessary to ensure staff, witnesses and victims feel secure participating in the investigation and trial processes.

Consider efficiency. Acknowledging that prosecuting atrocity crimes consistent with international standards is inherently complex, upfront efforts to streamline the process from investigation and prosecution strategy to trial and appeal procedures are essential to ensure maximum efficiency. The court must not cost so much and last so long that it strains the patience of the population it seeks to serve and undermines its own credibility.

Commit to outreach and civil society involvement. Active outreach to the affected population is essential to ensuring a hybrid tribunal's success. Further, it is clear that significant civil society participation is necessary for effective outreach. If a court is to have impact with the public, it must make significant institutional commitments, including dedication of funding and staff, to outreach.

Clarify reparations. Tying reparations directly to criminal cases is problematic in mass crimes because of the large number of persons affected by the violence and the difficulty of connecting reparations claims directly to the acts of an accused person. In addition, the accused are unlikely to have assets sufficient to fund meaningful reparations. A discrete reparation system, independent of criminal justice proceedings, can be far more efficient and effective in serving the interests of victims of international crimes

Plan for victim participation. As intended beneficiaries of the court, victims should have the opportunity to be well informed about the process and to participate at some level in telling their stories. But managing expectations and appropriately delineating the process for victims to participate is necessary to ensure efficiency.

Place the tribunal in context. A hybrid tribunal must be part of a broader transitional justice program. A court with significant international participation will likely have jurisdiction to try only a relatively small number of persons with leadership responsibility for international crimes. The criminal trials must focus primarily on the guilt of the accused rather than the needs of victims. Such a court cannot meet the many other important transitional justice needs of the population. This limitation should be acknowledged and the tribunal should be established alongside other transitional justice mechanisms, including systems for reparations, vetting of military and security services, reconciliation dialogues

and activities, psychological services, and community opportunities for discussion of history and truth-telling.

Consult with victims and civil society. A key goal of a hybrid tribunal is to build public confidence in judicial accountability and public institutions, particularly for victims and affected populations. Active consultation and ongoing communication with affected populations and civil society organizations about their needs and expectations from the court is necessary if this goal is to be met.

V. Conclusions

The language an entity such as the UN uses when it designs a court like the ECCC to describe justice mechanisms and their goals is inspirational and aspirational. It can create expectations that even the most fertile of circumstances could not produce. Cambodia had far from the most fertile circumstances available. It lacks a fair and independent legal system, several decades had passed since the fall of the KR, and the court was structured in a flawed way. That the ECCC failed to wholly achieve its lofty goals is unsurprising. While recognizing the significant positive impact the court has had, it is critical to acknowledge and understand the court's failures as well as its achievements, in the hopes of adjusting the remaining work of the court to meet the needs of Cambodians and justice as fully as possible.

The ECCC's successes include:

- *Accountability*: Holding a number of accused responsible for Khmer Rouge atrocities in public and generally fair trials.
- *Access to Justice for Victims*: Providing victims of Khmer Rouge atrocities with unprecedented access to the proceedings through civil party participation.
- *Legal Capacity Building*: Building the legal capacity of a large number of Cambodian staff through the opportunity to work at the court and to work alongside international professionals with far greater experience. While this capacity has the potential to positively affect the domestic system in the future, it will likely do so only if and when there is a change in political will in Cambodia regarding rule of law reform and an independent judiciary.

- *Modeling Fair Trial Standards and Best Practices:* The court was successful in modeling many, but not all, fair trial standards. Positive examples include the right of an accused to a lawyer, written and reasoned decisions, and transparency. The court modeled many practices that could be useful to domestic courts, such as court management procedures and application of the Cambodia Code of Criminal Procedure.
- *Interest and Understanding Among Cambodians about Khmer Rouge History and Certain Fair Trial Rights:* The response of Cambodians to the court is generally positive, and many report an increased understanding of Khmer Rouge history, increased willingness to discuss the past within their communities and families, and increased appreciation of some basic rights—such as the right to counsel.
- A majority of Cambodians sees the court as positively contributing, finally, to a sense of justice about the Khmer Rouge atrocities; they believe it has a positive impact on their society or their personal healing.

Positive impacts outside the stated goals of the court include:

- Strengthening civil society organizations that provide significant assistance to victims and civil parties, monitor the operations of courts, provide outreach and community discussions about the court and justice, and advocate for improvement in the courts operations.
- Spurring the inclusion of a section on Khmer Rouge history in the core curriculum of the public education system.
- Improved ability and willingness of Cambodians to publicly discuss the Khmer Rouge crimes and period. This change advances Cambodia on the road to social recovery.

The flaws and shortcomings of the court have been numerous. The most serious flaw that had ripple effects on all aspects of the court's work was the lack of independence of the Cambodian judges and officials from political influence. The inability of the UN and the international components of the court to effectively stall such interference is a closely related problem. Because of the specter of political interference, the court did not meet international fair trial standards in all respects, most prominently in not providing independent and impartial judicial decision making. The current government of Cambodia, who insisted on political control of aspects of the court, the Cambodian judicial officials who submitted to political pressure, the structure of the court that allowed interference, and the UN and international officials who failed to effectively challenge such interference all share the blame.

As a result of the political interference in the court, it has had, and is likely to continue to have, limited success in achieving the following goals:

- Promoting an end to impunity in Cambodia for those in power who commit serious crimes.
- Providing full accountability for the serious crimes committed between 1975 and 1979. The small number of people that the court has and likely will try to have has limited the court's record in establishing accountability for serious crimes, as has the fact many senior perpetrators were not brought to trial.
- Advancing the development of rule of law reform in Cambodia. The example of political interference combined with the lack of political will for reform limit the constructive impact of the capacity building and positive modeling of the ECCC.

The more Cambodians know about and follow the court's proceedings, the more positive they feel about its impact on themselves and on their society. The Cambodian people should be the most important recipients of any justice process—and to date, the ECCC generally, and particularly with respect to Case 002, is failing to provide adequate outreach to reach and educate them, and to deal with their questions and concerns. This is an area well within the control of the court to address if it demands and receives adequate resources.

The court and the international community could take the following actions to enhance the positive impact of the court during the remainder of the proceedings:

- Engagement at all levels of the court, the UN, and the donor community in honest discussion and assessment of the accomplishments and flaws of the court, including the problem of political interference and its impact on the parties and the proceedings.
- Fund and carry out more extensive and effective outreach to all parts of Cambodia.
- Televisе all remaining proceedings on domestic channels.
- Fund and carry out a more proactive legacy programming involving ECCC staff and national legal system professionals and students.
- Provide financial support for NGOs engaging in work to support the court, including legal representation of civil parties, outreach, psychosocial support, and education.

Endnotes

1. See the Justice Initiative's ECCC monitoring reports, position papers, and press releases at: <http://www.opensocietyfoundations.org/search?key=Cambodia>.

2. The methodology has clear limitations. The choice of questions and interview sources reflect the interests and connections that the Justice Initiative has developed during its ten years monitoring the court. The report expresses the perspective of an organization with a history with the court that people within the Cambodian government, the UN, and the court itself have regarded as overly critical. Because the Justice Initiative has regarded advocacy for improvement and compliance with international standards at the ECCC as a key element of its monitoring function, critical analysis of court actions has been an inherent part of our oversight work. While we strive for objectivity and fairness in our analysis, we have often expressed views that find fault with various aspects of the court's operation. Likewise, the interview methodology used necessarily depends on seeking actors within and outside of the ECCC who are both interested and willing to discuss facts and opinions about the court frankly. We endeavored to speak with a cross section of persons concerned about the impact of the court, but are necessarily limited to our wide, but certainly not complete, circle of contacts developed over years of working in Cambodia. None of our research purports to be quantitative in nature. In Chapters I and II, we concentrated our interviews with Cambodian legal professionals on persons with some relationship to the court, such as current or past staff, or those with a particular interest in legal reform in Cambodia. We thought this group would likely have the most interest and information about effects or potential effects of the court on the national legal system. These limitations may result in the absence of views of a segment of court actors and Cambodian people. We hope that these limitations serve not to diminish the findings of the report, but rather to suggest the need for further and more extensive research into the impact of the ECCC in Cambodia.

3. OHCHR, "Rule-of-Law Tools for Post-Conflict States, Maximizing the Legacy of Hybrid Courts," (New York and Geneva: United Nations, 2008), 4–5, <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> (hereinafter, *OHCHR Tools for Hybrid Courts*).

4. “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,” June 6, 2003, <http://203.176.141.125/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecution> (hereinafter, “ECCC Agreement”).

5. Cambodian Deputy Prime Minister Sok An, “ECCC Introduction to the Khmer Rouge Trials,” ECCC Publication, 5th edition, preface, 2012. See also, Message from Ban Ki-moon, United Nations Secretary-General in the same preface section: “By striving to end impunity for the atrocities of the Khmer Rouge Regime, they are helping to strengthen the rule of law and judicial capacity in Cambodia while advancing the cause of international criminal justice. Most importantly, I hope the Extraordinary Chambers are enabling the Cambodian people, who have been waiting for justice for so long, to bring a sense of closure to the darkest chapter in their history.”

6. ECCC Agreement and “Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea,” http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27-Oct_2004_Eng.pdf (hereinafter, ECCC Law).

7. The Cambodian government and the UN emphasize the importance of an international presence in the court to protect international fair trial standards. See Deputy Prime Minister Sok An’s statement in the ECCC booklet “Introduction to the Khmer Rouge Trials,” 5th edition, 2012: “Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice.”

8. See Articles 4, 5, and 6 of ECCC Law, and Article 9 of the ECCC Agreement.

9. Article 3 of ECCC Law gives the ECCC jurisdiction over certain crimes under the 1956 Penal Code (homicide, torture, and religious persecution).

10. See, for instance, discussion below on decisions to move forward with the investigation of suspects from Cases 003 and 004.

11. See Articles 5, 6, and 7 of the ECCC Agreement.

12. “Internal Rules Concerning the Organization and Procedure of the Extraordinary Chambers,” as amended January 2015, Rule 104 (hereinafter, *Internal Rules*).

13. Internal Rules, Rule 73.

14. Article 28 of the ECCC Agreement states: “Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.”

15. Reportedly, the Cambodian judges were acting on the request of the Bar Association of the Kingdom of Cambodia, which the government tightly controls. See U.S. Embassy Cable, “Cambodia’s ECCC Stumbles and Stalls,” Cable 06PHNOMPENH2095_a, November 28, 2006, http://www.wikileaks.org/plusd/cables/06PHNOMPENH2095_a.html.

16. See ECCC Agreement, Article 4: “I.a. A decision of the Trial Chamber shall require the affirmative vote of at least four judges; b. A decision of the Supreme Court Chamber shall require the affirmative vote of at least five judges.”

17. See *Report of Group of Experts*, paras. 138 and 158; and David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia,” 2008, http://www.cambodiatribunal.org/assets/pdf/court-filings/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf (hereinafter, *Scheffer Negotiation Summary*). From p. 14: “The primary negotiating objective of the supermajority vote was to ensure that no vote could be taken solely by the Cambodian judges and no vote could be taken solely by the international judges. With respect to due process rights, no defendant will be convicted without the vote of at least one international judge. . . . The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one Co-Investigating Judge or one Co-Prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of influence.”

18. In no major published decision by the court has there been a split or difference of opinion among the Cambodian judges. Alternatively, there have been several disagreements on legal issues between the internationals of the court. See, for instance, “Trial Chamber Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts, and Witnesses Testifying on Character,” October 9, 2009, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E72_3_EN.pdf.

19. This happened surprisingly few times in the life of the court, as the judges clearly strived to arrive at positions that could draw a unanimous vote. A split resulting in a “non-decision” did happen regularly, however, on issues involving implications of political interference, or where the government had expressed an opinion about how the issue should be resolved. See Pre-Trial Chamber, “Second Decision on Nuon Chea’s and Ieng Sary’s Appeal against the Office of Co-Investigating Judges’ (OCIJ) Order on Request to Summons Witnesses,” September 9, 2010, http://203.176.141.125/sites/default/files/documents/courtdoc/d314_1_12_redacted_en.pdf (hereinafter, *PTC Split Decision on Summoned Witnesses*); and Trial Chamber, 13(5), “Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01,” August 7, 2014, <http://www.eccc.gov.kh/en/documents/court/second-decision-nuon-chea39s-and-ieng-sary39s-appeal-against-ocij-order-request-summ> (hereinafter, *Case 002/02 Final Decision on Witnesses*). See also, Pre-Trial Chamber, “Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71: Public Redacted Version,” August 18, 2009, (hereinafter *PTC Split Decision on Co-Prosecutors Disagreement*). Although the Pre-Trial Chamber’s 42-page ruling allowed the additional submissions, which became Cases 003 and 004, to go forward (by virtue of the default provisions of the *Agreement* regarding the absence of a supermajority vote), it did not address any issues of real public concern regarding prosecutorial independence underlying the disagreement. For further analysis of the case, see: Justice Initiative Report, “Political Interference at the Extraordinary Chambers in the Courts of Cambodia,” July 2010, <http://www.opensocietyfoundations.org/sites/default/files/political-interference-courts-cambodia-20100706.pdf>.

20. See *Scheffer Negotiation Summary* p. 14: “The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one co-investigating judge or one co-prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of

influence.” See also, Agreement Article 7(4): “If there is no majority (among the Pre-Trial Chamber Judges) as required for a decision, the investigation or prosecution shall proceed.” The *Internal Rules* implementing this provision are ambiguously drafted. See Rules 71 and 72.

21. *Internal Rules*, Rules 13(5), 14(7), 71(c), 72(d), 77(13), and (new) Articles 20 and 23 of ECCC *Law*. (“If there is no majority as required for a decision, the prosecution [or investigation] shall proceed.”)

22. Pre-Trial Chamber, “Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71: Public Redacted Version,” August 18, 2009 (hereinafter, *PTC Split Decision on Co-Prosecutors Disagreement*).

23. See Justice Initiative Report, “Political Interference at the Extraordinary Chambers in the Courts of Cambodia,” July 2010, <http://www.opensocietyfoundations.org/reports/political-interference-extraordinary-chambers-courts-cambodia>.

24. See *PTC Split Decision on Summoned Witnesses*.

25. For a compelling description of Duch and the trial, see Thierry Cruvellier, *The Master of Confessions, The Making of a Khmer Rouge Torturer* (New York: Harper Collins, 2014), originally published in French as *Le Maître Des Aveux* (Paris: Editions Gallimard/Versilo: 2011).

26. See Duch Trial Chamber Transcripts, November 26–27, 2009, where, during closing statements, Duch and his Cambodian defense lawyer, Kar Savuth, reversed course on the trial strategy of showing remorse and asking for lenience, and argued that Duch should be acquitted of all charges. Duch’s international defense counsel, Francois Roux, was obviously dismayed at the change in course and stymied as to how to respond to the sudden about turn. Transcripts are available on the ECCC website at: <http://www.eccc.gov.kh>

27. See “Trial Chamber Decision on Request for Release, Case File No. 001/18-07-2007,” June 15, 2009; and “Case 001 Trial Chamber Judgment,” July 26, 2010, paras. 623–627.

28. Press Release, “Duch Verdict Marks Milestone for Khmer Rouge Tribunal,” July 26, 2010, <http://www.opensocietyfoundations.org/press-releases/duch-verdict-marks-milestone-khmer-rouge-tribunal>, stating that the verdict “represents a significant step toward accountability in Cambodia and a major achievement in international justice” and that “the completion of the court’s first trial—carried out in accordance with international standards—is a tremendous accomplishment.”

29. For literature exploring the views of Cambodians who directly participated in Case 001 as civil parties and of the general Cambodian public about the Duch trial and the ECCC’s proceedings in general, see: On civil party participation in Case 001, Phuong Pham, Patrick Vinck, Mychelle Balthazard, Judith Strasser, and Chariya Om, “Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia,” *Journal of Human Rights Practice*, 3, no. 3 (2011), 264–287 (hereinafter, *Phuong, Survey re Victim Participation in Case 001*); and on general Cambodian population views on Case 001 and the ECCC, Phuong Pham, Patrick Vinck, Mychelle Balthazard, and Sokhom Hean, *After the First Trial: A Population Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley, CA: Human Rights Center, University of California Berkeley, 2011) (hereinafter, *Berkeley 2011 Population Base Study*).

30. The Cambodian civil law system has no provision for guilty pleas in lieu of a trial.

31. For a fuller analysis of the Duch Appeal Judgment, see Justice Initiative Report, “Recent Developments of the Extraordinary Chambers,” February 2012, pp. 6–14, <http://www.opensociety->

foundations.org/sites/default/files/cambodia-eccc-20120223.pdf (hereinafter, *Justice Initiative February 2012 Update Report*). On the issue of the violation of Duch's rights, four Cambodian judges and international Judge Moto Noguchi (Japan) acknowledged the violation of Duch's fair trial rights but found that, as the violation had not been at the hands of the ECCC, it was not required to remedy the violation. Two international judges (Judge Agnieszka Klonowiecka-Milart, Poland, and Judge Chandra Nihal Jayasinghe, Sri Lanka) dissented on this point, their reasoning resembling that of the Trial Chamber.

32. Between August 15–19, 1979, Khmer Rouge leader Pol Pot and foreign minister, Ieng Sary (both now deceased), were tried *in absentia* by a Vietnamese-backed court through a process widely described as a show trial. See “Judgment of the People’s Revolutionary Court,” UN Doc. A/34/491, August 19, 1979; and Ek Madra, “Khmer Rouge Leader Makes Double Jeopardy Defense,” Reuters, July 3, 2008, <http://www.reuters.com/article/2008/07/03/uk-cambodia-rouge-idUKBKK25945020080703>.

33. It is worth noting that although many Cambodians, as well as international commentators, commonly refer to the Khmer Rouge atrocities against the Cambodian people generally as a “genocide,” the crimes do not necessarily fit the legal definition of genocide under the Genocide Convention of 1948 because the mass killings were largely based on political beliefs. See United Nations, “Convention on the Prevention and Punishment of the Crime of Genocide,” 1948, <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>. The charges in Case 002 for genocide are limited to crimes committed on racial, religious, or ethnic grounds against Cham Muslims and Vietnamese. For a discussion on how Cambodians may react to this distinction, see Stephanie Giry, “The Genocide that Wasn’t,” *New York Review of Books* (New York, NY), September 2014.

34. ECCC, “Closing Order for Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith,” September 15, 2010, <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf> (hereinafter, *Case 002 Closing Order*). Note that the accused were also charged under this Closing Order with an array of crimes under Cambodian domestic law; however, through a series of preliminary objections at the beginning of the trial, these crimes were struck from the indictment.

35. Ieng Thirith was found to be suffering from a dementing condition, most likely Alzheimer’s disease. See *Update Report*, pp. 16–18, and “Decision on Ieng Thirith Fitness to Stand Trial,” November 17, 2011, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_EN.PDF.

36. See Trial Chamber, “Decision on Accused Ieng Sary’s Fitness to Stand Trial,” November 26, 2012, <http://www.eccc.gov.kh/en/document/court/decision-accused-ieng-sary%E2%80%99s-fitness-stand-trial>.

37. Trial Chamber, “Severance Order Pursuant to Rule 89ter,” September 22, 2011, <http://www.eccc.gov.kh/en/document/court/severance-order-pursuant-internal-rule-89ter>.

38. Judgment Case 002/01, para. 174.

39. *Ibid.*, paras. 877 and 996.

40. Trial Chamber, “Decision on Additional Severance of Case 002 and Scope of Case 002/02,” April 4, 2014, <http://www.eccc.gov.kh/en/document/court/decision-additional-severance-case-00202-and-scope-case-00202>.

41. See, for instance, comments of Cambodians who viewed judgment announcement as part of the DC-Cam project to hold community meetings around the announcement, “Building Democracy in Cambodia Through Legal Education,” August 7, 2014, http://d.dccam.org/Projects/Living_Doc/pdf/Villagers_React_to_Verdict_in_Case_002-01.pdf.

42. See, for instance, Nuon Chea’s Closing Submissions in Case 002/01, September 26, 2013, para. 11, http://www.cambodiatribunal.org/wp-content/uploads/2014/09/Filing_NuonChea_20140902_RequestToConsiderEvidenceAppeal.pdf (hereinafter, *Nuon Chea’s Closing Submission*).

43. Nuon Chea Notice of Appeal against Judgment in Case 002/01, September 29, 2014, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-09-29%2016:58/E313_1_1_EN.PDF. Khieu Samphan’s Notice of Appeal is not available on the ECCC website.

44. Co-Prosecutors Notice of Appeal of a Decision in Case 002/01, September 29, 2014, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-09-29%2016:52/E313_3_1_EN.PDF.

45. The Trial Chamber Judgment has received harsh criticism of its organization, reasoning and evaluation of evidence on some of the same grounds by legal experts David Cohen Melanie Hyde and Penelope Van Tuyl. David Cohen, Melanie Hyde, Penelope Van Tuyl, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/02)*, East-West Press, Honolulu, HI, 2015, <http://www.eastwestcenter.org/system/tdf/private/cohen-wellreasoned2015.pdf?file=1&type=node&id=35372>. It remains to be seen if the Appeals Chamber agrees with this analysis.

46. Originally, there were five suspects in the two cases. The *Cambodia Daily* reported that one suspect died in 2013. See Lauren Crothers, Phorn Bopha, “War Crimes Suspect Sou Met Dead,” *Cambodia Daily*, June 27, 2013.

47. See Justice Initiative Report, “Salvaging Judicial Independence: The Need for a Principled Completion Plan,” November 2010, <http://www.opensocietyfoundations.org/sites/default/files/cambodia-khmer-rouge-20101110.pdf>.

48. See for instance Stephanie Giry, *Necessary Scapegoats? The Making of the Khmer Rouge Tribunal*, *New York Review of Books*, July 23, 2012.

49. See *PTC Split Decision on Co-Prosecutors Disagreement*.

50. Justice Initiative Report, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update,” <http://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20110614.pdf>.

51. See Statement of International Co-Investigating Judge Blunk, “Press Release by the International Co-Investigating Judge,” October 10, 2011.

52. The government of Cambodia refused to finalize the appointment of Kasper-Ansermet to the court, likely in part because he had referenced and linked documents critical of the government involvement in Cases 003 and 004 on a Twitter account. See Julia Wallace, “A Tweeting Judge in a Twisted Case,” December 19, 2012, <https://www.justicetribune.com/articles/tweeting-judge-twisted-case>.

53. ECCC, Office of the Co-Investigating Judges, “Order on Resuming the Judicial Investigation,” December 2, 2011, <http://www.eccc.gov.kh/en/document/court/order-resuming-judicial-investigation>.

54. International Reserve Co-Investigating Judge Kasper-Ansermet, “Note to the Parties on the Egregious Dysfunction within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004,” March 21, 2012, [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D38 EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D38%20EN.pdf).

55. While the court was obviously intended to operate with a joint investigation by both co-investigating judges, the *Internal Rules* do allow for one judge to act alone, so long as the other does not file a formal disagreement and obtain a supermajority decision of the Pre-Trial Chamber to stop the action. See *Internal Rules*, Rules 71 and 72. See, also, John D. Ciorciari and Anne Heindel, “Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal,” *Michigan Journal of International Law* 35, no. 2 (2014): 369–442, specifically 440, para. 133, <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1060&context=mjil> (hereinafter, *Ciorciari and Heindel, Lessons from KR Tribunal*). The Cambodian co-investigating judge justifies his unwillingness to participate in the investigation of Cases 003 and 004 with the argument that the accused are not persons “most responsible” for crimes within the jurisdiction of the court. In addition to evidence that political motivation is controlling the decision, several sources familiar with the investigations have strongly challenged this assertion. See Randle C. De Falco, “Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of ‘Most Responsible’ Individuals According to International Criminal Law,” *Genocide Studies and Prevention* 8, Spring 2014, 45–65.

56. See Pre-Trial Chamber, “Considerations of the Pre-Trial Chamber on Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation,” January 15, 2014, <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-appeal-against-decision-denying-his-requests-access>. The international judges of the chamber ruled that the Case 004 suspect was entitled to access to the case file under fair trial principles. The Cambodian judges disagreed on the grounds that the co-investigating judges had not formally charged him. Without a supermajority vote, the decision of the co-investigating judges denying access stood.

57. Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015,” <http://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>. See also *ECCC Agreement*, Article 25.

58. Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia, Report of the Secretary-General, A/70/403, September 30, 2015, <http://www.un.org/ga/acabq/documents/all?type%5B%5D=report&keys=A%2F70%2F403>.

59. This result is not clear because of considerable ambiguity in the rules. For instance, see *Internal Rules*, Rules 71 and 72.

60. See ECCC Completion Plan, Version 4, dated March 31, 2015, released June 1, 2015, [http://www.eccc.gov.kh/sites/default/files/Completion plan Rev 4 Final.pdf](http://www.eccc.gov.kh/sites/default/files/Completion%20plan%20Rev%204%20Final.pdf).

61. *OHCHR Tools for Hybrid Courts*; Jane E. Stromseth, “Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?” *Georgetown Journal of International Law*, 38 (2007): 251, 260, 268–69, 281; and Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals & the Rule of Law, Notes from Bosnia & Herzegovina & Cambodia,” *Just and Durable Peace by Piece (JAD PbP)*, Working Paper Series No. 7, 16 (May 2010).

62. See *Scheffer Negotiation Summary*.

63. Stuart Ford, “How Leadership in International Criminal Law is Shifting from the U.S. to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts,” *Saint Louis Law Journal* (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674063.

64. See Luc Reydam, Jan Wouters, and Cedric Ryngaert, *The Politics of Establishing International Criminal Tribunals* (Oxford, UK: Oxford University Press, 2012); and Laurence R. Helfer and Anne-Marie Slaughter, “Why States Create International Tribunals: A Response to Professors Posner and Yoo,” *California Law Review*, Vol. 93:899 (2005).

65. For background on U.S. involvement in Cambodia prior to 1973, see William Shawcross, *Sideshow, Kissinger, Nixon, and the Destruction of Cambodia* (New York: Simon and Schuster, 1979).

66. “Convictions, Not Justice, in Cambodia,” *Japan Times* (Tokyo, Japan), August 14, 2014.

67. Evidence of this fact is widely available. For evidence of government manipulation of the judicial proceedings for political purposes and general failure to respect basic rights in numerous cases following labor and political demonstrations in early 2014, see Human Rights Watch, “Submission for the Review of Cambodia by the Human Rights Committee in Advance of the Adoption of the List of Issues,” June 6, 2014, <http://www.hrw.org/news/2014/06/06/human-rights-watch-submission-review-cambodia-human-rights-committee>. The Justice Initiative has highlighted impunity in the Cambodian domestic justice sector in several reports. See, for example, Justice Initiative Report, “The Future of Cases 003 and 004 at the Extraordinary Chambers in the Courts of Cambodia,” <http://www.opensocietyfoundations.org/publications/future-cases-003-and-004-extraordinary-chambers-courts-cambodia>, in particular pp. 24–29 (hereinafter, *Justice Initiative October 2012 Report*), detailing recent examples of impunity for the politically connected in the domestic Cambodian justice system; and Justice Initiative Report, “Recent Developments at the Extraordinary Chambers: June 2011,” <http://www.opensocietyfoundations.org/reports/recent-developments-extraordinary-chambers-courts-cambodia-june-2011>. See also, “Cambodia Office of the High Commissioner for Human Rights, “Continuing Patterns of Impunity in Cambodia,” October 2005, http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf; and Human Rights Watch, “Tell Them That I Want to Kill Them: Two Decades of Impunity in Hun Sen’s Cambodia,” November 2012, <http://www.hrw.org/reports/2012/11/13/tell-them-i-want-kill-them>. The Human Rights Watch report highlights nine instances, or groups of instances, of grave impunity in Cambodia between 1992 and 2012 (“extrajudicial killings that have not been genuinely investigated or prosecuted by the authorities”).

68. Some of the most prominent examples include: the prosecution, conviction, and 20-year sentence imposed upon Beehive Radio station owner (and prominent government critic), Mam Sonando; the prosecution, conviction, and imprisonment (and subsequent release following public outcry) of 13 women known as the Boeung Kak Lake 13 whose public profiles related to the land rights protests; the sentencing of two prominent human rights activists—Yorm Bopha and Tim Sakmony—to prison terms on spurious charges; various examples of human rights defenders being hauled before courts as an intimidation tactic; and the 2012 decision to remove political opposition party leader, Sam Rainsy, from the voter registration list ahead of the 2013 national elections (Rainsy was convicted *in absentia* in 2010 on politically motivated charges). Other recent examples include: the dropping of charges against Bavet governor Chhouk Bundith, who was the chief suspect in the shooting of three garment workers who had been protesting outside the factory in which they worked; the botched investigation into the killing of prominent environmental activist, Chut

Wutty; inadequate investigation into the murder of journalist Hang Serei Udom; impunity surrounding the shooting of an unarmed 14-year-old girl by security forces in Broma district, following violent land evictions. See also, Cambodian Center for Human Rights, “Two Years On, Cambodian Rights Group Mourns Environmental Activist, Denounces Culture of Impunity,” April 28, 2014, https://www.ifex.org/cambodia/2014/04/28/two_years_chut_wutty/; and LICADHO, “Year 2013 in Review: Impunity in the Cambodian Courts,” March 20, 2014, <http://www.licadho-cambodia.org/articles/20140320/141/index.html>.

69. Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, and Eric Stover, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley, CA: Human Rights Center, University of California Berkeley, 2009), 28, Figure 4; 29, Table 5, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447662 (hereinafter, Berkeley 2009 Population Survey); Berkeley 2011 Population Base Study. See, also, Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vink, and Phuong Pham, “Victim Participation before the Extraordinary Chambers in the Courts of Cambodia, Baseline Study,” ADHOC, January 2013, <http://giz-cambodia.com/?p=747> (hereinafter, ADHOC Initial Case 002 Civil Party Survey).

70. *Ibid.*, and author’s interviews with legal professionals in 2014.

71. See comments of Cambodians who viewed the judgment announcement as part of DC-Cam project to hold community meetings around the announcement in: “Building Democracy in Cambodia Through Legal Education,” August 7, 2014.

72. See Steve Heder, “Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes, Cambodian Accountability in Comparative Perspective,” in *Awaiting Justice: Essays on Khmer Rouge Accountability*, eds. Jaya Ramji, Jason Abrams, and Beth Van Schaack (Lewiston, NY: Mellen Press, 2005), 377–423 (hereinafter, *Heder, Reassessing the Role of Senior Leaders*).

73. Articles 12 and 13 of the ECCC *Agreement*; and Articles 24 (new), 33 (new), 34 (new), and 35 (new) of ECCC *Law*.

74. See, for example, *Internal Rules*, Rules 79, 81, 84, 85, 87, and 90.

75. See *Scheffer Negotiation Summary*; and Steve Heder, “A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia” August 1, 2011 (hereinafter, *Heder, Personal Jurisdiction Article*), [http://www.cambodia-tribunal.org/sites/default/files/A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the ECCC.pdf](http://www.cambodia-tribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf).

76. See *OHCHR Tools for Hybrid Courts*, p. 17: “A strong approach to issues of fair trial and equality of arms potentially leads to the recognition of the important role of the defence.”

77. While defense counsel have vigorously represented their clients in Case 002, the trial chamber reprimanded two members of the Nuon Chea defense team (Michiel Pestman and Andrew Ianuzzi) on a number of occasions, and referred them to their respective bar councils for disciplinary purposes.

78. But see David Cohen, Melanie Hyde, Penelope Van Tuyl, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/02)*, East-West Press, Honolulu, HI, 2015, <http://www.eastwestcenter.org/system/tdf/private/cohen-well>

reasoned2015.pdf?file=1&type=node&id=35372, for an analysis that the Trial Chamber Judgment in Case 002 falls below international standards. Regardless of the validity of the argument, the decision is far more comprehensive and reasoned than judgments in Cambodian courts.

79. The Justice Initiative notes, however, its repeated statements about decision making in Cases 003/004, which were politically motivated. Many decisions emanating from the OCIJ during this time were devoid of legal merit, such as those concerning the admissibility of civil party applications, concerning the release of public information about crimes under investigation so as to enable victims to join proceedings, concerning the sanctioning of International Co-Prosecutor Andrew Cayley QC for seeking to inform the public about allegations under investigation, concerning the right of suspects in those cases to be assigned counsel, and concerning the issue of whether those suspects properly fall under the personal jurisdiction of the court.

80. See *Nuon Chea's Closing Submission*, para. 16.

81. *ECCC Agreement*, Article 3.3: "The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for their appointment to judicial offices. They shall be independent in the performance of the functions and shall not accept or seek instructions from any government or any other source."

82. *ECCC Law*, Article 10 (new): "Judges of the [ECCC] shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the procedures for appointment of judges, all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law."

83. *ECCC Code of Judicial Ethics*, Article 2.1: "Judges shall be impartial and ensure the appearance of impartiality in the discharge of the Internal Rule judicial functions." Article 7.1: "Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality."

84. *Internal Rules*, Rule 34: "Any party may file an application for disqualification of judge in any case in which the judge has a personal or financial interest or concerning which the judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias." *Internal Rules*, Rule 35: "The ECCC may sanction or refer to the appropriate authorities any person who knowingly and willfully interferes with the administration of justice, including any person who: [...] threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the co-investigating judges or a chamber; [...] threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the co-investigating judges or the chambers; knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC [including incitements and attempts therefore]."

85. See Pre-Trial Chamber, "Public Decision on the Co-Lawyer's Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea," February 4, 2008, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC_disqualification_ney_thol_C11_29_EN_0.pdf; and Trial Chamber, "Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests," January 28, 2011, <http://www>.

eccc.gov.kh/sites/default/files/documents/courtdoc/E5_3_EN.PDF. See also, *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia Case No. IT-95-17/1-A, Judgment (Appeals Chamber), July 21, 2000, paras. 189 and 190: A reasonable observer is “an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold.”

86. See, for example, Supreme Court Chamber (SCC), “Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Sylvia Cartwright,” April 17, 2012, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E137_5_1_3_EN.PDF. Of note in this decision, while the SCC dismissed this appeal on its merits, it expressly stated (at para. 24) that the conduct giving rise to the original motion—namely a Trial Chamber judge participating in meetings with the international co-prosecutor and the deputy director of administration in absence of a representative of the defense—might “create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge.” The SCC went on to recommend that any future meeting(s) include one or more defense representatives in order to “avoid such appearances.” This wording strikingly resembles the legal standard relating to appearance of bias.

87. For a list of these decisions and links to them, the ECCC website has a helpful category of decisions entitled “disqualification of judges,” which is available at <http://www.eccc.gov.kh/en/topic/457>.

88. See, for example, “Decision on Ieng Thirith, Ieng Sary, and Nuon Chea’s Applications for Disqualification of [Trial Chamber Judges],” March 23, 2011, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E55_4_EN.PDF. In this instance, the defense teams argued, for example, that the trial chamber was predisposed to finding that there was an international armed conflict in Cambodia during the Khmer Rouge era (by virtue of its determination of such in Case 001), which is a fact in dispute in Case 002.

89. See Trial Chamber, “Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests,” January 28, 2011, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E5_3_EN.PDF.

90. These allegations were based on a statement from an international investigator who claimed to have heard the words being uttered. See Pre-Trial Chamber, “Decision on Ieng Sary and Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde,” June 15, 2010, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/8_Reducted_EN.pdf; Pre-Trial Chamber, “Decision on Ieng Sary’s Rule 35 Application for Judge Marcel Lemonde’s Disqualification,” April 6, 2010, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/5_EN_o.pdf; Pre-Trial Chamber, “Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde,” December 14, 2009, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/7_EN_o.pdf; and Pre-Trial Chamber, “Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde,” December 9, 2009, <http://www.eccc.gov.kh/en/documents/court/decision-ieng-sarys-application-disqualify-co-investigating-judge-marcel-lemonde>.

91. For a detailed discussion of the court’s early decisions on claims of bias, see Christopher Dearing, “An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia” (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2008), http://www.dccam.org/Abouts/Intern/Chris_Dearing_Judicial_Bias.pdf.

92. See *Justice Initiative October 2012 Report*. The individuals include (now deceased) King Father Norodom Sihanouk, Chairman of the Cambodian People's Party Chea Sim, and Chairman of the National Assembly Heng Samrin, as well as Minister for Foreign Affairs Hor Namhong.

93. See "Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01," August 7, 2014, <http://www.eccc.gov.kh/en/document/court/final-decision-witness-experts-and-civil-parties-be-heard-case-00201> (hereinafter, *Case 002/01 Final Decision on Witnesses*).

94. For further information discussion of the details of these events, see Justice Initiative Report, "Political Interference at the Extraordinary Chambers in the Courts of Cambodia," July 2010, <http://www.opensocietyfoundations.org/reports/political-interference-extraordinary-chambers-courts-cambodia>.

95. See Case 002/01 Final Decision on Witnesses.

96. "Nuon Chea Closing Submission in Case 002/01," September 26, 2013 paras. 40–47, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-12-06_10:23/E295_6_3_Redacted_EN.PDF.

97. See PTC Split Decision Summoned Witnesses.

98. The evidence and allegations have been detailed in many reports of the Justice Initiative and other court watchers. See, for example, Justice Initiative Report, "Recent Development at the Extraordinary Chambers in the Courts of Cambodia," June 2011, <http://www.soros.org/sites/default/files/cambodia-eccc-20110614.pdf> (hereinafter, *Justice Initiative June 2011 Update*); and Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," November 2011, <http://www.soros.org/sites/default/files/eccc-developments-20111114.pdf> (hereinafter, *Justice Initiative November 2011 Update*); Amnesty International, "Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign," October 3, 2011, <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>; and Human Rights Watch, "Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign," October 3, 2011, <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>.

99. See Nuon Chea December 2012 Appeal re Summoned Witnesses, para. 29.

100. *Ibid.*, para. 27.

101. *Ibid.*, footnote 57.

102. Trial Chamber, "Decision on Rule 35 Applications for Summary Action," May 11, 2012, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E176_2_EN.PDF, para. 27: "ECCC judges are presumed to be able to perform their judicial functions with integrity, independence and impartiality by virtue of their oaths of office, training, and experience."

103. See Trial Chamber, "Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation," September 9, 2011, <http://www.eccc.gov.kh/en/document/court/decision-nuon-chea-motions-regarding-fairness-judicial-investigation-e513-e82-e88-and> (hereinafter, *Trial Chamber September 2011 Decision*); and Trial Chamber, "Decision on Application for Immediate Action Pursuant to Rule 35," November 22, 2012, <http://www.eccc.gov.kh/en/document/court/decision-application-immediate-action-pursuant-rule-35-e189> (hereinafter, *Trial Chamber November 2012 Decision*); Supreme Court Chamber, "Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's decision on Fairness of Judicial Investigation," April 27, 2012, <http://www.eccc.gov.kh/en/>

document/court/decision-immediate-appeal-nuon-chea-against-trial-chamber%E2%80%99s-decision-fairness-judicia (hereinafter, *Supreme Court Chamber April 2012 Decision*); and Supreme Court Chamber, “Decision on NUON Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35,” March 25, 2013, <http://www.eccc.gov.kh/en/document/court/decision-nuon-chea%E2%80%99s-%E2%80%9Cimmediate-appeal-against-trial-chamber-decision-application-imm>, (hereinafter, *Supreme Court Chamber March 2013 Decision*).

104. Ibid.

105. See *PTC Split Decision on Co-Prosecutors Disagreement*, where neither the prosecutors nor any of the Pre-Trial Chamber judges mentioned political interference in connection with the disagreement between the co-prosecutors about whether Cases 003 and 004 should go forward for judicial investigation.

106. Major unanimous Trial Chamber decisions finding no reasonable basis to investigate allegations of interference include *Trial Chamber September 2011 Decision* and *Trial Chamber November 2012 Decision*. The Supreme Court Chamber in *Supreme Court Chamber April 2012 Decision* and *Supreme Court Chamber March 2013 Decision*, respectively, upheld them both.

107. See “Order in Response to the Appeals Chamber’s Decision on Nuon Chea and Ieng Sary’s Request to Summons Witnesses,” June 11, 2010, not included on the ECCC public website; and *PTC Split Decision on Summoned Witnesses*, describing the complex procedure and steps that led up to the joint decision of the co-investigating judges to decline any investigation.

108. See *PTC Split Decision on Summoned Witnesses*.

109. See “Trial Chamber Judgment in Case 001 (Duch),” July 26, 2012.

110. Minh Nam, Tan Tu, and An Dien, ‘Vietnam did not invade, but revived Cambodia: Hun Sen’, *Than NienNews/Vietweek*, 5 January 2012 (reproduced in ECCC Media Clippings: 7-9 January 2012, p 8); <http://www.thanhniennews.com/politics/vietnam-did-not-invade-but-revived-cambodia-hun-sen-8741.html>; and Nuon Chea’s Application for Summary Action Against Hun Sen Pursuant to Rule 35, February 22, 2011, <http://www.eccc.gov.kh/en/document/court/application-summary-action-against-hun-sen-pursuant-rule-35>.

111. Trial Chamber, “Decision on Rule 35 Applications for Summary Action,” May 11, 2012, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E176_2_EN.PDF, para. 26. Press reports stated that the prime minister said: “The killer and genocide perpetrator is defending himself in an effort to evade the crime. Everybody knows our country used to have a genocidal regime and now we and the world have opened a trial against them.”

112. See *Internal Rules*, Rule 55(5).

113. See, generally, *Nuon Chea’s Closing Submissions*, para. 12, p. 6.

114. See *Trial Chamber September 2011 Decision*; *Trial Chamber November 2012 Decision*; *Supreme Court Chamber April 2012 Decision*; and *Supreme Court Chamber March 2013 Decision*.

115. See Scheffer Negotiation Summary, p. 17.

116. Under the ECCC’s *Internal Rules* (Rev. 8), Rule, 23bis 1, in order to be granted civil party status, an individual must “demonstrate as a direct consequence of at least one of the crimes alleged against the [suspect or accused] that he or she has in fact suffered physical, material or psychological

injury upon which a claim of collective and moral reparation might be based.” Rule 23 states that the purpose of civil party action before the ECCC is to: “(a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) seek collective and moral reparations.”

117. See, generally, *Internal Rules*, Rule 2.

118. *Internal Rules*, Rule 23.

119. Case 001 Trial Chamber Judgment, para. 665.

120. *Internal Rules*, Rule 23.3.

121. See Cedric Ryngaert, “Victim Participation in the Cambodian Courts,” April 18, 2008, The Hague Justice Portal, www.haguejusticeportal.net/index.php?id=9135; International Federation for Human Rights (FIDH), “Victims’ Rights before the ECCC, A Mixed Record for Civil Parties,” November 2012, <https://www.fidh.org/en/region/asia/cambodia/eccc/Victims-Rights-before-the-ECCC-A-12533> (hereinafter, “Victims’ Rights before the ECCC”); Susanna SaCouto, “Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?” *Michigan Journal of Gender & Law*, 18 (2012): 297–359.

122. See “Victims’ Rights Before the ECCC,” p. 32.

123. Case 001 Civil Party Survey; Nadine Stammel, Sebastian Burchert, Sopheap Taing, Estelle Bockers, and Christine Knaevslrud, “The Survivors’ Voices: Attitudes on the ECCC, the Former Khmer Rouge and Civil Party Participation,” Berlin Center for the Treatment of Torture Victims (bzfo), December 2010, http://psychologybeyondborders.org/wp-content/uploads/2013/08/bzfo_cambodia_report_20101.pdf.

124. ADHOC Case 002 Initial Civil Party Survey.

125. Berkeley 2009 Population Survey.

126. Berkeley 2011 Population Survey.

127. Case 001 Civil Party Survey, p. 286.

128. See ADHOC Case 002 Initial Civil Party Survey, p. ii.

129. See Women’s Caucus for Gender Justice, “Recommendations and Commentary for August 1997 Prep Com on the Establishment of an International Criminal Court,” August 4–15, 1997; and discussion in Susanna SaCouto, “Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?” *Michigan Journal of Gender & Law*, 8 (2012): 297–359.

130. *Ibid.*, p. 40: “At the ECCC some of the victims participating as civil parties in the Duch trial found that they were able to address issues other than those strictly required to convict the accused for the crimes with which he was charged. Particularly significant for some victims was the ability to question Duch directly about, among other things, why he had ordered their loved ones to be tortured or killed. Indeed for some victims, the ability to learn about these details and to communicate their story to the court, irrespective of whether either was necessary for successful prosecution of the accused was quite meaningful. This view was echoed by a civil party lawyer, who noted in his closing that the ECCC had already provided victims with a ‘most valuable reparation’: an acknowledgment of their right to be present and to participate, and of their solidarity.”

131. See ADHOC Case 002 Initial Civil Party Survey, and Case 001 Civil Party Survey.

132. See Co-Prosecutors, “Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations,” December 18, 2009, www.cambodiatribunal.org/assets/pdf/court-filings/d268_2_en.pdf. Unfortunately, because of the severance order in Case 002, these charges were not included in the first phase trial, but are scheduled to be included in the second phase trial.

133. Because most of these submissions are confidential under the rules of the court governing investigations, it is difficult to assess their overall effectiveness.

134. See descriptions of programs and services for civil parties and Khmer Rouge victims and families provided by Cambodian NGOs on their respective websites: Cambodia Human Rights Action Committee, (CHRAC), http://www.chrac.org/eng/index.php?page=khmer_rouge_tribunal (CHRAC is a coalition of Human Rights NGOs who worked together on many ECCC related issues); Cambodia Human Rights and Development Association (ADHOC), <http://www.adhoc-cambodia.org/?cat=142>; Cambodia Defenders Project (CDP), <http://www.cdpcambodia.org/content.php?id=43>; the specific program and website on “Gender-Based Violence during the Khmer Rouge,” <http://gbvkr.org/en/>; Khmer Institute for Democracy (KID), http://kidcambodia.org/index.php?option=com_content&task=view&id=8&Itemid=9; Documentation Center of Cambodia (DC-Cam), <http://www.dccam.org/Projects/index.htm>; The Sleuk Rith Institute, <http://www.cambodiasri.org>; The Cambodia Tribunal Monitor Project (in Association with Center for International Human Rights at Northwestern University School of Law), <http://www.cambodiatribunal.org>; Transcultural Psychosocial Organization Cambodia (TPO), <http://www.tpocambodia.org>; Youth For Peace (YfP), <http://www.yfpcambodia.org>; Center for Social Development (CSD), http://www.csdcambodia.org/about_csd.htm; and Asian International Justice Initiative (AIJI), <http://www.east-westcenter.org/research/asian-international-justice-initiative/current-projects>.

135. *OHCHR Tools for Hybrid Courts*, p. 18.

136. Theresa de Langis, “Final Results for ECCC Baseline Study: Gender Sensitivity in Transitional Justice Processes in Cambodia,” 2012 (hereinafter, *De Langis Gender Baseline Study*), <http://www.civilparties.org/?p=593>

137. CEDAW, “Baseline Violence Against Women Survey.” See also “Violence Against Women: 2009 Follow-Up Survey,” April 2010.

138. Amnesty International, “Breaking the Silence: Sexual Violence in Cambodia,” 2010, <http://www.amnesty.org/en/news-and-updates/report/cambodia-government-protect-victims-sexual-violence-reports-rape-increase>.

139. See Katrina Natale, “I Could Feel My Soul Flying Away From My Body: A Study of Gender-based Violence During Democratic Kampuchea in Battambang and Svay Rieng Provinces,” Cambodia Defender’s Project, November 2011 (report based on 104 respondents). See also, Nakagawa Kasumi, “Gender-based Violence During the Khmer Rouge Regime: Story of Survivors from the Democratic Kampuchea 1975–1979,” March 2008, 2nd ed., <http://gbvkr.org/wp-content/uploads/2013/02/Kasumi-GBV-Study-2007.pdf>.

140. *Ibid.*, Natale.

141. Cambodian Defenders Project (CDP), “Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime,” 2014 (report based on 105 respondents), p. xiv, http://gbvkr.org/wp-content/uploads/2014/05/Sexual-violence_ethnic-minorities_KR-regime_CDP-2014-Lo-Res.pdf.

142. *Ibid.*

143. *De Langis and Studzinsky ECCC Briefing Paper*, p. 1, and references at notes 2, 5, and 6.

144. *ECCC Law*, Art. 5.

145. *Ibid.*

146. See Margot Wallström, “The Forgotten Khmer Rouge Victims,” *Phnom Penh Post* (Phnom Penh, Cambodia), May 29, 2012, at <http://www.phnompenhpost.com/national/forgotten-khmer-rouge-victims>. See, also, Trial Chamber, “Press Release by Trial Chamber Regarding Sexual Violence Crimes,” June 5, 2012, <http://www.eccc.gov.kh/en/articles/press-release-trial-chamber-regarding-sexual-violence-crimes>.

147. *Ibid.*, Wallström.

148. *Ibid.*

149. Robert Petit, “Gender-based Violence Far from Overlooked,” *Phnom Penh Post* (Phnom Penh, Cambodia), July 6, 2012, p. 17, <http://www.phnompenhpost.com/national/gender-based-violence-far-overlooked>; and Andrew Cayley QC, “KRouge’s Female Victims Were Not Forgotten,” *Phnom Penh Post* (Phnom Penh, Cambodia), June 1, 2012, p. 17, <http://www.phnompenhpost.com/national/krouge%E2%80%99s-female-victims-not-forgotten>.

150. See Sin Soworn and Silke Studzinsky, “Tribunal Has Failed Victims of Sex Crimes,” *Phnom Penh Post* (Phnom Penh, Cambodia), June 11, 2012, p. 18, <http://www.phnompenhpost.com/national/tribunal-has-failed-victims-sex-crimes>; Theresa de Langis, “Pragmatism Must Yield to Compassion,” *Phnom Penh Post* (Phnom Penh, Cambodia), June 19, 2012, <http://www.phnompenhpost.com/index.php/2012061956864/National-news/pragmatism-must-yield-to-compassion.html>.

151. ECCC Press Release, “Statement By the International Co-Prosecutor Nicholas Koumjian Regarding Case File 004,” April 24, 2014.

152. See Sin Soworn and Silke Studzinsky, “Tribunal has Failed Victims of Sex Crimes,” *Phnom Penh Post*, June 11, 2012, p. 18, <http://www.phnompenhpost.com/national/tribunal-has-failed-victims-sex-crimes>.

153. *De Langis Gender Baseline Study*, p. 9.

154. *Case 001 Appeal Judgment*, para. 7, <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>.

155. *Ibid.*, para. 85.

156. See, generally, Tamara L. Tompkins, “Prosecuting Rape as a War Crime: Speaking the Unspeakable,” *Notre Dame Law Review* 70, no. 4 (1999); Kelly Askin, “Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward,” in *Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Anne-Marie de Brouwer, Charlotte Ku, Renée Römken, Larissa van den Herik (Cambridge, UK: Intersentia, 2013), 32–49.

157. Pre-Trial Chamber, “Decision on Ieng Sary’s Appeal Against the Public Order,” addressing rape as a crime against humanity, para. 364(1)–(7), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_30_EN.PDF.

158. *Case 002 Closing Order*, paras. 314, 344, 361, and 1426.

159. Katrina Anderson, “Turning Reconciliation on its Head: Responding to Sexual Violence under the Khmer Rouge,” *Seattle Journal for Social Justice* 2, no. 3 (2004); and Theresa de Langis and Silke Studzinsky, “Briefing Paper on the ECCC, the Cambodian Women’s Hearing, and Steps for Addressing Sexual Violence Under the Khmer Rouge Regime,” May 2012, p. 4, <http://gbvkr.org/wp-content/uploads/2013/02/Briefing-Paper-on-VAWECCC-Theresa-de-Langis-Final-ENG.pdf> (hereinafter, *De Langis and Studzinsky Briefing Paper on the ECCC*).

160. Panel Statement for Asia Specific Regional Women’s Hearing on Gender-Based Violence in Conflict, “True Voices of Women under the Khmer Rouge Regime,” <http://gbvkr.org/wp-content/uploads/2012/11/Asia-Pacific-Regional-Womens-Hearing-2012-Panel-Statement.pdf>; Cambodia Defenders Project, “Report on the Proceedings of the 2011 Women’s Hearing on Sexual Violence Under the Khmer Rouge Regime,” May 2012, http://gbvkr.org/wp-content/uploads/2013/01/Report-on-2011-Womens-Hearing_Phnom-Penh.pdf (hereinafter, “Report on the Proceedings of the 2011 Women’s Hearing”); Cambodia Defenders Project, “Asia Pacific Regional Women’s Hearing on Gender-Based Violence in Conflict, Report on the Proceedings,” December 2012, <http://gbvkr.org/wp-content/uploads/2013/06/Women-Hearing-Report-2012-final-designed-EN-small-5.pdf>; and Cambodian Defenders Project, “2013 Women’s Hearing with the Young Generation on Gender-Based Violence during the Khmer Rouge Regime Report on Proceedings,” 2014, <http://gbvkr.org/wp-content/uploads/2014/05/WomenHearingEng.pdf>.

161. *De Langis and Studzinsky ECCC Briefing Paper*, p. 1, and references at notes 2, 5, and 6.

162. Trial Chamber, “Case 002 Severance Order Pursuant to Internal Rule 89ter,” September 22, 2011, para. 2, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF.

163. Sin Soworn and Silke Studzinsky, “Tribunal Still Has an Opportunity to Address Sexual Violence,” *Phnom Penh Post* (Phnom Penh, Cambodia), June 27, 2012, p. 16.

164. De Langis Gender Baseline Study, p. 9.

165. *Ibid.* The study was part of the ECCC Victim Support Section’s project with the United Nation’s Fund to End Violence Against Women on “Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime,” 2012–2015.

166. *Ibid.*

167. See <http://www.cdpcambodia.org/content.php?id=43>.

168. See also Clair Duffy, “ECCC Judicial Appointments: An Opportunity for the UN to Translate its Aspirations into Tangible Outcomes,” *International Justice Monitor*, April 28, 2015, <http://www.ijmonitor.org/2015/04/eccc-judicial-appointments-an-opportunity-for-the-un-to-translate-its-aspirations-into-tangible-outcomes/>.

169. Panel Statement for Women’s Hearing, “True Voices of Women under the Khmer Rouge Regime,” p. 2, <http://gbvkr.org/wp-content/uploads/2012/11/Asia-Pacific-Regional-Womens-Hear->

ing-2012-Panel-Statement.pdf; and Cambodia Defenders Project, “Report on the Proceedings of the 2011 Women’s Hearing.”

170. “Report on the Proceedings of the 2011 Women’s Hearing”; and Cambodian Defenders Project, “2013 Women’s Hearing with the Young Generation on Gender-Based Violence during the Khmer Rouge Regime Report on Proceedings,” 2014, <http://gbvkr.org/wp-content/uploads/2014/05/WomenHearingEng.pdf>.

171. See Cambodian Women’s Oral History Project, “Live Stories of Survival under the Khmer Rouge Regime,” <http://cambodianwomensoralhistory.com/about/>.

172. See, for instance, Cambodian Center for Human Rights, “Briefing Note on Judicial Reform,” February 2013, http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2013-02-18-CCHR%20Briefing%20Note%20-%20Judicial%20Reform_en.pdf.

173. See, for instance, Marcus Cox and Ok Serei Sopheak, “Cambodia Case Study, Evaluation of Australian Law and Justice Assistance, Australian Government, AusAID, Office of Effectiveness,” December 2012.

174. See Sok An, “Statement on the Entry into Force of the Agreement Between Cambodia and the United Nations on the Khmer Rouge Trials on 29 April 2005,” Phnom Penh, May 3, 2005, http://www.eccc.gov.kh/sites/default/files/legal-documents/Statement_on_ENTRY_INTO_FORCE_AGREEMENT_29_April_05-Eng.pdf (hereinafter, “Statement on the Entry into Force of the Agreement”).

175. See, for instance, Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals & the Rule of Law, Notes from Bosnia & Herzegovina & Cambodia,” *Just and Durable Peace by Piece (JAD PbP)*, Working Paper Series No. 7, 16 (May 2010), p. 14; and British Embassy Phnom Penh, “UK Boosts Funding for Justice, Judicial Reform,” October 18, 2013, <https://www.gov.uk/government/world-location-news/uk-boosts-funding-for-justice-judicial-reform>; and UN, “Report of Secretary-General on Khmer Rouge Trials,” LIN Doc A/59/432, § 27, <http://www.unakrt-online.org/sites/default/files/documents/A-59-432.pdf>.

176. See, for instance, Cambodia Human Rights Action Committee, “Khmer Rouge Tribunal Activities,” http://www.chrac.org/eng/index.php?page=khmer_rouge_tribunal.

177. Jane Stromseth, “Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?” *Hague Journal on the Rule of Law*, 1 (2009): 87–97 (hereinafter, *Stromseth, Justice on the Ground*); see p. 88 specifically.

178. See *OHCHR Tools for Hybrid Courts*; Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals & the Rule of Law, Notes from Bosnia & Herzegovina & Cambodia,” *Just and Durable Peace by Piece (JAD PbP)*, Working Paper Series No. 7, 16 (May 2010); and Kathryn A. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton and Company), 2011.

179. Cambodia’s court system is notoriously underfunded, with some gradual but minor changes in funding levels seen in the last ten years. See remarks by H.E. Meng Eang Nay, Ambassador, Deputy Permanent Representative of the Permanent Mission of Cambodia: “the Royal Government of Cambodia’s cash commitment to the ECCC from its national budget tripled from \$0.6 million in 2006 to \$1.8 million in 2013, exceeding the amounts allocated to the Cambodian National

Supreme Court by 257% or to its National Appeal Court by 300%.” This statement appears in the Report of the UN Secretary-General on the Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia at the 22nd Formal Meeting of the 5th Committee on Agenda, item 134: “Proposed Programme Budget biennium 2014–2015,” http://www.un.org/en/ga/fifth/68/Statements/134_Info_Sec_LBD_RevEst_HLPF_Subv_Cambodia_Courts_PBI_Info_telecomm_intl_sec/C5_68_om_ST_2013_12_10_Item134_PPB_2014-15_multi_Cambodia.pdf.

180. See John Coughlan, Sana Ghouse, and Richard Smith, “The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia’s Legal and Judicial System,” *Amsterdam Law Forum* 4, no. 16 (2012): 34: “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 at the ECCC can provide a good model for the Cambodian courts.”

181. Cambodian Center for Human Rights, “Briefing Note on Judicial Reform,” February 2013, p. 2, http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2013-02-18-CCHR%20Briefing%20Note%20-%20Judicial%20Reform_en.pdf.

182. Surya P. Subedi, “Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,” United Nations General Assembly, A/HRC/24/36, August 5, 2013, p. 7.

183. Marcus Cox and Ok Serei Sopheak, “Cambodia Case Study, Evaluation of Australian Law and Justice Assistance,” Australian Government, AusAID, Office of Effectiveness, December 2012. The authors acknowledge some limited signs of progress over the years, which include “an additional building for the Court of Appeal completed and inaugurated in 2012. The building adds two new courtrooms, which allows for more cases to be heard, and upgraded facilities for the court clerks. The number of appeal judges has also increased. Appeal cases are now heard within one or two years, which is a great improvement on the previous situation.... It is expected that the backlog of oldest cases (pending for more than seven years) will be cleared by the end of 2013. Australia provided funding for a new computerized system to register and manage cases. Overall, the court management at the Court of Appeal has improved” (p. 9).

184. See *OHCHR Tools for Hybrid Courts*, p. 7: “Without an explicit mandate on the issue, the interpretation of legacy is, to a large extent, left to the discretion of individual actors. Many will automatically gravitate to an approach which focuses on the efficient disposing of cases. Those individuals have on occasion successfully promoted legacy initiatives, but these were not necessarily systemic, neither did they receive basic political or budgetary support.”

185. See “Statement on the Entry into Force of the Agreement,” Phnom Penh, May 3, 2005, [http://www.cambodia.gov.kh/krt/pdfs/Statement on ENTRY INTO FORCE AGREEMENT 29 April 05-Eng.pdf](http://www.cambodia.gov.kh/krt/pdfs/Statement%20on%20ENTRY%20INTO%20FORCE%20AGREEMENT%2029%20April%2005-Eng.pdf), where Deputy Prime Minister Sok An stated: “We are confident that the formula we have agreed to establish will not only meet our country’s needs for justice in this egregious case, but will also assist the wider process of legal and judicial reform by providing a model court meeting international standards. Furthermore, we are hopeful that the Cambodian model may also serve as an inspiration for other countries in their search for justice.”

186. *Stromseth, Justice on the Ground*, p. 88.

187. ECCC and CHRAC, “Hybrid Perspectives of the Legacies of the ECCC,” Conference Report and Recommendations, September 13–14, 2012, http://www.chrac.org/eng/CHRAC%20Documents/Conference%20Report%20on%20Legacies%20of%20the%20ECCC_English_FINAL.pdf; and CHRAC and BAKC, “Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform,” Workshop Report, March 2013, http://www.kas.de/wf/doc/kas_34774-1522-1-30.pdf?130620053322.

188. See, for instance, Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia,” February 2008, <http://www.opensocietyfoundations.org/publications/recent-developments-extraordinary-chambers-courts-cambodia-2>.

189. For instance, the Office of the Co-Investigating Judges has standard operating protocol for various investigative steps adapted to the ECCC procedural rules and translated into Khmer. Similar protocols that could easily be adapted to the national system exist in many areas of court management, such as archiving, document filing and distribution, and publication of judicial decisions. The ECCC Supreme Court Chamber makes an effort to cross-reference ECCC Internal Rules with Criminal Procedure Code references in its decisions where possible. The witness protection section of the court has developed a database for witness management that tracks, for instance, whether a summons has been served and whether a witness has received copy of relevant documents. The court uses *Casemap* software to track complaints filed by victims and applications for civil party status. Each of these practices could be adapted relatively easily for use in the national court system.

190. See CCHR, “The Use of Pre-Trial Detention in Cambodian Courts,” Briefing Note, July 14, 2013, p. 3, [http://sithi.org/tmp/admin/article/files/CCHR_Pre-Trial Detention Briefing Note \(July 2013\) \(ENG\).pdf](http://sithi.org/tmp/admin/article/files/CCHR_Pre-Trial%20Detention%20Briefing%20Note%20(July%202013)%20(ENG).pdf).

191. See *Duch Trial Chamber Judgment*, paras. 623–629; and *Decision*, paras. 178–182.

192. For analyses, see *Ciorciari and Heindel, Lessons from KR Tribunal*. Regarding the international judges of the Supreme Court Chamber’s dissenting decision arguing against reversal of the Trial Chamber’s ruling on the human rights issues, see *Duch Trial Chamber Judgment*, paras. 323–338.

193. See ECCC/TC, “Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and Other Records Relating to Interrogations of Prisoners,” May 21, 2015, <http://www.eccc.gov.kh/en/document/court/co-prosecutors-submission-regarding-application-torture-convention-s-21-confessions->; and ECCC/TC, “Nuon Chea’s Submissions Regarding the Use of ‘Torture-Tainted Evidence’ in the Case 002/02 Trial,” May 21, 2015, [http://www.eccc.gov.kh/en/document/court/nuon-chea’s-submissions-regarding-use-“torture-tainted-evidence”-case-00202-trial](http://www.eccc.gov.kh/en/document/court/nuon-chea-s-submissions-regarding-use-torture-tainted-evidence-case-00202-trial).

194. *Stromseth, Justice on the Ground*, p. 96.

195. See, for instance, ADHOC press releases on various justice issues, including the ECCC, <http://www.adhoc-cambodia.org/?cat=119>.

196. From March 15–28, 2015, the authors interviewed 28 legal professionals in Phnom Penh, under the promise of anonymity. These focused interviews took place at a point when the first two trials were complete, but before the judgment in Case 002 was announced, and before there was a formal resolution of investigations in Cases 003 and 004. Ten of the interviewees had worked

at the ECCC and then returned to practice in the national system. When the court concludes its work, a much greater influx of professionals with ECCC experience will return to the national system. Over the course of monitoring the ECCC since 2006, the Justice Initiative has informally interviewed many additional legal professionals on the same subjects, and their views also inform this discussion.

197. See Bridget Dunlap, "The Rule of Law without Lawyers: American Legal Reformers and the Cambodian Legal Shortage," April 12, 2014, <http://ssrn.com/abstract=2424255>. Several interviewees mentioned that the presidency of the Bar Association is heavily influenced by the governing party and that the Bar Association has historically been used to discipline lawyers who speak out against problems in the system.

198. Scholars and activists have given considerable notice to the increase in civil activity in Cambodia following the upset in the 2013 elections and consideration as to whether this harkens a sea of change in Cambodians' tolerance for corruption and self-dealing in their government. See, for instance, Theara Khoun, "Cambodia: Politics and a Legacy of Trauma," Middle East Institute, 2014, <http://www.mei.edu/content/cambodia-politics-and-legacy-trauma>.

199. The Lawyer Training Center is the typical route for new lawyers to become members of the bar. The Bar Association of the Kingdom of Cambodia manages it. The Royal School for Judges and Prosecutors is the training ground from which judges and prosecutors enter the judicial system. The government controls the leadership of all three of these institutions.

200. See Justice Initiative, "Recent Developments at the ECCC Report," November 2011, <http://www.opensocietyfoundations.org/reports/recent-developments-extraordinary-chambers-courts-cambodia-november-2011>. A spokesman for Secretary-General Ban Ki Moon, in response to Judge Blunk's resignation, stated that the ECCC must be free from "external interference." He did not, however, call for an investigation of the allegations of political interference and other irregularities in the office of the co-investigating judges. See, also, UN Press Release, "United Nations Rejects 'Media Speculation' that Judges Received Instructions to Dismiss Case before Extraordinary Chambers in the Courts of Cambodia," June 14, 2011. In contrast, the UN issued a statement on January 20, 2012, asserting that the Cambodian government was in "breach" of the *Agreement*, in failing to appoint Judge Kasper-Ansermet as the international investigating judge. Kasper-Ansermet submitted his resignation before it could be determined if this action would have any impact on the government's interference. See UN, "Statement Attributable to the Spokesperson for the Secretary-General on Cambodia," January 20, 2012, <http://www.un.org/sg/statements/?nid=5815>. The international judges of the court took a public stand against corruption with respect to Cambodian staff in early 2009. Judge Silvia Cartwright stated at a plenary session that the international judges of the court "will not allow corruption to interfere with the tribunal's delivery of justice for the people of Cambodia." See Elena Lesley, "Judge Calls for a 'Corruption-Free' Court as Plenary Opens," *Phnom Penh Post* (Phnom Penh, Cambodia), March 2, 2009. See, also, UN, "Statement Attributable to the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia," New York, March 30, 2012, <http://www.un.org/sg/statements/index.asp?nid=5961>; UN News Centre, "UN Voices Concern as Second Judge Resigns from Cambodia Genocide Court," March 19, 2012, <http://www.un.org/apps/news/story.asp?NewsID=41578&Cr=Cambodia&Cr1=>; and World Radio, "UN Concerned Over Khmer Rouge Tribunal Row," March 22, 2012, <http://ki-media.blogspot.com/2012/03/un-concerned-over-khmer-rouge-tribunal.html>.

201. See discussions of the relationship between judicial accountability and independence in Sandra Day O'Connor, "Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence," *Denver University Law Review* 86, no. 1 (2008); International Center for Ethics, Justice, and Public Life; Brandeis University, "Toward the Development of Ethics Guidelines for International Courts," 2003 Brandeis Institute for International Judges, <https://www.brandeis.edu/ethics/pdfs/internationaljustice/ethics/EthicsGuidelines.pdf>; and Ronli Sifris, "Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?" *Chicago-Kent Journal of International and Comparative Law* 8, no. 88 (July 2013), <http://ssrn.com/abstract=2292769>.

202. Some international actors at the ECCC refer to the role of the UN not as a partnership with the Cambodian government, but as a minor technical assistance role, minimizing responsibility for flaws of the court. This view seems to overlook the key role of UN staff at all levels of the court and in financing the court.

203. ECCC *Agreement*, Article 28.

204. See Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," November 2009, http://www.opensocietyfoundations.org/sites/default/files/eccc_20091123.pdf.

205. For more detailed descriptions of the saga of efforts to deal with corruption allegations at the court, see: Ciorciari and Heindel, *Lessons from the KR Tribunal*; Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," May 2009, http://www.cambodiatribunal.org/assets/pdf/reports/osji_monthly_report_may_2009.pdf, and October 2008, http://www.opensocietyfoundations.org/sites/default/files/eccc_20081012.pdf; John Ciorciari, "Justice and Judicial Corruption," 2007, http://www.cambodiatribunal.org/sites/default/files/resources/Ciorciari_October_2007.pdf; and Christopher Dearing, "An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia" (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2008), http://www.dccam.org/About/Intern/Chris_Dearing_Judicial_Bias.pdf.

206. Jinah Roe, "Exit, Voice, and Loyalty at the Khmer Rouge Tribunal: Should the International Community Stay or Go?" *Carnegie Council for Ethics in International Affairs*, 2014, https://www.carnegiecouncil.org/publications/ethics_online/0080/pf_printable.

207. See Ciorciari and Heindel, *Lessons from the KR Tribunal*, p. 173.

208. See *Final Decision on Witnesses*.

209. See *Trial Chamber September 2011 Decision*; and *Trial Chamber November 2012 Decision*.

210. A total of 97 individual interviews and small focus groups were conducted with 122 people in Cambodia. Of those 122 interviewees, 109 were Cambodians, including victim/survivors, accused perpetrators, bystanders, and youth. Some interviewees had participated in a study the Justice Initiative conducted in 2007/8. Of the 122 interviewed, 28 were from civil society and international organizations working with ECCC-related projects, and 13 were non-Cambodians. The majority of the interviews (80) were conducted by the (Khmer-speaking) author of this section of the report, accompanied by a research assistant. A further 17 interviews—mainly of teachers and youth—were conducted by the research assistant. Interviewees' ages ranged from high school youth to octogenarians, with the majority of interviewees in the 40–70 age range. The interviewees held a variety

of occupations and practice different religions. The majority were Buddhist, although there were eight Cham Muslims and one Christian. This qualitative research was done using a semi-structured questionnaire, which asked open-ended questions about the impact of the ECCC. Data was collected in October 2013 (nine interviews) and between December 2013 and January 2014 (88 interviews). Thus, these interviews were conducted prior to the guilty verdict in the Case 002/01 trial. Secondary sources included literature review, meeting reports, and participation in various meetings. As the sampling was not random, and the sample size is small, results cannot be generalized to the entire population, but do provide insights into individuals' views in NGOs working on the ECCC, and in a variety of communities across the country.

211. It was not possible to ask all questions of all interviewees due to time constraints. In addition, when the interviewee had limited knowledge of the ECCC, it was not possible to ask detailed questions about the cases.

212. Interview #81, male, 70-year-old civil party. (Hereinafter, "IV" will be used for "Interview".)

213. IV #87, male, NGO worker.

214. Transparency International, "Corruption Perceptions Index 2013," <http://cpi.transparency.org/cpi2013/results/>.

215. IV #33, middle-aged male teacher in urban NW. The reference to shrimp soup is a common proverb indicating the networks linking one person to another, and that many can get tangled in the tentacles of the shrimp as they are removed from the pot.

216. Heng Sreang, "Justice in Cambodia: A Short Reflection on Some Obstacles to Implementing 'Justice' within the Context of the Law in Present-Day Cambodia," *Nordic Institute of Asian Studies NYTT Asia Insights* no. 3 (December 2006): 22; and Laura McGrew, "Transitional Justice Mechanisms," in *The Extraordinary Chambers* (New York: Justice Initiative, 2006), 142.

217. IV #3, female expatriate NGO worker.

218. Life expectancy was 70 in 2008 and 71 in 2013. See The World Bank, "World Development Indicators 2013," World DataBank, 2013, <http://databank.worldbank.org/data/download/WDI-2013-ebook.pdf>.

219. The World Bank, "World Development Indicators 2013," World DataBank, 2013, <http://data.worldbank.org/country/cambodia?display=graph>.

220. The World Bank, "Cambodia Overview," Dec, 23, 2013, <http://www.worldbank.org/en/country/cambodia/overview>.

221. Ibid.

222. Elizabeth Becker, "Cambodians Refuse to Accept Rigged Elections," *Yale Global* (New Haven, CT), October 15, 2013, <http://yaleglobal.yale.edu/content/cambodians-refuse-accept-rigged-elections>.

223. International Republican Institute, "Survey of Cambodian Public Opinion: January 12–February 2, 2013," [http://www.iri.org/sites/default/files/Cambodian Poll 9 Final PUBLIC.pdf](http://www.iri.org/sites/default/files/Cambodian%20Poll%209%20Final%20PUBLIC.pdf).

224. IV #83, ECCC international staff.

225. IV #64, male, middle-aged commune chief in south.

226. IV #88, male NGO worker.

227. IV #32, youth group in northwest.

228. IV #56, former KR elderly, former commune leader in south.

229. IV #32, youth group in northwest.

230. IV #32, youth group in semi-urban northwest.

231. *Ciorciari and Heindel, Lessons from KR Tribunal*, p. 440; and Lucy Hovil and Moses Chrispus Okello, “Editorial Note, Special Issue: Civil Society, Social Movements and Transitional Justice,” *International Journal of Transitional Justice* 5, no. 3 (November 2011), 333–344.

232. This particular group may be more inclined to see positive impact, especially the donor and ECCC staff, as they have a vested interest in finding positive impact. At the same time, all interviewees were asked both about positive and negative impact, so they did not just provide blanket praise.

233. There is very little tolerance for different political views in Cambodia. In Cambodia’s hierarchical patron–client dominated society, criticism of the state is often equated with treason. Decisions are still made in a top-down manner; for example, the judges still take instructions from the leaders in the executive branch. The most prominent NGO working on transitional justice in Cambodia is the Documentation Center of Cambodia (DC-Cam), which conducts documentation, legal education, outreach, civil party support, victim–perpetrator dialogue and reconciliation, and genocide education. The human rights organizations involved early in justice-related activities include: the Cambodian Human Rights and Development Association (ADHOC; outreach, monitoring, civil party complaints, and network), the Cambodian Human Rights Action Committee (CHRAC; monitoring, outreach, and coordination), Cambodian Defenders Project (CDP; civil party representation, monitoring, and gender-based violence or GBV projects), Legal Aid of Cambodia (LAC; civil party representation, monitoring), the Khmer Institute for Democracy (KID; outreach, monitoring), and the Center for Social Development (CSD; outreach, monitoring, dialogue, and reconciliation). Other key players currently include: Asian International Justice Initiative (AIJI; outreach, monitoring), Avocats Sans Frontieres (ASF; civil party representation), Bophana Center (documentation, memory), Kdei Karuna (KdK; formerly the International Center for Conciliation; grassroots historical dialogue, intergenerational dialogue, memorialization, research), Khmer Mekong Films (outreach films), the Transcultural Psychosocial Organization (TPO; psychosocial services, testimonial therapy, dialogue), Youth for Peace (YFP; outreach, intergenerational dialogue, memorialization, research), Youth Resource Development Program (YRDP; outreach, research, intergenerational dialogue), and Women’s Media Center (WMC; radio, outreach).

234. IV #3, female expatriate NGO worker.

235. IV #9P, female expatriate NGO worker.

236. IV #79, male expatriate NGO worker.

237. IV #2 male 45 year old NGO worker.

238. IV#64 male middle-aged commune chief in S.

239. See “Report on the Proceedings of the 2011 Women’s Hearing,” “Panel Statement for Asia-Pacific Regional Women’s Hearing on 10 and 11 October, 2012 in Phnom Penh, Cambodia,” <http://gbvkr.org/wp-content/uploads/2012/11/Asia-Pacific-Regional-Womens-Hearing-2012-Panel-Statement.pdf>; and Cambodian Defenders Project, “2013 Women’s Hearing with the Young Generation

on Gender-Based Violence during the Khmer Rouge Regime Report on Proceedings,” <http://gbvkr.org/wp-content/uploads/2014/05/WomenHearingEng.pdf>.

240. IV #1P, male expatriate NGO worker.

241. IV #3, female expatriate NGO worker.

242. Elizabeth Becker, “Cambodians Refuse to Accept Rigged Elections,” *Yale Global* (New Haven, CT), October 15, 2013, <http://yaleglobal.yale.edu/content/cambodians-refuse-accept-rigged-elections>.

243. Philip Gourevich, “Mass Murder Relies on People Like Us: An Interview with Thierry Cruvellier,” *New Yorker* (New York, NY), May 15, 2014, <http://www.newyorker.com/online/blogs/books/2014/05/mass-murder-relies-on-people-like-us-an-interview-with-thierry-cruvellier.html>.

244. IV #1P, male expatriate NGO worker. Also, “Another impact that is very important that people are saying—I think in general they are not so impressed with what is happening at the court, but now Khmer do speak about the KR and the past. Before they were not talking about it, which is a big difference to open the discourse” (IV #1, female expatriate NGO worker).

245. IV #88, male NGO worker.

246. IV #90, male journalist.

247. IV #82, male NGO worker.

248. Kate Hodal, “Khmer Rouge Survivor’s Tale Helps Cambodia Confront its Brutal Past,” *The Guardian* (New York, NY), January 24, 2012, <http://www.theguardian.com/world/2012/jan/24/khmer-rouge-survivor-film-cambodia>.

249. IV #4P, female expatriate NGO worker.

250. IV #35, male, 40-year-old teacher in former KR area in northwest.

251. Berkeley 2009 Population Survey; Berkeley 2011 Population Survey. See also, ADHOC Initial Case 002 Civil Party Survey.

252. International Republican Institute, “Survey of Cambodian Public Opinion: October 28–November 10, 2013,” [http://www.iri.org/sites/default/files/Cambodian Poll 9 Final PUBLIC.pdf](http://www.iri.org/sites/default/files/Cambodian%20Poll%209%20Final%20PUBLIC.pdf).

253. Huy Vannak, Bou Meng: A Survivor from Khmer Rouge Prison S-21, Justice for the Future Not Just for the Victims (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2010), 67–68.

254. IV #75, husband and wife, teachers in their 40s from south.

255. IV #64, male, middle-aged commune chief in south.

256. IV #38, young male Cham teacher in south.

257. IV #8, male, 55-year-old commune chief, rural northwest.

258. IV #68, elderly male, accused former KR perpetrator in south.

259. IV #58, female, former KR teacher.

260. IV #66, young male village chief in south.

261. IV #35, male, 40-year-old teacher in former KR area in northwest.

262. IV #7, male, middle-aged former village chief in northwest.
263. IV #5, NGO volunteer group ages 28, 38, 50, and 43 in rural northwest.
264. IV #29, two middle-aged former KR soldiers, now government officials.
265. IV #81, male, 70-year-old, civil party.
266. IV #80, male, 65-year-old, civil party.
267. See Rochelle Braaf, *Sexual Violence Against Ethnic Minorities during the Khmer Rouge Regime*, (Phnom Penh, Cambodia: Cambodian Defenders Project, 2014), xiv, http://giz-cambodia.com/wordpress/wp-content/uploads/Sexual-violence_ethnic-minorities_KR-regime_CDP-2014.pdf.
268. IV #44, male, elderly farmer in south.
269. IV #49, male, 55-year-old farmer in south.
270. IV #85, ECCC international staff.
271. Interviewees making this comment included IV #8, male, 55-year-old commune chief rural NW, and IV #7, middle-aged male former village chief in northwest.
272. IV #44, male elderly farmer in south.
273. Abby Seiff, "Duch Sentenced to Life in Prison By Khmer Rouge Tribunal," *Cambodia Daily* (Phnom Penh, Cambodia), February 4, 2012, <http://www.cambodiadaily.com/archives/duch-sentenced-to-life-in-prison-by-khmer-rouge-tribunal-539/>. See, also, IV #80, male, 65-year-old, civil party. The issue of the impact of excessive pre-trial detention on what sentence Duch should receive was a nuance not understood by most ordinary Cambodians.
274. IV #4, male, 60-year-old, civil party.
275. IV #90, male journalist.
276. IV #74, former KR soldier/NGO volunteer in south.
277. IV #30, male, 60-year-old government official living in former KR area.
278. IV #6, brother and sister farmers; male is also 30-year-old NGO volunteer in rural Cambodia.
279. IV #81, male, 70-year-old, civil party.
280. IV #73, male, 65-year-old retired teacher in south.
281. IV #38, young male Cham teacher in south.
282. IV #65, young monk in south.
283. IV #42, elderly male farmer in south.
284. IV #66, young male village chief in south.
285. IV #39, male, 50-year-old Cham farmer in south.
286. IV #74, former KR soldier/NGO volunteer in south.
287. IV #56, former KR elderly/commune leader in south.
288. IV #74, former KR soldier/NGO volunteer in south.
289. IV #44, male elderly farmer in south.

290. IV #45, elderly male retired teacher/farmer in south.

291. IV #5P, male NGO worker.

292. IV #74, former KR soldier/NGO volunteer in south.

293. IV #64, male, middle-aged commune chief in south.

294. IV #47, male, 45-year-old village chief in south.

295. IV #81, male, 70-year-old civil party.

296. IV #64, male, middle-aged commune chief in south.

297. IV #74, former KR soldier/NGO volunteer in south.

298. IV #60, male, 65-year-old former KR/government village chief in south.

299. IV #20, international organization staff.

300. These NGOs include: ADHOC, AIJI, ASF, ASRIC, Bophana Center, CDP, CHRAC, CSD, Kdei Karuna, KID, LAC, and YfP. Also, see Nadine Kirchenbauer, "Outreach Mapping Around KRT," 2014.

301. One civil party actor stated that he spoke at various outreach events: "Concerning the next generation, I have gone to almost all of the provinces in our country, when the ECCC conducts outreach programs to tell the people my stories. In Phnom Penh, I went to RUPP (Royal University of Phnom Penh), PUC (Pannasastra University of Cambodia), Russey Keo (Agricultural College), and so on," (IV #80, male, 65-year-old, civil party).

302. Christoph Sperfeldt, "Cambodian Civil Society and the Khmer Rouge Tribunal," *International Journal of Transitional Justice* 6, no. 1 (2012): 149–160.

303. Viceth Sen, "Social Capital in an Urban and a Rural Community in Cambodia," *Cambodia Development Review* 16, no. 2 (2012): 6–10, specifically 8, https://www.academia.edu/2300509/Social_capital_in_an_urban_and_a_rural_community_in_Cambodia.

304. Ciorciari and Heindel, *Lessons from KR Tribunal*, p. 423.

305. Amongst those 6%, 61% went online daily, another 22% went on a couple of times per week, and 75% accessed via cell phone, while 20% through their computer, and 6% through their tablet. Facebook was by far the most common site accessed (versus Twitter, VODhotnews.com, or KI Media). See International Republican Institute, "Survey of Cambodian Public Opinion: October 28–November 10, 2013," http://www.iri.org/sites/default/files/Cambodian_Poll_9_Final_PUBLIC.pdf.

306. IV #20, international organization staff.

307. Even this journalist who is interested in the ECCC responded vaguely about the last time they had broadcast something: "I don't know, I don't remember recently, perhaps the end of December, no...not sure in December, it was on Case 002 about the final closing order. The spokesperson usually they send us an email or press release," (IV #90, male journalist).

308. IV #65, young monk; IV #3, female expatriate NGO worker.

309. IV #79, male expatriate NGO worker.

310. IV #1P, male expatriate NGO worker.

311. Extraordinary Chambers in the Courts of Cambodia, “PAS Outreach Figures 2009–2014, as of 30 June 2014,” http://www.eccc.gov.kh/sites/default/files/Outreach_stats_June_2014.pdf.
312. IV #3, female expatriate NGO worker.
313. IV #89, expatriate international organization staff.
314. IV #2, male NGO worker.
315. IV #85, ECCC international staff.
316. Caitlin Reiger, *Where to From Here for International Tribunals? Considering Legacy and Residual Issues*, (New York, NY: International Center for Transitional Justice, 2009), 1, <http://ictj.org/sites/default/files/ICTJ-Global-Legacy-Tribunal-2009-English.pdf>. See, also, Thorsten Bonacker and Susanne Buckley-Zistel, “Introduction: Transitions from Violence—Analyzing the Effects of Transitional Justice,” *International Journal of Conflict and Violence* 7, no. 1 (2013): 4–9, [http://www.ijcv.org/issues/ijcv7\(1\)2013.pdf](http://www.ijcv.org/issues/ijcv7(1)2013.pdf).
317. Philip Gourevich, “Mass Murder Relies on People Like Us: An Interview with Thierry Cruvellier,” *New Yorker* (New York, NY), May 15, 2014, <http://www.newyorker.com/online/blogs/books/2014/05/mass-murder-relies-on-people-like-us-an-interview-with-thierry-cruvellier.html>.
318. IV #77, 65-year-old monk.
319. IV #82, male NGO worker.
320. IV #86, expatriate international organization staff.
321. IV #86, expatriate international organization staff.
322. “There are many restrictions of witnesses and accused to tell the truth at the ECCC; they are constrained within the questions of the prosecutors and defense lawyers, so they can’t tell all of their experiences. This is a challenge to truth telling at the ECCC,” (IV #82, male NGO worker).
323. Philip Gourevich, “Mass Murder Relies on People Like Us: An Interview with Thierry Cruvellier,” *New Yorker* (New York, NY), May 15, 2014, <http://www.newyorker.com/online/blogs/books/2014/05/mass-murder-relies-on-people-like-us-an-interview-with-thierry-cruvellier.html>.
324. Laura McGrew, “Transitional Justice Mechanisms,” in *The Extraordinary Chambers* (New York: Justice Initiative, 2006), 142.
325. IV #60, male, former KR/victim village chief in south.
326. IV #75, husband and wife teachers in their 40s from south.
327. IV #65, young monk in south.
328. IV #4, male, 60-year-old, civil party.
329. IV #17, male, middle-aged farmer in northwest.
330. DC-Cam, “Mapping Project, 1995–Present,” <http://www.dccam.org/Projects/Maps/Mapping.htm>.
331. Julian Poluda, Judith Strasser, and Sotheara Chhim, “Cambodia: Justice, Healing, and Reconciliation,” in *Peacebuilding, Memory and Reconciliation: Bridging Top-down and Bottom-up Approaches*, eds. Bruno Charbonneau and Geneviève Parent (New York: Routledge, 2012), 104–105.

332. See ECCC, “Annex: Overview of Civil Party Reparation Projects in Case 002/01,” April 4, 2014, <http://www.eccc.gov.kh/sites/default/files/articles/Annex Case 002-01 ReparationProjects.pdf>.
333. IV #32, youth group in semi-urban northwest.
334. Huy Vannak, Bou Meng: A Survivor from Khmer Rouge Prison S-21, *Justice for the Future Not Just for the Victims* (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2010), 69.
335. IV #84, male NGO worker.
336. Jeffry Sonis, James Gibson, Joop T.V.M. de Jong, Nigel Field, Sokhom Hean, and Ivan Komproe, “Probable Posttraumatic Stress Disorder and Disability in Cambodia: Associations with Perceived Justice, Desire for Revenge, and Attitudes Toward the Khmer Rouge Trials,” *Journal of the American Medical Association* 302, no. 5 (2009), 527–536.
337. Julian Poluda, Judith Strasser, and Sotheara Chhim, “Cambodia: Justice, Healing, and Reconciliation,” in *Peacebuilding, Memory and Reconciliation: Bridging Top-down and Bottom-up Approaches*, eds. Bruno Charbonneau and Geneviève Parent (New York: Routledge, 2012), 101–102.
338. IV #88, male NGO worker.
339. IV #88, male NGO worker.
340. Ibid.
341. IV #1P, male expatriate NGO worker.
342. IV #85, ECCC international staff.
343. Eric Stover, Mychelle Balthazard, and K. Alexa Koenig, “Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia,” *International Review of the Red Cross* 93, no. 882 (June 2011), 532–533, <http://www.icrc.org/eng/assets/files/review/2011/irrc-882-stover-balthazard-koenig.pdf>.
344. Phuong, *Survey re Victim Participation in Case 001*, p. 265.
345. IV #88, male NGO worker.
346. IV #84, male NGO worker.
347. IV #7P, female expatriate NGO worker.
348. IV #89, expatriate international organization staff.
349. IV #4, male, 60-year-old civil party victim.
350. IV #83, ECCC international staff.
351. IV #4,P female expatriate NGO worker.
352. IV #20, international organization staff.
353. Thorsten Bonacker and Susanne Buckley-Zistel, “Introduction: Transitions from Violence—Analyzing the Effects of Transitional Justice,” *International Journal of Conflict and Violence* 7, no. 1 (2013): 4–9, [http://www.ijcv.org/issues/ijcv7\(1\)2013.pdf](http://www.ijcv.org/issues/ijcv7(1)2013.pdf).
354. See reparations projects at ECCC, “Annex: Overview of Civil Party Reparation Projects in Case 002/01,” April 4, 2014, <http://www.eccc.gov.kh/sites/default/files/articles/Annex Case 002-01 ReparationProjects.pdf>.

355. IV #80, male, 65-year-old, civil party.

356. IV #4, male, 60-year-old, civil party.

357. IV #86, expatriate international organization staff.

358. Eric Stover, Mychelle Balthazard, and K. Alexa Koenig, "Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia," *International Review of the Red Cross* 93, no. 882 (June 2011), 528–531, <http://www.icrc.org/eng/assets/files/review/2011/irrc-882-stover-balthazard-koenig.pdf>. See, also, *Ciorciari and Heindel, Lessons from KR Tribunal*, p. 428.

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“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

Gordon Hewart’s statement is especially true for the Extraordinary Chambers in the Courts of Cambodia, the UN-backed tribunal established to try surviving leaders of the Khmer Rouge for some of the most heinous crimes of the 20th century. The court is expected not only to provide justice for victims and survivors, but also to provide a model for the rule of law in Cambodia. This report looks both at the performance of the ECCC and how that performance is perceived in Cambodia.

Now in its 10th year, the ECCC has struggled to complete trials while dealing with accusations of corruption and ongoing political interference. But it has also provided a positive model of impartial justice—something that is still too rare in Cambodia. And perhaps most importantly, the court has offered access to justice for victims and sparked a reckoning with Cambodia’s past. For all its flaws, most Cambodians say they want the ECCC to continue its work.

This report grapples with all the complexity, promise, and shortcomings of the ECCC. The report’s first half assesses the court’s efforts to provide accountability, end impunity, and help develop the rule of law. With hybrid tribunals similar to the ECCC now being considered in several countries, the report distills valuable lessons drawn from hard-won experience.

The report’s second half looks at how the intended beneficiaries of the court feel about its work. Based on dozens of interviews with court staff, ordinary Cambodians, and even former members of the Khmer Rouge, *Performance and Perception* offers the most comprehensive assessment to date of what the ECCC has done, and what Cambodians think of it.

