the global voice of
the legal profession®

Safeguarding Judicial Independence in Mixed Tribunals:

Lessons from the ECCC and Best Practices for the Future

September 2011

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**

Contents

Glossary of Acronyms 5

Foreword 6

Executive Summary 7

1. Introduction 10

2. Right to Independence and Impartiality of Judges 11

2.1 Requirement of independence of the judiciary 12

2.2 Requirement of impartiality of the judiciary 13

3. Establishment of the ECCC 14

3.1 Group of Experts Report 14

3.2 Negotiations for the establishment of the ECCC 15

3.3 Resulting ECCC structure 19

4. Impact of the Lack of Effective Safeguards on Judicial Independence 21

4.1 Lack of training and professional expertise 21

4.2 Executive interference 23

4.2.1 Executive interference in selection of judges to the ECCC 24

4.2.2 Executive interference in cases before the Court 26

4.3 Corruption among Court officials and government employees 30

5. Best Practices for Safeguarding Judicial Independence and Impartiality 35

5.1 Composition 35

5.2 Judicial selection process 36

5.2.1 Separate nomination and selection authority for judges 36

5.2.2 Involve non-state actors 37

5.2.3 Set minimum educational and professional requirements for judges 38

i. Judges should hold degrees in law and have judicial experience 38

ii. Judges must have a proven record of high integrity 40

5.3 Oversight 40

5.3.1 Establish an Independent Review Committee 41

i. Authority to initiate and investigate allegations of impropriety and publish findings independent of the national government 41

ii. Authority to petition for judges to be recused or disqualified 41

5.3.2 Protect whistleblowers 43

5.4 Civil society 44

6. Conclusion 45

Glossary of Acronyms

ECCC	Extraordinary Chambers in the Courts of Cambodia
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
OSJI	Open Society Justice Initiative
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge
UNDP	United Nations Development Programme
UNMIK	United Nations Interim Administration Mission in Kosovo

Foreword

This report is the result of my own interest in the area of international criminal justice. As an outspoken proponent of international justice as a way to counter impunity and support accountability, I believe strongly in the role of the international, mixed, and domestic war crimes tribunals.[i]

Since 1945, there have been 313 armed conflicts in which an estimated 92–101 million people have lost their lives, twice the number of the victims who lost their lives in the First and Second World Wars combined.[ii] Yet, to date, only 823 persons have been indicted by international and regional courts.[iii] The disparity between these numbers is staggering. Projected into the future, the need to focus on accountability and international justice becomes paramount. So will the reliance on war crimes courts.

Certainly, international justice took a leap forward on 1 July 2002 with the establishment of the International Criminal Court (ICC). Created as a permanent institution to prosecute individuals accused of the most egregious international crimes – namely, genocide, war crimes, and crimes against humanity – this vanguard court is a remarkable development in international law.

Of course, international, mixed and domestic courts must ensure that the trials they undertake are consistent with international standards of independence and fairness. The assumption is that most of these courts – certainly the international and mixed courts – diligently apply international standards to their judicial proceedings. However, this assumption is not always correct. These courts, on occasion, fail to adhere to international standards of justice. Yet, advocates of international justice often remain silent in their criticism of these failures, which reflect poorly on the international community. If we are serious in promoting international justice, we must also be willing to criticise those courts that do not meet international standards.

I was an early supporter of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Consistent with my belief that we must fight impunity through accountability, I believed in the ECCC's overall mission, including its ability to help bring justice to victims, and accuracy to the historical record. However, as the ECCC's activities increased, my confidence in its judicial process started to decrease. I observed a growing number of problems that made me question the very legitimacy of the Court. I also knew that such concerns were relevant to any defendant appearing before the ECCC. Subsequently, I approached the international co-lawyers representing the defendant Nuon Chea – Michiel Pestman and Victor Koppe. I mentioned my interest in looking more deeply into my concerns about the ECCC. I asked to join their team and for permission to draft this report. They agreed.

---

i **International** (International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Court Tribunal for Rwanda); **mixed** (East Timor (ie, the Serious Crimes Panels), Cambodia (the Extraordinary Chambers in the Courts of Cambodia (ECCC)), the War Crimes Chamber of the State Court of Bosnia and Herzegovina, the Special Court for Sierra Leone, Kosovo (ie, 'Regulation 64' Panels in the Courts of Kosovo)); and **domestic** (Iraq, Serbia). The war crimes courts listed here have previously faced these same challenges.

ii M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia, 2010).

iii *Ibid.*

In 2010, I wrote a memo setting forth my initial concerns about the ECCC. I then assigned a small group of IBA interns (Margaret-Ann Scotti, Wendy Betts, David Lanza, Lindsay Oak, Joanna Buckley, Tricia Patel, and Olivia Wybraniec) to assist me in researching the history of the ECCC and to identify potential issues. I also asked Michael A Newton, Professor of the Practice of Law at Vanderbilt University Law School, to oversee a parallel research memo on the status of the ECCC (AJ Gochenaur, Oluwafunmito Phillips Seton, and Valerie Han Wang were the students who worked on the memo). Professor Newton is a well-known expert in the area of international justice.

I then combined both research memos, edited the new draft and added several additional sections. The new draft assessment report was subsequently sent to the IBA War Crimes Committee for their review. The Committee provided excellent feedback, including suggestions for improvement. With the assistance of Wendy Betts, a very talented IBA intern, I again reworked the draft and finalised the work into this final assessment report.

This report does *not* represent the views nor the opinion of the IBA, nor any single individual who assisted me in the drafting process, nor any individual who was interviewed for the report. I take full responsibility for the report's content and conclusions.

In the end, this was a personal journey, reflecting my desire to simply raise concerns about the establishment and operation of international war crimes courts, so that future efforts toward embracing international justice mechanisms can be improved. I hope this report contributes to that effort.

Dr Mark Ellis
Executive Director, IBA

Executive Summary

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 to prosecute the senior leaders most responsible for crimes of the Khmer Rouge between 1975 and 1979. The laws establishing the ECCC require it to exercise its jurisdiction in accordance with international standards and contain guarantees on the independence and impartiality of the judges.

The Agreement between the United Nations (UN) and the Royal Government of Cambodia established the ECCC as a domestic court, with international participation despite overwhelming public concerns about the status of the Cambodian judiciary and executive interference with the judicial branch.

Since the ECCC is based on the Cambodian legal system and since the majority of the judges are Cambodian, the ECCC's legitimacy is heavily dependent on the legitimacy of the Cambodian judiciary. The Cambodian Constitution nominally provides for separation of powers,[1] the independence of the judiciary,[2] and reiterates that the legislative and executive branches shall not have judicial power.[3] However, while this legal framework complies de jure with international standards of fair trial and due process, because of the lack of practical safeguards, the proceedings of the ECCC do not comply de facto.

The right to an independent and impartial judiciary is a necessary cornerstone of a legitimate judicial process. Mixed courts, such as the ECCC, because of their international imprimatur and the gravity of the crimes they address, bear the extra burden of setting an exemplary procedure for certain domestic courts. The judges that oversee the court are entrusted with the highest responsibility of maintaining international standards of due process, therefore the selection and oversight of these judges must be imbued with strong safeguards to protect their independence. The ECCC has fallen short of this responsibility.

Several allegations have been reported that raise doubts as to the independence and impartiality of the ECCC judiciary, the direst allegations surrounding the premature closure of the third Khmer Rouge case.

The selection process for the Cambodian judges serving on the Court was not transparent. In 2007, the Open Society Justice Initiative (OSJI) reported that, 'After many calls for a transparent and open judicial selection process from non-governmental civil society organisations, the Cambodian judges for the ECCC were selected in a closed manner with no input from civil society… The selection process fuelled distrust at the initial stages of the [C]ourt and placed a high bar for the judges and the [C]ourt to surmount to demonstrate independence and impartiality'.[4]

---

1 Constitution of the Kingdom of Cambodia, as amended 1999, unofficial translation taken from the *UNDP Legal*, Article 51.

2 *Ibid*, Article 128.

3 *Ibid*, Article 130.

4 *Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia* [hereinafter '*Progress and Challenges*'], OSJI, June 2007, at 8, available at: **www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20070627** (last accessed 9 August 2011).

At least two judges are on record as admitting to accepting bribes regarding the disposition of cases. Cambodian ECCC personnel also have filed complaints alleging that Cambodian judges and other personnel of the ECCC are compelled to kickback part of their wages to Cambodian government officials in exchange for their position.

In a positive move, an Independent Counsellor position to deal with corruption issues has been created and represents significant progress for the ECCC. However, the fact that the UN waited until corruption allegations surfaced before addressing the problem in a reactive manner after widespread allegations has eroded confidence in the Court, and the fact that the Independent Counsellor has not disclosed any conclusions or reports on corruption in the Court prompts doubt as to whether the position has affected the Court's conduct.

In 2010, OSJI issued a report stating: '… the exercise of political influence by government actors at all levels in Phnom Penh has tainted the Court's operation and infringed upon its judicial independence.'[5] The report concludes that '[t]o date, the specter of political interference has not been addressed adequately, despite the ECCC's general commitment to respect international standards' based on the fact that 'the [C]ourt has a majority of Cambodia judges in each of its chambers, a Cambodian co-investigating judge, and a Cambodian co-prosecutor chosen from a domestic judicial system that is uniformly viewed as subject to political control'. [6]

In endorsing a mixed court, the UN not only adds its own legitimacy to the court, it also risks its own legitimacy. The hallmark of the UN must count for something or its ability to encourage justice throughout the world will be greatly curtailed or possibly even lost entirely.

While scholars may debate the degree to which the ECCC is a success or failure, there is no doubt that the UN has given its hallmark to a court whose independence fails to meet international standards of due process. In resting the legitimacy of the ECCC on that of the Cambodian judiciary, the ECCC has weakened the UN brand in the realm of internationalised accountability.

5 *Political Interference at the Extraordinary Chambers in the Courts of Cambodia* [hereinafter '*Political Interference Report*'], OSJI, July 2010, at 3, available at: **www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf** (last accessed 9 August 2011).

6 *Ibid*, at 10.

1. Introduction

The era of accountability is irreversibly under way, and increasingly reliant on the viable integration of international standards into the framework of domestic processes. Impartiality and independence are necessary in any judiciary, but are especially vital when states cooperate to create a mixed court that combines international norms and practices into the fabric of a domestic system. It is almost axiomatic that the creation of a mixed tribunal will be the pinnacle of a highly choreographed and emotive political and sociological process. Indeed, if the central purpose of the mixed court is to do justice and thereby sustain the seeds of lasting peace and societal healing, the selection of judges equipped to dispense justice in an independent and impartial manner should be the sine qua non of a legitimate judicial process. Inadequate safeguards for judicial independence and integrity will inevitably create attendant costs with respect to the institutional legitimacy and authority of the tribunal.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) clearly illustrates the challenges posed by judicial bias and political interference in mixed tribunals. The Royal Government of Cambodia and the United Nations (UN) established the ECCC as a domestic court, with international participation, despite overwhelming public concerns about the status of the Cambodian judiciary and executive interference with the judicial branch. The problems that inhere in the ECCC are fundamentally a formation issue. The Agreement establishing the ECCC requires it to exercise its jurisdiction in accordance with international standards and contain guarantees on the independence and impartiality of the judges. However, the Agreement did not ensure that suitable safeguards were in place in relation to the selection and appointment of domestic judges for the ECCC. Similarly, the Agreement did not provide for mechanisms to effectively counter political pressure in light of the heavily Cambodian composition of the Court. Unfortunately, reports and allegations of government interference with the selection of judges to the ECCC and the workings of the ECCC, combined with a lack of transparency, have tainted and undermined the credibility of the Court. Given that the ECCC was established on a weakened foundation, subsequent corrective measures may be difficult, if not impossible.

Nonetheless, the ECCC provides a living model for gleaning the normative standards that should henceforth form the minimum thresholds for judicial selection and oversight in a mixed court, anything less than which the international community should not endorse. While perfection can sometimes be an enemy of justice, no compromise can be accepted that might damage the ability of the international community to provide legitimacy to future courts. Understanding and implementing the best practices derived from the ECCC experience will protect future benches from allegations of political interference and corruption. These lessons will be particularly important in the common scenario in which the domestic state forming the mixed court also relies on some measure of international assistance with the formation and operation of the tribunal.

This assessment discusses international requirements for and the indicia of independence and impartiality; explains the tensions between the de jure independence and impartiality and the de facto deficiencies found in the ECCC; and draws lessons for the international community as to minimum standards that must be met in the composition, selection and oversight of judicial personnel to merit endorsement by the international community.

2. Right to Independence and Impartiality of Judges

The right to an independent and impartial judiciary is an integral principle of law.[7] International standards for judicial independence and impartiality are set forth in multiple human rights instruments, including the:

- Universal Declaration of Human Rights, Article 10 – 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him';[8]
- European Convention on Human Rights, Article 6(1) – 'In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law';[9]
- American Convention on Human Rights, Article 8(1) – 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law';[10]
- African Charter on Human and Peoples' Rights, Article 7(d) – 'the right to be tried within a reasonable time by an impartial court or tribunal';[11] and
- United Nations Basic Principles on the Independence of the Judiciary, Principle 2 – 'The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[12]

Additionally, Article 14(1) of the International Covenant on Civil and Political Rights, to which Cambodia is a party, guarantees every defendant the right to a fair hearing in civil and criminal proceedings before an independent, competent and impartial tribunal, established by law.[13] The United Nations Human Rights Committee has held that 'the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception'.[14]

---

7 UN Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* [hereinafter '*Human Rights in the Administration of Justice*'] (2003), at 118.

8 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: **www.unhcr.org/refworld/docid/3ae6b3712c.html** (accessed 16 August 2011).

9 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: **www.unhcr.org/refworld/docid/3ae6b3b04.html** (accessed 16 August 2011).

10 Organization of American States, *American Convention on Human Rights, 'Pact of San Jose', Costa Rica*, 22 November 1969, available at: **www.unhcr.org/refworld/docid/3ae6b36510.html** (accessed 16 August 2011).

11 Organization of African Unity, *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), available at: **www.unhcr.org/refworld/docid/3ae6b3630.html** (accessed 16 August 2011).

12 UN General Assembly, *Basic Principles on the Independence of the Judiciary*, 13 December 1985, available at: **www2.ohchr.org/english/law/indjudiciary.htm** (accessed 17 August 2011).

13 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, at 171, available at: **www.unhcr.org/refworld/docid/3ae6b3aa0.html** (accessed 16 August 2011).

14 UN Human Rights Committee, Communication No 263/1987, *M Gonzalez del Río v Peru*, UN Doc CCPR/C/46/D/263/1987, 28 October 1992, para 5.2.

The right to an independent and impartial judiciary is a necessary cornerstone of a legitimate judicial process to prevent a culture of impunity in non-compliant states and the erosion of the rule of law; to instil confidence in citizens and guarantee that their rights are being protected; and to maintain the dignity of the democratic order. Independence and impartiality sustain the image of the law as a social decision-making process offering fair and equal treatment to all parties to litigation.[15] Mixed courts, such as the ECCC, because of their international imprimatur and the gravity of the crimes they address, 'bear the extra burden of setting an exemplary procedure for certain domestic courts – especially in developing countries – to follow'.[16] The following section will consider the essence of these requirements in more detail.

2.1 Requirement of independence of the judiciary

Article 4 of the Basic Principles on the Independence of the Judiciary states that, 'there shall not be any inappropriate or unwarranted interference with the judicial process'.[17] Independence is 'reflected in such matters as security and tenure of and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government'.[18] Thus, the judiciary must be independent of the other branches of government. Included in this principle is a duty to completely grant the judiciary independent decision-making authority over 'all issues of a judicial nature and… exclusive authority to decide whether an issue submitted is within its competence, as defined by law'.[19] According to the European Convention on Human Rights, as interpreted by the European Court of Human Rights, independence is shown in the manner of appointing members of the judiciary and in the existence of safeguards against outside pressures.[20]

It is recognised internationally that the process by which judges are selected and appointed is vital to ensuring the independence of the judiciary and inspiring public confidence in the court system. As an example, the Parliamentary Assembly of the Council of Europe has in recent years passed a number of protocols, resolutions and recommendations to ensure that the selection and appointment of judges to the European Court of Human Rights is democratic, accountable and transparent.[21] Anywhere the judicial selection process is not adequately protected, a system of patronage may develop. In this system, judges, owing their careers and any hopes of future advancement to politicians who influence selection, will be swayed to rule according to the will of those politicians. Judges who go against the will of their political patrons might see their careers stagnate or may even lose their jobs. Additionally, to ensure independence, 'judges subjected to disciplinary proceedings [must be] granted due process before a competent, independent, and impartial organ which must be… controlled by an authority independent of the Executive'.[22]

---

15 Yuval Shany and Sigall Horovitz, 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities', *Leiden Journal of International Law* (2008), 21: 113–129.

16 *Ibid.*

17 *Basic Principles on the Independence of the Judiciary*, see note 12 above, Principle 4.

18 *Human Rights in the Administration of Justice*, see note 7 above, at 119, citing *Valiente v The Queen* [1985] 2.S.C.R 673, at 2.

19 *Basic Principles on the Independence of the Judiciary*, see note 12 above, Principle 3.

20 European Court of Human Rights, *Case of Incal v Turkey, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-IV*, 1571, para 65.

21 Council of Europe, Parliamentary Assembly, Recommendation 1649 (2004), available at: **http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EREC1649.htm** (last accessed 11 August 2011).

22 *Human Rights in the Administration of Justice*, see note 7 above, at 132; see also Principle 20, *Basic Principles on the Independence of the Judiciary*, which states that, '[d]ecisions in disciplinary, suspension or removal proceedings [of judges] should be subject to an *independent review*'. [emphasis added].

Although international law does not provide any details regarding what qualifications judges should have, or how judges should be appointed, Principle 10 of the Basic Principles on the Independence of the Judiciary provides an indication of minimum acceptable standards for judicial appointments:

> 'Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.'[23]

Thus, appointments that appear to favour individuals of certain political leanings or appointments of individuals who do not possess appropriate training or qualifications in the law undermine the independence both of the individual judge and of the tribunal. Though there have been a number of transitional states, such as Albania, where the political affiliation of judges became a determinative factor in their selection, international law is clear that political processes for assessing judicial qualifications cannot impinge on the judicial presence that the nominee brings to the Bench.

2.2 Requirement of impartiality of the judiciary

Impartiality is evidenced when judges do not 'harbour preconceptions about the matter put before them, and… [do] not act in ways that promote the interests of one of the parties'.[24] Some courts have interpreted this requirement to be both subjective and objective.[25] Subjectively, the individual members of the tribunal should hold no bias, prejudice, or preconceptions about the issue before them.[26] Objectively, the court must 'offer guarantees to exclude any legitimate doubt' of its impartiality, and must determine whether there are facts that may raise doubts as to the impartiality of the judge.[27]

Because society's confidence in the court system is at stake, with respect to impartiality, as with independence, courts have held that even appearances of impartiality alone may be important.[28] These policy considerations have also led some to suggest that a judicial code of conduct be developed, which would prohibit, or otherwise restrict, the participation of judges in cases where their involvement might raise the mere appearance of bias.[29]

The concept of independence and impartiality are necessarily commingled.[30] If a judge is not truly independent, his or her impartiality becomes open to question.[31] Thus, for the purposes of this assessment, the two concepts are treated collectively.

---

23 *Basic Principles on the Independence of the Judiciary*, see note 12 above, Principle 10.

24 *Human Rights in the Administration of Justice*, see note 7 above, at 120, citing 12 Communication No 387/1989, *Arvo O Karttunen v Finland* (Views adopted on 23 October 1992), in UN Doc GAOR, A/48/40 (vol II), 120, para 7.2.

25 *Human Rights in the Administration of Justice*, see note 7 above, at 120.

26 *Ibid*, at 137.

27 77 European Court of Human Rights, (Application no 42095/98) case of *Daktaras v Lithuania, judgment of 10 October 2000,* para 30.

28 *Ibid*.

29 Shany and Horovitz, see note 15 above, at 121.

30 Michael Bohlander, *The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics* (May 2007), at 30, available at: **http://ssrn.com/abstract=1592840**.

31 *Ibid*.

3. Establishment of the ECCC

The ECCC was established to prosecute the senior leaders most responsible for crimes of the Khmer Rouge between 1975 and 1979.[32] Under the leadership of Pol Pot, the Khmer Rouge attempted to attain an agrarian communist utopia in what they called Democratic Kampuchea. The Khmer Rouge drove Cambodians from the cities into forced labour camps to produce rice.[33] In order to quell dissent, both real and perceived, Khmer Rouge forces rounded up political opponents and minorities, as well as Cambodia's elite and educated classes and sent them to prison camps where they were tortured and killed.[34] At least 1.5 million people died as a result of Khmer Rouge atrocities.[35]

The first steps to establishing the ECCC were taken in 1997 as the ad hoc tribunals for the former Yugoslavia and Rwanda, the first international tribunals since Nuremberg and Tokyo, were just under way. Referencing the UN assistance to these tribunals, Cambodian co-Prime Ministers Norodom Ranariddh and Hun Sen wrote to UN Secretary-General Kofi Annan asking for similar assistance in establishing a court to prosecute the leaders of the Khmer Rouge.[36] Most of the Khmer Rouge leaders at that point had not faced any accountability for their crimes. In fact, the Cambodian Government had recently granted an amnesty to Ieng Sary, current ECCC defendant, in September 1996.

It was questionable whether the domestic courts had the capacity to handle the egregious crimes that had destroyed Cambodian society. For most of Cambodia's recent history, the nation's legal system was severely compromised by civil conflict.[37] Even before the Khmer Rouge regime, Cambodia lacked a modern judiciary.[38] Whatever judiciary that had existed was shattered by the Khmer Rouge's targeting of educated professionals, which destroyed the nation's population of lawyers and legal educators.[39] The judiciary as it currently exists began in 1993 with the signing of the Cambodian Constitution, developed with the assistance of the United Nations Assistance to the Khmer Rouge (UNAKRT).[40] As a result, there are few qualified judges and lawyers in Cambodia.[41]

3.1 Group of Experts Report

In response to Cambodia's request for UN assistance, the Secretary-General commissioned a Group of Experts to travel to Cambodia and report on the Cambodian judiciary's ability to contribute to such a court.[42] On 13 July 1998, the Group of Experts was appointed to evaluate existing evidence,

---

32 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, UN–Cambodia, Preamble (6 June 2003), available at: **www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf** [hereinafter 'UN–Cambodia Agreement'].

33 'Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135', paras 19 and 22 (18 February 1999), available at: **www.unakrt-online.org/Docs/GA%20Documents/1999%20Experts%20Report.pdf** [hereinafter 'Group of Experts Report'].

34 *Ibid*, at paras 24–28.

35 *Ibid*, at para 35.

36 Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, UN Doc A/51/930, S/1997/488 (24 June 1997).

37 Group of Experts Report, see note 33 above, at para 127.

38 *Political Interference Report*, see note 5 above, at 3.

39 Group of Experts Report, see note 33 above, at para 127.

40 *Political Interference Report*, see note 5 above, at 4.

41 Group of Experts Report, see note 33 above, at para 127.

42 Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc A/53/850, S/1999/231 (16 March 1999).

assess the feasibility of bringing Khmer Rouge leaders to justice and explore options for doing so. The Group of Experts' Report documented numerous deficiencies in the domestic judicial system in Cambodia. Although the Cambodian Constitution incorporates the protections of the Universal Declaration of Human Rights, provides for equal protection under the law,[43] and calls for a system of impartial courts, independent of the political branch,[44] the Group of Experts found that the courts and government had done little to develop these concepts. For example, Article 135 of the Constitution specifically requires that the government pass a law on the status of lawyers and judges and a law describing how the court system will function.[45] However, neither of these laws had been passed since the passage of the Constitution. As a result, criminal procedure in Cambodia often had little correlation to the rights and protections established in the Constitution.[46]

The Experts were particularly concerned by the Cambodians' scepticism of the impartiality of the domestic justice system.[47] Underpaid legal officials were believed to be susceptible to bribery.[48] Judges were often closely allied with the leading political party, leading to allegations of political influence.[49] The Experts concluded that, '… domestic trials organized under Cambodian law are not feasible and should not be supported financially by the United Nations'[50] and that, 'the level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials'.[51]

The Group of Experts also examined the potential for a mixed court, stating that:

> '[t]he Group carefully considered the option of such a mixed or foreign court established by Cambodia. It nevertheless decline[d] to recommend this option because of concerns… that even such a process would be subject to manipulation by political forces in Cambodia. The possibilities for undue influence are manifold, including in the content of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and on prosecutorial, defence and investigative staffs. A Cambodian court and prosecutorial system, even with significant international personnel, would still need the Government's permission to undertake most of its tasks and could lose independence at critical junctures.'[52]

Thus, in its final report of 15 March 1999, the Group of Experts proposed that an international court be established.[53] The Experts suggested a court established under the authority of the UN Security Council through Chapter VII of the UN Charter, similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[54] Alternatively,

---

43 Cambodian Constitution, see note 1 above, Article 31.

44 The Constitution states that: 'The legislative, executive, and judicial powers shall be separate' (Article 1); 'The Judicial Power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens' (Article 128); and 'Judicial power shall not be granted to the legislative or executive branch' (Article 130).

45 Cambodian Constitution, see note 1 above, Article 135.

46 Group of Experts Report, see note 33 above, at para 125.

47 *Ibid,* at para 129.

48 *Ibid.*

49 *Ibid.*

50 *Ibid,* at para 132.

51 *Ibid,* at para 133.

52 *Ibid,* at para 137.

53 *Ibid,* at para 219.

54 *Ibid,* at paras 140–41.

the Experts suggested that the Security Council could establish a court under their Chapter VI authority to peacefully settle disputes.[55] As a third alternative, the UN General Assembly would recommend establishment of a court under its recommendatory power found in Chapter IV of the UN Charter.[56]

The Experts further recommended that the court should comprise at least two trial chambers, each consisting of three judges, and an appellate chamber consisting of five judges.[57] According to the Experts, the majority of the judges should be international judges.[58] The Report also suggested that having at least one Cambodian judge in the court would be best, but questioned whether even one adequately qualified and impartial judge could be found.[59] The Experts also recommended a single international prosecutor.[60]

Despite the Group of Experts' recommendations, the Security Council never passed a resolution using its authority to establish a court.[61] Security Council inaction may be traceable to disagreement over whether Chapter VII granted the Council authority to take action in Cambodia.[62] As Chapter VII authority grants power to act in order to deal with threats to the peace, the Council may not have authority to act under Chapter VII where the armed conflict had long since ended and there was no demonstrable basis for linking an accountability process to improved regional peace and stability.[63] Furthermore, neither the Security Council's Chapter VI authority nor the General Assembly's Chapter IV authority had ever been used to create an international court before. Additionally, Chapters VI and IV only grant recommendatory power, thus Cambodia itself would have to agree to cooperate with any such court.[64] As a result, the establishment of any type of court international in character would require the cooperation of the Cambodian Government through a negotiated agreement.[65]

3.2 Negotiations for the establishment of the ECCC

Following the release of the Group of Experts Report on 22 February 1999, Cambodian Foreign Minister Hor Nam Hong announced that the Cambodian Government did not accept the Experts' recommendations and that Cambodia was going to proceed unilaterally with a trial of a former Khmer Rouge military commander.[66] Prime Minister Hun Sen, who had become the sole Prime Minister by ousting co-Prime Minister Norodom Ranariddh in 1997, extended an offer to the international community to participate in the trials in order to ensure international standards of due process were met.[67] The Secretariat began to pursue negotiations for a 'mixed tribunal' combining Cambodian and international elements.[68] This was a new and creative idea as, at the time, such a

55 *Ibid*, at para 142.

56 *Ibid*, at para 146.

57 *Ibid*, at para 155.

58 *Ibid*, at para 160.

59 *Ibid*.

60 *Ibid*, at para 161.

61 Daphna Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in Cesare P R Romano, André Nollkaemper and Jann K Kleffner (eds), *Internationalized Criminal Courts* (Oxford and New York: OUP, 2004), at 17.

62 David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, at 3–4, available at: **www.cambodiatribunal.org/CTM/Cambodia%20Scheffer%20Abridged%20Chapter%20July%202007.pdf**.

63 Group of Experts Report, see note 33 above, at para 142.

64 *Ibid*, at paras 142–146.

65 Shraga, see note 61 above, at 17.

66 Scheffer, see note 62 above, at 6.

67 *Ibid*.

68 Shraga, see note 61 above, at 17.

court had never before been implemented.[69]

The negotiation process between the UN and the Government of Cambodia was very protracted and difficult.[70] It is important to note that the Cambodian Government's acceptance of a mixed court was a waiver of sovereignty. As such, the Government was reluctant to accept proposals that appeared to shape the court as a UN court convened in Cambodia with only secondary Cambodian assistance.[71] As Hun Sen described it, the question was 'whether Cambodia should be cooperating with the UN or the UN should be cooperating with Cambodia'.[72]

The main points of contention included the status of the Agreement between the UN and the Cambodian Government and the composition of the court.[73] Ambassador Hans Corell, the Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, insisted that the Agreement predominate over any contrary domestic statute, a position to which the Cambodian Government would not yield.[74] Additionally, the Secretary-General announced that he would only agree to such a mixed court if the court had:

- a majority of international judges;
- an independent, international prosecutor;
- guarantees that the Cambodians would arrest all suspects in Cambodian territory; and
- an agreement that suspects who were previously granted immunity in Cambodian courts may be prosecuted.[75]

By contrast, the Cambodian Government was adamant that the court should have a majority of Cambodian judges.[76] UN negotiators believed that what the Cambodians really wanted was to maintain complete control, making few, if any, concessions to the UN, while gaining the hallmark of the UN to add legitimacy to the court.[77]

On 10 August 2001, before UN and Cambodian negotiators came to an agreement, Cambodia unilaterally enacted a law for the establishment of the ECCC that contained many of the terms to which the UN had objected.[78] On 8 February 2002, the UN halted negotiations saying: 'the United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have.'[79]

---

69 Thomas Hammarberg, *How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian Government and the UN*, Part II: March 1999 January 2001.

70 Telephone interview with Hans Corell, Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations (4 April 2011).

71 Scheffer, see note 62 above, at 6–7.

72 *Ibid*, at 7.

73 Telephone interview with Hans Corell, see note 70 above.

74 *Ibid.*

75 *Political Interference Report*, see note 5 above, at 5–6.

76 Telephone interview with Hans Corell, see note 70 above.

77 *Ibid.*

78 Scheffer, see note 62 above, at 16.

79 Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders, Statement by the UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, available at: **www.un.org/News/dh/infocus/cambodia/corell-brief.htm**.

The UN General Assembly, led by nations that had been active in attempts to reach a compromise solution, passed Resolution 57/228, requesting that the UN Secretary-General resume negotiations and give effect to the principle that the ECCC be a national court, within the existing court structure of Cambodia, established and operated with international assistance. [80] This Resolution required that the Secretariat negotiate within the framework of Cambodia's proposal for the court while also meeting international standards.[81] In effect, the Secretariat was instructed to accept a system that the Secretariat had already found to fall short of due process standards, while also maintaining those standards.

As a result, Ambassador Corell had no choice but to return to Cambodia to start negotiations with his hands essentially tied.[82] Secretary-General Kofi Annan stated publicly that his negotiators had been hamstrung by the General Assembly Resolution saying, 'it became clear to me, then, that the only agreement that it would be possible to negotiate with the [Cambodian] Government was one that accepted the structure and organisation of the Extraordinary Chambers foreseen in Cambodia's Law of 10 August 2001'.[83] The Secretary-General additionally cited further pressure from within the UN saying: 'certain Member States that were closely following the resumed negotiations had made it clear to me that they expected me not to seek any changes to the structure and organisation of the Extraordinary Chambers that had been contemplated during the earlier negotiations.'[84] The Cambodians were aware of the international pressure on the negotiators not to seek changes and negotiated in full knowledge of their position of strength.[85]

Nonetheless, the Secretary-General issued a report on 31 March 2003, outlining the continued misgivings of those negotiating the agreement with the Cambodian Government and suggested amendments. The Secretary-General drew attention to the reports of the Special Representative for Human Rights in Cambodia,[86] 'who ha[d] consistently found there to be little respect on the part of the Cambodian courts for the most elementary features of the right to a fair trial'. [87] The Secretary-General's report went on to reiterate the Secretariat's concerns that 'established international standards of justice, fairness and due process might therefore not be ensured' under the draft agreement.[88] The Secretary-General, noting the 'precarious state of the judiciary in Cambodia', argued that unless the General Assembly allowed him to push for certain additional safeguards, the credibility of the court would be lacking.[89] The Secretary-General specifically suggested that:

> 'In order to ensure the impartiality, independence, and credibility of investigations, prosecutions and trials, the following adjustments should be made to the draft agreement that had been under discussion during the previous negotiations:

80 See Resolution adopted by the General Assembly, 27 February 2003, UN Doc A/RES/57/228.

81 Shraga, see note 61 above, at 18–19.

82 Telephone interview with Hans Corell, see note 70 above.

83 See 'Report of the Secretary-General on Khmer Rouge Trials', 31 March 2003, UN Doc A/57/769 at para 23.

84 *Ibid*, at para 21.

85 *Ibid*.

86 The Secretary-General references the 'Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Peter Leuprecht', submitted in accordance with Resolution 2002/89, 18 December 2002, UN Doc E/CN.4/2003/114, and the 'Note by the Secretary-General on the Situation of Human Rights in Cambodia', 27 September 2002, UN Doc A/57/230.

87 'Report of the Secretary-General on Khmer Rouge Trials', see note 83 above, at para 28.

88 *Ibid*.

89 *Ibid*, at para 79.

– A majority of judges, both in the Trial Chamber and in the Appeals Chamber, should be international personnel…

– Decisions of the Chambers should be taken by simple majority vote…

– Both the prosecutor and investigating judge should be international personnel.'[90]

These warnings were ignored by the Member States. The General Assembly, despite 'taking note of the report of the Secretary-General',[91] approved the draft with no changes on 13 May 2003.[92] Ironically, the approval was given despite the fact that the General Assembly had recently published Resolution 57/225 on the situation of human rights in Cambodia, which noted '… with concern the continued problems related to the rule of law and the functioning of the judiciary resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary'.[93]

With no other options available, the Secretary-General signed the Agreement on 6 June 2003. A subsequent report by the Secretary-General's Special Representative for Human Rights in Cambodia, Yash Ghai, summarised this process with the truism that the considered advice of the Group of Experts had been 'overruled by political expediency'.[94]

3.3 Resulting ECCC structure

The ECCC was established as a specially organised court within the Cambodian domestic court system. The Court has three chambers, a pre-trial chamber of five judges, a trial chamber of five judges, and an appellate chamber of seven judges. Three of the five judges in the pre-trial and trial chambers and four of the seven appellate judges are Cambodian, and the minority consists of international judges. The Cambodian judges are chosen under the existing procedures of the Cambodian Constitution, meaning the Supreme Council of the Magistracy appoints the judges.[95] The international judges are also chosen by the Supreme Council of the Magistracy from nominations put forward by the UN Secretary-General.[96]

Rather than one international prosecutor, as suggested by the Group of Experts, the ECCC has two co-prosecutors, one Cambodian and one international, and two co-investigating judges, also split with one Cambodian and one international. The domestic and international co-prosecutors, and likewise the co-investigating judges, must agree before taking investigative action. If they disagree on whether to pursue a certain action, a dispute resolution system refers the disagreements to the pre-trial chamber.

90 *Ibid*, at para 16.

91 General Assembly Resolution 57/228 B, Preamble, 22 May 2003, UN Doc A/RES/57/228 B.

92 *Ibid*, paras 1–2.

93 General Assembly Resolution 57/225 on the situation of Human Rights in Cambodia, 26 February 2003, UN Doc A/RES/57/225.

94 'Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai', 29 February 2008, UN Doc A/HRC/7/42, at para 82.

95 The Law on the Establishment of the Extraordinary Chambers as amended, Article 10 (new), 27 October 2004, [hereinafter 'ECCC Law'].

96 *Ibid*, Article 11(new).

Although the Group of Experts' and Secretary-General's recommendations were not followed, the legal framework did incorporate procedures unique to the ECCC in an attempt to counter the potential for political influence. In particular, the Agreement required that decisions in the chambers be taken by supermajority and created a dispute resolution mechanism in the case of disagreements between the international and Cambodian co-prosecutors or co-investigating judges.

All chambers must reach a supermajority for decisions, requiring four of the five judges in the pre-trial and trial chambers or five of the seven in the appellate chamber. In theory, this requirement protects against the Cambodian majority dominating the Court, as no decision can be made without at least one international vote. Most importantly, no suspect can be convicted without a supermajority vote in the trial chamber. However, this safeguard does not completely block political interference or judicial bias, because the procedures allow a simple majority to prevail in some situations.[97]

The dispute resolution system in the pre-trial chamber was intended to counter the possibility that the Cambodian co-prosecutor or co-investigating judge could impede and effectively end the investigation into any person that the government did not wish to see investigated.[98] The pre-trial chamber in the ECCC is unlike pre-trial chambers in other courts in that it was instituted in the Court for the specific purpose of handling these disputes between domestic and international personnel rather than simply hearing pre-trial motions. Its authority lies in the text of Article 7(4) of the Agreement, which provides:

> 'A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.'[99]

The pre-trial chamber provides a mechanism for the international prosecutor to be able to stand before the Court, and the general public, and articulate the gravamen of events that he or she seeks to investigate.[100] Combined with the supermajority requirement, the dispute resolution mechanism ensures that, in order to stop the international prosecutor or co-investigating judge from pursuing a case, at least one international judge must side with the three national judges to create the necessary majority. If there is no such majority, the investigation or prosecution shall proceed. The utility of the dispute resolution safeguard is limited, however, as it only addresses discrete situations, rather than all prosecution and judicial decisions that split along nationality lines and which may be subject to external influence. As a result, it does not fully counter political interference or other threats to the independence and impartiality of the Court.

97 *Political Interference Report*, see note 5 above, at 12–13.

98 Telephone interview with Hans Corell, see note 70 above.

99 UN–Cambodia Agreement, see note 32 above, Article 7(4),

100 Telephone interview with Hans Corell, see note 70 above.

4. Impact of the Lack of Effective Safeguards on Judicial Independence

The experience of the ECCC demonstrates that de jure protections of judicial independence are not sufficient. While the legal framework of the ECCC complies de jure with international standards of fair trial and due process, because of the lack of practical, effective safeguards, the ECCC does not comply de facto. The Cambodian Constitution contains guarantees of judicial independence and impartiality.[101] The King is constitutionally responsible for ensuring the independence of the judiciary with the support of the Supreme Council of the Magistracy pursuant to Article 132 of the Constitution.[102] Similarly, the Law governing the ECCC also guarantees an independent and impartial judiciary and compliance with due process. Article 12(2) of the UN–Cambodia Agreement requires the ECCC to exercise its jurisdiction 'in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR], to which Cambodia is a party' and Article 33 (new) of the ECCC Law states that: 'The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR].'[103]

At the Plenary Session of the ECCC on 31 January 2008, and amended at the Plenary Session of the ECCC on 5 September 2008, the ECCC also adopted a Code of Judicial Ethics.[104] Article 2.1 of the Code states that, 'judges shall be impartial and ensure the appearance of impartiality in the discharge of their functions'.[105] Article 7.1 further states that, '[j]udges 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'.[106]

Despite these de jure protections, the early concerns about the deficiencies within the Cambodian domestic judicial system permeating the ECCC proceedings have come to fruition. Several allegations have been reported that raise doubts as to the independence and impartiality of the ECCC judiciary. These allegations have tainted the legitimacy of the ECCC and undermined its operations in practice. The allegations relate primarily to lack of training and professional expertise on the part of the judges, executive interference in judicial selection and proceedings, and corruption among Court officials and government employees.

4.1 Lack of training and professional expertise

The Cambodian judges in the ECCC were nominated and selected according to existing procedures of the Cambodian judicial system. Pursuant to Article 11(new) of the ECCC Law, the Supreme

101 Cambodian Constitution, see note 1 above, Article 31.

102 *Ibid*, Article 132.

103 ECCC Law, see note 95 above, Article 33.

104 Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia, available at: **www.eccc.gov.kh/sites/default/files/legal-documents/Code_of_judicial_ENG.pdf**.

105 *Ibid*, Article 2.1.

106 *Ibid*, Article 7.1.

Council of the Magistracy appoints the domestic judges and the foreign judges upon nomination by the UN Secretary-General.[107] Further, Article 10 (new) of the ECCC Statute states:

> 'The judges of the Extraordinary Chambers shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing 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.'[108]

Although the UN–Cambodia Agreement set out some basic educational standards for candidates to sit in the Court, they were not incorporated into the ECCC Statute. Given the Court's overwhelming reliance on the Cambodian domestic legal system, there is no other legislative source specifying qualification for judges. In the absence of more specific provisions, the criteria set out in Principle 10 of the Basic Principles on Independence of the Judiciary should govern.[109]

On 8 May 2006, the Cambodian Supreme Council of Magistracy selected 17 judges and prosecutors to serve in the Court.[110] Despite calls from a number of non-governmental organisations advocating for the selection of judges according to professional criteria,[111] the Government of Cambodia did not select candidates on professional criteria alone.[112] It has been widely reported by international observers that some of the Cambodian judges on the Court have only the equivalent of a high school certificate.[113] Tellingly, many of the individuals appointed by the domestic authorities had poor track records in terms of judicial independence and legal competence, while some lacked the necessary qualifications or experience to effectively carry out their duties. The Cambodian League for the Promotion and Defense of Human Rights (LICADHO) criticised the judicial appointments to the ECCC in its December 2007 report and outlined concerns about the Cambodian appointees including:

- Major-General Ney Thol: Military Court President and CPP Central Committee Member. Does not hold a law degree and presided over the trials of Prince Norodom Ranariddh;
- Ya Sokhan: Presided over the trial of FUNCINPEC parliamentarian Prince Norodom Sirivudh in 1996;
- Thou Mony: Twice ruled against Born Samnang and Sok Sam Oeun, and acquitted Hun Sen's nephew of manslaughter in 2004;

---

107 ECCC Law, see note 95 above, Article 11.

108 *Ibid*, Article 10.

109 *Basic Principles on the Independence of the Judiciary*, see note 12 above, Principle 10.

110 LICADHO and Miwa Igawa, *Khmer Rouge Tribunal, After Over a Quarter Century*, available at: **www.forum-asia.org/news/press_releases/fa/pdfs/Khmer%20Rouge%20Tribunal,%20After%20Over%20a%20Quarter%20Century.pdf** (last accessed 9 August 2011).

111 For instance, one NGO (the Cambodian Human Rights Action Committee (CHRAC)) argued: 'The successful conduct of the ECCC will depend heavily on the quality of the judges and prosecutors appointed. CHRAC respectfully recommends that the Supreme Council of the Magistracy use the following criteria when they decide who to appoint. The appointees should: 1) Have completed their legal training and hold a university degree in law or an equivalent; 2) Have experience in significant criminal cases and have worked in criminal or international criminal courts as judge or prosecutor for at least three years; 3) Include all suitably qualified and skilled women judges and prosecutors to achieve gender balance; 4) Be persons of high moral character, impartiality and integrity; 5) Be capable of and aware of the need to act independently of the Government and any other person or organization; 6) Be unlikely to be repeatedly disqualified from cases because they have a personal interest in or personal association with any party in any case.' CHRAC also recommended that Cambodian candidates be able to speak either French or English to a high standard to facilitate communication. The CHRAC, *Selection of Judges and Prosecutors for the Extraordinary Chambers in the Court of Cambodia*, Media Statement, 2 May 2006.

112 *Progress and Challenges*, see note 4 above, at 8; 'UN Urges Cambodia's Judicial Reform', Global Policy Forum (19 May 2006), available at: **www.globalpolicy.org/intljustice/tribunals/cambodia/2006/0519judicial.htm** (last accessed 9 August 2011).

113 According to the World Bank, only one in six of Cambodia's 117 judges and one in nine of the Supreme Court judges had law degrees in 2004. See World Bank, *Cambodia at the Crossroads*, Report No 30636-KH (November 2004).

- Thong Ol: Acquitted Khmer Rouge Commander Chhouk Rin of murder charges in 2000;
- Nil Nonn: Admitted in a 2002 interview of taking money from parties in court cases; and
- Pen Pich Saly: Has never served as a judge.[114]

The Cambodia Daily reported that, in response to criticisms of the judicial appointments, Reach Sambath, spokesman for the ECCC, stated that the trial would give the judges a chance to 'redeem' their reputations.[115] Prime Minister Hun Sen referred to critics of the appointments as 'animals' who 'want to seduce their own parents'.[116] Lao Monghay, a Cambodian legal analyst working with the Hong Kong-based Asian Human Rights Commission said the selection of these judges 'tarnishes right from the start the image of that tribunal, and because of that, it would lack public confidence and trust'.[117] LICADHO similarly stated, '[i]t is a matter of grave concern that, before a single suspect has been brought to trial, the ECCC was already tarnished by… the assignment of Cambodian judges with track records of serious political bias. Far from being a role model, it appears that the tribunal is so far serving to reinforce and reward the very worst aspects of the Cambodian judicial system'. [118]

Selecting judges based on objective criteria and using an open and fair appointment process is critical to the establishment of a competent, independent and impartial court.[119] The process by which judges are selected and appointed is vital to ensuring the independence of the judiciary and inspiring public confidence in the court system. Since these courts are customarily intended and used as models for what the nation's judicial system should strive towards, the proper groundwork should be laid down from the outset in order to bolster the confidence of the public in the judicial process. While the ECCC has been praised by some for its handling of Case 001, other legal experts believe that the lack of judicial experience of some judges caused unnecessary delays in that trial. [120] These delays had the spillover effects of undermining the legitimacy of the Court and, consequently, public confidence in the Court.[121]

4.2 Executive interference

The judiciary in Cambodia is not de facto independent from the government. A 2005 report by the UN Special Representative for Human Rights, *Continuing Patterns of Impunity in Cambodia*, concluded that: 'Cambodia had yet to develop neutral State institutions, checks on executive power, and the means to enforce rights guaranteed in the law and the Constitution. The judiciary continued to be subject to executive interference and open to corruption.'[122]

---

114 LICADHO, *Human Rights in Cambodia: The Charade of Justice* [hereinafter 'LICADHO Report'], December 2007, at 25, available at: **www.licadho-cambodia.org/reports/files/113LICADHOReportCharadeJustice07.pdf** (last accessed 9 August 2011).

115 Quoted in Prak Chan Thul, 'KR Trial Will Redeem Judges: Spokesman', *The Cambodia Daily*, 6–7 May 2006.

116 'PM: Critics of KR Judges are "Not Human"', *The Cambodia Daily*, 12 May 2006.

117 Ker Munthit, *Cambodia Judges' Credibility Questioned*, 22 May 2006, available at: **www.genocidewatch.org/images/Cambodia_22_May_06_Cambodia_judges_credibility_questioned.pdf** (last accessed 9 August 2011).

118 LICADHO Report, see note 114 above, at 26.

119 Working Group on the Extraordinary Chambers and OSJI, *International Standards for the Nomination of Judges to the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, February 2004, available at: **www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia_20040224/cambodia_20040224.pdf** (last accessed 9 August 2011).

120 Interview with Jim Goldston, Executive Director, OSJI, 16 March 2011.

121 *Ibid.*

122 Special Representative of the Secretary-General for Human Rights in Cambodia, *Continuing Patterns of Impunity in Cambodia*, October 2005, available at: **http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB05102005E.pdf** (last accessed 9 August 2011).

Judges at all levels of the Cambodian system, including the Cambodian judges in the ECCC, rely on political patronage for their entire careers.[123] The transfer of former Phnom Penh Investigating Judge Hing Thirith is an example of the role of political patronage in both the regular courts and the ECCC. Thirith was removed from his position in Phnom Penh and appointed to a new position in a distant province after finding that there was no evidence to support charges against two suspects, who were falsely accused of the murder of a popular union leader.[124] In contrast, Appeals Court Judge Thou Mony, who reinstated the charges against the suspects despite the lack of evidence against them, was later appointed to the ECCC.[125]

The ruling party often uses the judicial system as a political tool through the patronage system. A 2007 non-governmental report documents seven different examples of political opponents to ruling leaders being arrested and convicted of crimes between 1998 and 2007, only to be pardoned after agreeing to political deals advantageous to the ruling party, and often returning to high-ranking government positions almost immediately.[126] The report similarly lists 27 instances of police, public officials or the families of officials committing crimes and escaping with little or no punishment.[127] In 2010, the UN Special Rapporteur on the Situation of Human Rights in Cambodia, Surya Subedi, strongly criticised the rampant government interference in the work of the Cambodian judiciary, stating that, 'both financial and political interference in the judiciary was undermining the faith that Cambodians had in their judicial institutions'.[128] This political interference has become evident in the proceedings of the ECCC.

4.2.1 Executive interference in selection of judges to the ECCC

Theoretically, the Supreme Council of the Magistracy, which makes judicial selections and disciplines judges, is constitutionally isolated from the political branch.[129] However, in 2006, the Secretary-General's Special Representative for Human Rights in Cambodia, Yash Ghai, reported that the 'Supreme Council of the Magistracy has not played its constitutional role – as an independent institution responsible for appointing, transferring and disciplining judges', [130] that '[a]ll members but one belong to the Cambodian People's Party, and two members are on its Central Committee'[131] and that '[t]here is a tendency in the Government to use the King in his capacity as chair of the Council as a rubber stamp instead of the real decision maker as he is under the Constitution'.[132] The Special Representative noted that he had received many complaints of executive interference in the work of the judiciary and many examples of trials that failed to meet standards of due process and that, 'in order to safeguard the integrity of the judiciary more generally, the principal objective must

123 *Political Interference Report*, see note 5 above, at 5.

124 LICADHO Report, see note 114 above, at 16.

125 *Ibid*. Both Samnang and Sok Sam Oeun were convicted in spite of multiple alibi witnesses and a recantation of almost all of the evidence against them. After nearly five years of detention, they were granted new trials and released on 31 December 2008. They are still awaiting retrial at the time of writing, as they have yet to be officially exonerated. Chea Vichea, the victim, was a union leader with an affiliation to the opposition Sam Rainsy Party. Despite the innocence of the suspects, officials refuse to investigate anyone else until the two suspects are officially exonerated. See: **www.licadho-cambodia.org/articles/20090118/83/index.html**.

126 LICADHO Report, see note 114 above, at 5–6.

127 *Ibid*, at 11–15.

128 Mark Worley and Neou Vannarin, 'UN Envoy Says Judiciary "Compromised"', *The Cambodia Daily*, 18 June 2010, at 1–2.

129 Cambodian Constitution, see note 1 above, Articles 132–34.

130 'Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai', see note 94 above, at para 15.

131 *Ibid*, at para 16.

132 *Ibid*, at para 17.

be to strengthen the Supreme Council of the Magistracy, to make it broadly representative and free from political party and executive interference'.[133] If for no other reason than the appearances of improper influence, these officials should not have been involved in judicial selection for the ECCC.

Nevertheless, the Supreme Council of the Magistracy claimed that it selected and vetted the ECCC judges and prosecutors, as legally mandated. Contrary to this claim, Cambodian newspapers publicised a memo written by Deputy Prime Minister Sok An to Prime Minister Hun Sen.[134] This memo asked for Hun Sen's 'exalted decision' on the list of Cambodian judges and prosecutors to be appointed to the ECCC by the Supreme Council of the Magistracy.[135] One day later, Hun Sen agreed to the request and signed off on the list. Six weeks later, King Norodom Sihamoni, on behalf of the Supreme Council of the Magistracy, appointed all but one of the judges on the list.[136] Although Hun Sen's government has denied any wrongdoing, Former Appeal Court Prosecutor-General, and former member of the Supreme Council of the Magistracy, Harrot Raken, said that the Council enjoyed little independence at the time of court appointments; but he declined to say who actually selected the judges.[137]

In August 2007, a Cambodian Royal Decree selected You Bunleng, Co-Investigating Judge at the ECCC, to replace Ly Vuochleng as President of the domestic Appeals Court.[138] Even the UN voiced concern over this appointment, specifically citing the appearance that Bunleng was appointed at the request of the executive branch of Cambodia's Government and without the involvement of the Supreme Council of the Magistracy as required by Cambodian law.[139] In response to Benlung's domestic appointment, the Secretary-General's Special Representative for Human Rights in Cambodia, Yash Ghai, and the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, issued a joint statement that the appointment cast doubt on the judicial independence of the ECCC.[140] Bunleng continues to serve on the ECCC, in addition to his appointment on the Appeals Court.

In the end, the selection process for the Cambodian ECCC judges was not transparent. In 2007, OSJI outlined the challenges the Court faced. Of the four factors listed as undermining the Court's credibility, OSJI placed 'flaws in the Cambodian judicial selection process'[141] as the first. In contrast, the selection process for international judges on the ECCC was more transparent. The UN invited Member States to nominate candidates for international positions on 30 June 2005. The UN took nominations from anyone, including self-nominations, for international judges and prosecutors. In addition, OSJI assisted with the development of a database of individuals interested in all positions, including administrative staff, and provided that to the UN. Following nominations, the UN's Office of Legal Affairs conducted interviews and made recommendations to the Government of Cambodia.[142]

---

133 *Ibid,* at para 29.

134 'Nuon Chea Lawyers Query Hun Sen on KR Tribunal Judgeships', *The Cambodia Daily*, 6 August 2009; 'Officials Mum on KR Tribunal Judicial Appointments Memo', *The Cambodia Daily*, 20–21 June 2000.

135 *Ibid.*

136 The excluded judge was a reserve judge.

137 'Nuon Chea Lawyers Query Hun Sen on KR Tribunal Judgeships', see note 134 above.

138 Scheffer, see note 62 above, at 36.

139 *Ibid.*

140 *Ibid.*

141 *Progress and Challenges,* see note 4 above, at 7.

142 Mark Ellis' communication with OSJI staff members, July 2010.

The UN Basic Principles on the Independence of the Judiciary Principle 10 states: 'Any method of judicial selection shall safeguard against judicial appointments for improper motives.'[143] The UN and the Cambodian Government did not ensure that suitable safeguards were in place in relation to the selection and appointment of domestic judges for the ECCC, which is arguably a violation of Principle 10. The failure of the UN and international partners to insist that the Cambodian Government operate a transparent selection process and select judges with significant international experience and solid reputations for impartiality undermines the legitimacy of the Court.

4.2.2 Executive interference in cases before the Court

The ECCC has also come under heavy scrutiny for perceived bias in favour of the Cambodian Government's wishes to avoid questioning certain witnesses, and more significantly, to limit the Court's prosecution to just five members of the Khmer Rouge. Such issues of political influence were not as apparent in the ECCC's first case, Case 001, against Kaing Guek Eav who oversaw the notorious Tuol Sleng detention centre. In that case, the accused pled guilty and was not as high-ranking a political figure as the defendants and suspects in the cases now before the Court. As a result, Case 002 and Cases 003/004 pose challenges that the Court did not face in Case 001. Given the difference in nature between these cases, the concerns foreshadowed at the outset of the ECCC are now coming to the fore.

Case 002 involves the former Head of State, Khieu Samphan; Pol Pot's chief ideologue Nuon Chea (also known as Brother Number Two); former Foreign Affairs Minister Ieng Sary; and former Social Affairs Minister Ieng Thirith. The Government, including Prime Minister Hun Sen, has publicly expressed its opposition to the hearing of certain witnesses close to the Government.[144] Immediately after the summons for six high-level witnesses were published, government spokesman Khieu Kanharith declared that it is the Government's position that the witnesses should not testify.[145] These six government officials never gave testimony or even responded to the summons, and the investigating judges declined to take additional measures to compel the witness' cooperation.

The possible witness intimidation that this behaviour indicates requires some sort of response by the Court under Internal Rule 35.[146] Defence attorneys appearing before the ECCC have argued that members of the Government of Cambodia are interfering with the administration of justice at the Court.[147] The defence teams for Nuon Chea and Ieng Sary requested the Court to investigate possible governmental intimidation of these witnesses.[148] The request notably garnered polarised opinions in the pre-trial chamber, with the Cambodian judges denying that an investigation was warranted, and the international judges issuing strong dissenting opinions, concluding that 'no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a

---

143 *Basic Principles on the Independence of the Judiciary*, see note 12 above, Principle 10.

144 Letter to the UN Special Rapporteur on the Situation of Human Rights in Cambodia from the Nuon Chea Defence Team, 11 November 2010 (on file with author).

145 Sebastian Strangio and Cheang Sokha, 'Government Testimony Could Bias KRT: PM', *Phnom Penh Post*, 9 October 2009, available at: **http://khmerization.blogspot.com/2009/10/govt-testimony-could-bias-krt-pm.html** (last accessed 9 August 2011); Public Redacted Second Decision on Nuon Chea and Ieng Sary's appeal against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, at para 40.

146 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (rev 5), Rule 35, as revised on 9 February 2010, available at: **www.eccc.gov.kh/sites/default/files/legal-documents/IRv7-EN.pdf**.

147 Letter to the UN Special Rapporteur on the Situation of Human Rights in Cambodia from the Nuon Chea Defence Team, see note 144 above.

148 Request for Investigation, Nuon Chea Defence Team (30 November 2009); Request for Investigation Pursuant to Rule 35, Nuon Chea Defence Team (28 April 2011); Second Request for Investigation Pursuant to Rule 35, Nuon Chea Defence Team (3 June 2011), Extraordinary Chambers in the Courts of Cambodia, available at: **www.eccc.gov.kh/sites/default/files/documents/courtdoc/E92_Redacted_EN[1].pdf** (last accessed 9 August 2011).

reason to believe that one or more members of the [Cambodian Government] may have knowingly and wilfully interfered with witnesses…'.[149]

The defence team for Nuon Chea has also accused Judge Bunleng of submitting to government pressure to thwart the testimony of witnesses, as he had refused to participate in the summoning of the six high-level witnesses.[150] Additionally, he refused to sign a letter summoning King Father Norodom Sihanouk, and later, a government official tried to thwart the delivery of the summoning letter that was signed by international Co-Investigating Judge Lemonde, raising suspicion that a concerted effort had taken place.[151]

Most troubling, however, has been the handling of Cases 003 and 004. Despite the fact that the Court has sole responsibility for deciding whether these cases proceed, Prime Minister Hun Sen told UN Secretary-General Ban Ki-moon in October 2010 that further prosecutions beyond those who are now on trial for Case 002 would not be 'allowed', for the sake of the country's stability.[152] Bias from the national members of the Court has also been evident since even before investigations into Cases 003 and 004 began. The ECCC Cambodian Deputy Co-Prosecutor Chan Dararasmey stated in March 2011 – prior to the ECCC's decision on the matter – that '[t]here will be no Case 003 and 004 because there was no consensus between national and international co-prosecutors'.[153] Not only was this statement an inappropriate assumption of an independent court official, but also showed a lack of respect or knowledge of the rules of the Court. Even if there is disagreement among the co-prosecutors, the Internal Rules provide a presumption for the case to go forward.[154]

As noted by a comprehensive report on the ECCC's proceedings, once the question was considered, opinions on whether to begin the investigation largely fell along Cambodian/international lines.[155] International Co-Prosecutor Robert Petit referred the suspects for investigation, whereas the Cambodian Co-Prosecutor opposed prosecution. Because the prosecutors did not agree on whether the cases should proceed, they had to submit the matter to the pre-trial chamber, which required a supermajority vote to stop the cases from proceeding. Again, the voting fell along national/international lines: the two Cambodian judges concluded that the cases should not go forward, whereas the international judges concluded that it should. Because of the absence of a supermajority, the cases were allowed to proceed.[156]

Another indicator of bias was the Co-Investigating Judge Bunleng's revocation of his authorisation for beginning the investigations. Despite the requirement that the investigation proceed, Judge Bunleng delayed signing the rogatory letters to start the investigation, prompting Judge Lemonde to write Bunleng a letter urging his signature by 4 June 2010, or else he would file an official disagreement

149 Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, Second Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summons Witnesses, 002/19-09-2007-ECCC/OCIJ, 9 September 2010, at para 6.

150 'Nuon Chea Team Accuses You Bunleng of Political Bias', *The Cambodia Daily*, 28 June 2010.

151 Application for Disqualification of Judge You Bunleng, Nuon Chea Defence Team (17 June 2010).

152 'No Third Khmer Rouge Trial, says Hun Sen', *RFI English*, 27 October 2010, available at: **www.english.rfi.fr/node/55442** (last accessed 15 June 2011).

153 Clair Duffy, 'Khmer Rouge Court at Critical Point', 27 March 2011, available at: **http://blog.soros.org/2011/03/khmer-rouge-court-at-critical-point** (last accessed 9 August 2011).

154 *Ibid*; see Extraordinary Chambers in the Courts of Cambodia, Internal Rules (rev 5), Rule 71(4)(c), as revised on 9 February 2010. ('If the required majority is not achieved before the Chamber… the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.')

155 OSJI, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', March 2010 Update.

156 *Ibid.*

on the issue.[157] On 7 June 2010, the UN announced that both co-investigating judges had signed the rogatory letters. The evening following the UN's announcement, a government spokesman repeated the government's opposition to the investigations, stating that 'just only the five top leaders [are] to be tried'.[158] The following day, on 8 June, Judge Bunleng struck out his signature on the letters and briefly explained that he did not feel that the time was 'opportune' to investigate Cases 003 and 004, and he wanted to wait until after indictments were made in Case 002.[159]

Although the Case 003 investigation was eventually begun, it has been widely criticised for lacking transparency and not being carried out genuinely. Government officials have reiterated the government's opposition to prosecution, and the ECCC seems to have acted in step with this agenda, ultimately closing Case 003 with an incomplete investigation. Basic details of the investigation were kept 'confidential', including the identities of the suspects.[160] According to OSJI, the Case 003 investigation violates the UN Principles to Combat Impunity, which provide that a victim's right to justice includes 'prompt, thorough, independent and impartial investigations'.[161] International legal norms also call for some transparency to the investigation for public scrutiny.[162] The ECCC gave persons who directly suffered harms from the crimes investigated in Case 003 only 15 days to apply to participate in future civil proceedings, even though the ECCC still did not reveal either the crimes being investigated, or the suspects.[163] Because the acts and suspects involved have remained secret, Case 003 garnered only a few hundred victim complaints, whereas Case 002 had more than 6,000.[164]

In addition to the Court's public actions, confidential sources from inside the Court reported a general belief within the Court that the co-investigating judges would be influenced by political and financial considerations to dismiss Cases 003 and 004.[165] More strikingly, these sources further revealed that staff of the Office of Co-Investigating Judges purposefully filled the Case 003 file with Case 002 material to give the impression that a full investigation had taken place. OSJI noted that in the Court's announcement of the Case 003 closure, the Court seemingly 'went out of its way to note that there were 48,000 pages and 2,000 pieces of evidence in the Case 003 file'.[166] It also was revealed by the media that the co-investigating judges neither interviewed the suspects, nor conducted field investigations of the locations of the alleged crimes before officially closing the 20-month long investigation on 29 April 2011 with little explanation.[167]

---

157 James O'Toole, 'Judges Give KRT Update', *Phnom Penh Post,* 11 February 2011, available at: **http://phnompenhcapital.com/judges-give-krt-update** (last accessed 9 August 2011); see also, Request for Investigation Pursuant to Rule 35, Nuon Chea Defence Team (28 April 2011).

158 *Ibid.*

159 *Ibid.*

160 Kong Sothanarith, 'Judges Order Retraction from Tribunal Prosecutor', *VOANews.com*, 18 May 2011, available at: **www.voanews.com/khmer-english/news/Judges-Order-Retraction-From-Tribunal-Prosecutor-122185704.html** (last accessed 9 August 2011).

161 OSJI, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', June 2011 Update, at 8 (citing UN Doc No E/CN.4/2005/102, 'Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of Principles to combat impunity', Diane Orentlicher, 18 February 2005).

162 *Ibid*, at 10.

163 Youk Chhang, 'Documentation Center of Cambodia Supports Transparent and Independent Case 003 and Case 004 Investigations', 5 May 2011, available at: **www.cambodiatribunal.org/blog/2011/05/documentation-center-cambodia-supports-transparent-and-independent-case-003-and-case** (last accessed 9 August 2011).

164 Sok Khemara, 'Civil Party Lawyer Says Tribunal is Failing Victims', *VOANews.com*, 1 June 2011, available at: **www.cambodiatribunal.org/images/CTM/civillawyersays.pdf** (last accessed 15 June 2011).

165 OSJI, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', June 2011 Update, at 7, 11.

166 *Ibid.*

167 See, eg, OSJI, 'Cambodia's Khmer Rouge Court Must Fully Investigate Case 003', 3 May 2011, available at: **www.soros.org/initiatives/justice/focus/international_justice/news/cambodia-eccc-20110429** (last accessed 9 August 2011).

National Co-Prosecutor Chea Leang – apparently the niece of Deputy Prime Minister Sok An[168] – welcomed the closure of the case, claiming that the two suspects in Case 003 did not fall within the jurisdiction of the Court because they were neither senior leaders, nor individuals who were 'most responsible' for the crimes committed.[169] However, a leaked ECCC document revealed the two suspects to be Khmer Rouge Air Force Commander Sou Met and Navy Commander Meas Mut, both of whom are alleged to have participated in a plan to eliminate 'undesirable elements' from the Revolutionary Army of Kampuchea, resulting in possibly tens of thousands of murders.[170] Additionally, holders of the leaked document described that the 'level of detail' of the document indicated a 'strong case'.[171] The tribunal's judges, rightly, have since threatened prosecution for anyone publishing the confidential document; the disclosed information further indicates bias in the decision to close the investigation.[172]

In contrast, international Co-Prosecutor Andrew Cayley appealed the closure of the investigation to the co-investigating judges, specifying several sites that needed examination and insisting that the Court publicly name the two suspects and interview them.[173] In response, the co-investigating judges ordered sections of the request to be redacted, claiming that the request mentioned confidential information, including detailed 'alleged crimes, crime bases and criminal scenarios', as well as 'intended future actions' of the prosecutor related to investigation.[174] Cayley appealed the order, calling it an inappropriate act of censure that interfered with his duty to keep the public informed of Court proceedings,[175] but the co-investigating judges rejected the appeal.[176] They considered Cayley's requests 'invalid', based on a technicality as he had acted unilaterally without filing a disagreement between the co-prosecutors, even though according to Cayley such practice was previously accepted in the Court.[177] Not only was the procedure trivial, but the co-investigating judges seemed to have erred in their application of the law of the Court, showing either lack of understanding or respect for the law. The Internal Rules give the co-prosecutors ample authority to file documents on their own, and nevertheless, any obligation to file a disagreement falls on the party disagreeing with the current motion.[178]

---

168 Brendan Brady, 'No More KR Suspects: Chea Leang, Sok An's Niece', *KI-Media*, 6 January 2009, available at: **http://ki-media.blogspot.com/2009/01/no-more-kr-suspects-chea-leang-sok-ans.html** (last accessed 9 August 2011).

169 'Case 003 and 004 Heading to the Dumpster, as Hun Xen Ordered?', *KI-Media*, 3 May 2011, available at: **www.ki-media.co.cc/2011/05/ki-media-case-003-and-004-heading-to.html** (last accessed 9 August 2011) (quoting 2 May 2011 report by *The Cambodia Daily*).

170 Jared Ferrie, 'Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges', *Christian Science Monitor*, 8 June 2011, available at: **www.csmonitor.com/World/Asia-Pacific/2011/0608/Leaked-document-casts-doubt-on-impartiality-of-Khmer-Rouge-judges** (last accessed 9 August 2011).

171 *Ibid.*

172 James O'Toole, 'KRT Judges Warn Press on 003', *Phnom Penh Post*, 10 June 2011.

173 Kong Sothanarith, 'Judges Order Retraction from Tribunal Prosecutor', see note 160 above.

174 Order on International Co-Prosecutor's Public Statement Regarding Case File 003 (18 May 2011); 003/07-09-2009-ECCC-OCIJ, available at: **www.eccc.gov.kh/en/document/court/order-international-co-prosecutors-public-statement-regarding-case-file-003** (last accessed 9 August 2011).

175 Kong Sothanarith, 'Prosecutor Files Appeal against Judges' "Censure"', *VOANews.com*, 31 May 2011, available at: **www.voanews.com/khmer-english/news/Prosecutor-Files-Appeal-Against-Judges-Censure-122861789.html** (last accessed 9 August 2011).

176 Kong Sothanarith, 'Tribunal Judges Refuse to Re-Investigate Case 003', *VOANews.com*, 7 June 2011, available at: **www.voanews.com/khmer-english/news/Tribunal-Judges-Refuse-To-Re-Investigate-Case-003-123357403.html** (last accessed 9 August 2011).

177 Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, Case No 003/07-09-2009-ECCC/OCIJ, 7 June 2011, at 2–3.

178 OSJI, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', June 2011 Update, at 20–21. See Disagreement No: 18-11-2008/ECCC-PTC, Annex 1: Public Redacted Version Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, at para 27, available at: **www.eccc.gov.kh/sites/default/files/documents/courtdoc/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_%28English%29.pdf** (noting that 'the proper procedure' is for the co-prosecutor who raises objections to the motion to initiate the filing of a disagreement).

Cayley has since appealed the order to the pre-trial chamber. As of late June 2011, the Chamber judges had not yet issued a decision. It is suspected, however, that the dismissal will stand because of the likely split along national/international lines and the need for a supermajority to overcome the original order.[179]

The co-investigating judges' refusal to reopen Case 003 or even to provide explanation for its closure has prompted wide outrage and concern from numerous Cambodian civil society groups, which in May 2011 released a collective press release accusing the Court of interfering with the people's right to justice, as well as the right to know what happened during the Khmer Rouge period.[180] Five UN workers of the Court have resigned in protest of the case's closure. Stephen Heder, an expert on the Khmer Rouge, wrote in his resignation letter to Co-Investigating Judge Siegfried Blunk:

> 'In view of the judges' decision to close the investigation into Case File 003 effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff's evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office, I have concluded that no good use can or will be made of my consultancy services.'[181]

The UN has also been accused of ordering the closure of the case, again having its credibility undermined by the Court's actions.[182] UN Secretary-General Ban Ki-moon vehemently denied a UN role in the closure of the case, but supported the Court's lack of explanation for its decision, stating the judges 'are not under an obligation to provide reasons for their actions at this stage of the investigation in Case Three'.[183] While an explanation might not be required by Cambodian law, justification for this major step was necessary to attempt to salvage legitimacy for both the Court and for the UN.

4.3 Corruption among Court officials and government employees

As noted by the Group of Experts, one of the most troubling problems with the Cambodian judicial system is the lack of confidence Cambodians have in the system. According to a 2005 poll, Cambodians found the justice system to be the second most dishonest public service in Cambodia and the least effective.[184] A 2006 poll of Cambodian businesses called the justice system Cambodia's most corrupt institution.[185] The allegations that judges were corrupt even led Human Rights Watch to argue that '[t]he Cambodian judges [...] receive their order directly or indirectly from Hun Sen. They

---

179 *Ibid.*

180 Asian Human Rights Commission, 'Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out', 20 May 2011, available at: **http://humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011** (last accessed 9 August 2011).

181 James O'Toole, 'Outgoing Consultant Blasts Tribunal Judges', *Phnom Penh Post*, 14 June 2011, available at: **http://kimedia.wordpress.com/2011/06/14/ki-media-outgoing-consultant-blasts-tribunal-judges-blunk-and-you-bunleng** (last accessed 9 August 2011).

182 'UN Denies Halting Khmer Rouge Investigation', *AFP*, 15 June 2011, available at: **www.google.com/hostednews/afp/article/ALeqM5i8oHhoRjZdGmNrIa6WUisV18DNmA?docId=CNG.b3569aafd06fe78f58be73c5faaa97a5.821** (last accessed 9 August 2011).

183 UN Department of Public Information, 'Secretary-General, United Nations Rejects "Media Speculation" that Judges Received Instructions to Dismiss Case before Extraordinary Chambers in Courts of Cambodia', 14 June 2011, available at: **www.un.org/News/Press/docs/2011/sgsm13642.doc.htm** (last accessed 9 August 2011) .

184 LICADHO Report, see note 114 above, at 22.

185 *Ibid.*

cannot act independently for fear of being removed or worse'.[186] It is imperative to the legitimacy of the ECCC that similar perceptions are not projected on to the ECCC. However, very quickly after the ECCC began operations, allegations of serious corruption at the Court began to surface. The failure to deal with these allegations has led critics to conclude that the ECCC also has become rife with corruption and inherent bias.

Reports of impropriety prompted the United Nations Development Programme (UNDP), which distributes donor funds to the ECCC, to issue an audit report of the ECCC in October 2007. The international audit revealed serious lapses in the recruitment of Cambodian staff for the ECCC, and recommended all their contracts be nullified and the hiring process be restarted from scratch.[187] Unfortunately, while this report highlighted the deficiencies in hiring local staff for the ECCC, the report did not instil confidence in the ECCC judicial selection process because according to the UNDP, 'the scope of the audit did not include judges appointed by the Supreme Council of Magistracy'.[188]

Corruption related to bribery has also been an issue. While judicial wages have increased since the Group of Experts cited low pay for judges as a weakness in the system, at least two judges, including ECCC Judge Nil Nonn, are on record as admitting to accepting bribes regarding the disposition of their regular court cases.[189] Takeo Provincial Court President, Tith Sothy, was quoted saying '[i]f a judge is a clever man, he can find ways to make a lot of money'.[190] Given the potential profit derived from bribes, it is not surprising that judges and other Court officials are alleged to gain their positions in the first place by paying bribes to members of the executive branch as a sort of investment in their future ability to gain from the position.[191]

The procedure for the disqualification of a judge from the ECCC does not adequately address situations involving allegations of corruption. In response to Ieng Sary's request to disqualify Judge Nil Nonn for his past acceptance of bribery, the Trial Chamber responded that Internal Rule 34 provides judge disqualification for 'bias against a particular accused in relation to a particular case, and cannot be used to lodge a general complaint about the fitness of an individual to serve as a judge'.[192] The Court thus did not disqualify Judge Nil Nonn because the bribes he received in previous cases are not strictly relevant to his perception of Case 002. Even if judges exhibit bias or

---

186 Susan Postlewaite, 'Khmer Rouge Trial Threatened', *Asia Sentinel*, 24 April 2009, available at: **http://asiasentinel.com/index.php?option=com_content&task=view&id=1841&Itemid=189** (last accessed 9 August 2011). See also the HRW statement published in A Salisbury, 'Rights Group Urges Cambodia Tribunal to End Perception of Government Interference', *The Jurist*, 23 July 2009, available at: **http://jurist.law.pitt.edu/paperchase/2009/07/rights-group-urges-cambodia-tribunal-to.php** (last accessed 9 December 2009).

187 UN Development Programme, 'Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia', Report No RCM0172, 4 June 2007.

188 *Ibid*, at 9.

189 LICADHO Report, see note 114 above, at 22.

190 *Ibid.*

191 *Ibid.*

192 The procedure for the recusal or disqualification of a judge from the ECCC is outlined in Rule 34 of the ECCC Internal Rules:
'34(2) Any party may file an application for disqualification of a 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.
34(3) A party who files an application for disqualification of a judge shall clearly indicate the grounds and shall provide supporting evidence. The application shall be filed as soon as the party becomes aware of the grounds in question.
34(5) An application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber. In any other case it shall be submitted to the Chamber in which the judge in question is sitting. The Judge in question may continue to participate in the judicial proceedings pending a decision. However, he or she may decide to step down voluntarily at any point in the following proceedings.
34(7) The Judge shall be entitled to present written submissions to the Chamber within 10 (ten) days of his or her receipt of the application, through its President. The application for disqualification of the Judge, along with the submissions by the Judge, shall be considered by the Chamber Judges, who shall vote on the matter, and hand down a written decision in the absence of the judge in question and the applicant.'

engaged in misconduct in previous cases, it is still not enough to disqualify them from the case at hand. The Trial Chamber conceded that '[a] pattern of improper conduct… may call into question a person's qualifications to act as a judge at the ECCC, [but] [n]o relevant mechanisms are provided in the ECCC Law and Agreement'.[193] Only the Supreme Council of the Magistracy, following the law of Cambodia, can provide for removal based on judicial qualification alone.

Additional concerns have been raised about the possibility of corruption in the selection of judges and staffing of the Court. On 14 February 2007, OSJI issued a press release calling for an investigation of allegations that Cambodian judges and other personnel of the ECCC are compelled to kickback part of their wages to Cambodian government officials in exchange for their position.[194] The Cambodian Government was reportedly hostile to those suspected of filing complaints.[195] In August 2008, formal corruption complaints regarding the kickbacks were received directly from staff members of the ECCC, but the Cambodian Government ignored calls from other states to initiate an independent review of the allegations.[196]

When the Cambodian Government finally sought to address these allegations, it appointed two ethics monitors and created a formal mechanism under which complaints could be reported directly to Deputy Prime Minister Sok An.[197] The anti-corruption team was headed by Judge Kong Srim, an ECCC judge in the Supreme Court Chamber, and spokeswoman Helen Jarvis.[198] It was an attempt to establish international credibility with donor nations that were reluctant to provide funds.[199] The Government also required that Cambodian staff sign a code of conduct pledging not to undertake corrupt practices.[200]

Despite these reforms, corruption allegations persisted. The ongoing allegations led the Nuon Chea defence team to launch a complaint at Phnom Penh Municipal Court, asserting that their client would not be given a fair trial.[201] The attorneys made specific allegations that the Cambodian judges were using intimidation tactics – including threatening to sue them for defamation – in an attempt to stop the corruption investigation. The defence team's request for an investigation was denied. The same court and anti-corruption team also rejected attempts to raise corruption allegations by defence lawyers for Khieu Samphan and Ieng Sary. Court officials repeatedly claimed that the allegations were unspecific, unsourced and unsubstantiated.[202]

---

193 Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, No 002/19-09-2007IECCCITC, 28 January 2011, at 4–5.

194 OSJI, 'Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly', 14 February 2007, available at: **www.soros.org/initiatives/justice/news/cambodia_20070214** (last accessed 9 August 2011).

195 Numerous reports detail retaliation against people who speak against official corruption or other forms of wrongdoing in Cambodia. See, for instance, LICADHO, 'Attacks & Threats Against Human Rights Defenders In Cambodia – 2007', August 2008, available at: **www.licadho-cambodia.org/reports.php?perm=127** (last accessed 11 August 2011); *Cambodia: A Risky Business – Defending the Right to Housing*, Amnesty International, issued 26 September 2008, available at: **www.amnesty.org/en/library/info/ASA23/014/2008/en** (last accessed 11 August 2011); and 'Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai', see note 94 above; OSJI, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', October 2008, at 3–5.

196 Michael Saliba, *Allegations of Corruption at ECCC: Overview*, 28 September 2009, available at: **www.cambodiatribunal.org/images/CTM/ctm_blog_9-28-2009.pdf** (last accessed 11 August 2011).

197 The National Resident Judge, Kong Srim, and the Chief of Public Affairs, Helen Jarvis, were entrusted as ethics monitors by all national staff at the meeting dated 15 August 2008.

198 *Composite Chronology of the Evolution and Operation of the ECCC*, at 44.

199 *Ibid.*

200 Humanitarian Law Perspectives 2009, *The Extraordinary Chamber of the Cambodian Court*, at 10.

201 Stéphanie Gée, 'Khmer Rouge Court: Short of Money Against a Backdrop of Unsolved Allegations of Corruption', *Ka-Set News*, 25 February 2009, available at: **http://cambodia.ka-set.info/khmer-rouge/news-court-eccc-un-donors-funding-backers-corruption-khmer-rouge-trial-investigation-ban-ki-moon-090225.html** (last accessed 11 August 2011).

202 *Cambodia's Judiciary on Trial*, 9 April 2009, available at: **www.rfa.org/english/news/cambodia/cambodiajudiciary-04092009111855.html?searchterm=None** (last accessed 9 August 2011).

The UN then attempted to encourage the Cambodians to establish a credible mechanism to address allegations of corruption. Again, the Cambodian Government refused to cooperate, which led to the temporary breakdown of the negotiations regarding anti-corruption measures for the tribunal.[203] Another attempt at establishing an anti-corruption team was soon under way. From 6 to 8 April 2009, then UN Assistant Secretary-General for Legal Affairs Peter Taksøe-Jensen met with Cambodian Deputy Prime Minister Sok An to discuss a proposal of instituting an ethics monitoring mechanism for the ECCC.[204] The goal was to give the staff of the ECCC the ability to approach any ethics monitor on their own, to make statements concerning corruption without fear of retaliation.[205] Taskøe-Jensen also emphasised that the UN planned to strengthen its anti-corruption mechanism within the Court.[206] Again, this proposal remained just that – a proposal. The UN and Cambodian officials failed to agree on the details.[207] Taksøe-Jensen left the meeting saying that he believed they were close to an agreement but that further negotiations would not continue.[208]

Finally, on 12 August 2009, Sok An and Taksøe-Jensen announced the conclusion of the text of the Agreement to Establish an Independent Counsellor at the Extraordinary Chambers in the Courts of Cambodia.[209] The Agreement was reached more than a decade after the Group of Experts first raised concerns over the independence and impartiality within the ECCC and two years after allegations were first made that Cambodian staff at the ECCC had to pay part of their salary as a kickback to maintain their positions. According to the statement released:

> 'The designation of an Independent Counsellor builds on the existing structure of national and international Ethics Monitors… [i]t represents a further step to help strengthen the human resources management in the entire ECCC administration, including anti-corruption measures, to ensure the requirements of due process of law, including full protection of staff on both sides of the ECCC against any possible retaliation for good faith reporting of wrongdoing. In this context, the Independent Counsellor will be available to all staff to bring forward any concerns confidentially, and will be empowered to address such concerns.'[210]

The Agreement mandates that the Counsellor be a person of high integrity and good reputation.[211] Uth Chhorn, former Auditor-General of Cambodia, was selected to be the first Counsellor.[212] To further ensure his independence, the Counsellor will not be an employee of the ECCC, the UN, or a political appointee of the Cambodian Government. The costs of establishing and maintaining this position are shared equally by the UN and the Cambodian Government.

---

203 Joint Statement by the Cambodian Center for Human Rights and the Asian Human Rights Commission, 'Tolerance of Corruption at KRT Unacceptable', 17 April 2009.

204 Statement of Peter Taksøe-Jensen, Phnom Penh, 8 April 2009, available at: **www.unakrt-online.org/1.pdf** (last accessed 11 August 2011).

205 *Ibid.*

206 *Ibid.*

207 'UN, Cambodia Officials Fail to Agree on Genocide Tribunal Corruption Monitoring', *Jurist Legal News and Research*, 9 April 2009, available at: **http://jurist.law.pitt.edu/paperchase/2009/04/un-cambodia-officials-fail-to-agree-on.php** (last accessed 11 August 2011).

208 *Ibid.*

209 Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, 12 August 2009, available at: **www.un.org/News/Press/docs/2009/l3146.doc.htm**.

210 *Ibid.*

211 Agreement to Establish an Independent Counsellor at the Extraordinary Chambers in the Courts of Cambodia, August 2009.

212 *Ibid.*

When an employee or a person affiliated with the Court suspects misconduct or impropriety, he or she will report the alleged misconduct to the Independent Counsellor, who will then investigate. If his findings rise to an appropriate level, he will report such findings to the Deputy Prime Minister of Cambodia as well as the Assistant Secretary-General for Legal Affairs of the UN, who together will seek to resolve the matter through appropriate consultations.[213] Throughout the process, the Independent Counsellor will maintain the strictest level of confidentiality toward the staff of the ECCC, and all persons will be protected from any retaliation for reporting misconduct in good faith.[214]

This Agreement was received with the full support of both the ECCC and the Friends of the ECCC, an organisation comprised of the Ambassadors of the largest donor countries. The Ambassador of Japan and the chargé d'affaires of France, serving as Co-Chairs of the Friends of the ECCC, released an official statement on 30 April 2009 to declare their full support of the 'broad progress [made] to set up anti-corruption measures within the ECCC'.[215] Although the Friends of the ECCC is not party to the Agreement, it was instrumental to the entire negotiating process as the final Agreement followed detailed consultations with the organisation.[216]

The establishment of the Independent Counsellor position seemed to represent significant progress for the ECCC, but it is troubling that the UN reacted to the problem only after widespread allegations had already eroded the perceptions attached to the important work of the Court. Moreover, despite the promise the Independent Counsellor position had as an instrument for investigating and responding to corruption within the ECCC, transparency has already proven to be an issue. Uth Chhorn announced in June 2010 that the first corruption report on the ECCC would be made public the following month. However, in October 2010, he announced that the report would no longer be disclosed, based on an agreement between the Cambodian Government and the UN. Chhorn claimed not to know what prompted the decision.[217]

213 Saliba, *Allegations of Corruption at ECCC: Overview*, see note 196 above.

214 *Ibid.*

215 Statement of the Co-Chairs of Friends of the Court, 30 April 2009, available at: **www.ambafrance-kh.org/spip.php?article1163** (last accessed 11 August 2011).

216 Saliba, *Allegations of Corruption at ECCC: Overview*, see note 196 above.

217 James O'Toole, 'UN Keeps Corruption Probe Confidential', *Phnom Penh Post*, 18 October 2010.

5. Best Practices for Safeguarding Judicial Independence and Impartiality

It is the responsibility of the international community to include effective safeguards to ensure de facto implementation of de jure protections, particularly in a country with a demonstrated history of deficient implementation of the fair trial protections provided on paper. The following best practices for such safeguards address the needs highlighted by the ECCC experience and draw upon models provided by other international and mixed tribunals.

5.1 Composition

Mixed courts are typically held in nations where the judicial system is underdeveloped, or where the system has been destroyed through conflict or by authoritarian rule. In the case of Cambodia, the original letter from the co-Prime Ministers requesting UN assistance referenced an inability of the Cambodian justice system to handle the trial saying, 'Cambodia does not have the resources or expertise to conduct this very important procedure'.[218] Though the Group of Experts questioned whether even one qualified, independent judge could be found in the Cambodian system, the General Assembly Resolution that forced the Secretariat to return to the negotiations effectively forced the negotiators to accept not just one Cambodian judge, but a majority of Cambodian judges, which opened the door to political influence.

As a general rule, wherever politically possible, the majority of judges in mixed courts should be international. A majority of international rather than domestic judges is the safest structure for courts in which the capacity or independence of the domestic judiciary is a question. However, the requirement of a majority of international judges does not have to be a hard and fast rule as to stand in the way of justice.

It is important to note that states wishing to have more domestic judges than international judges are not necessarily doing so out of a motive of interference with the courts. While the international community often sees the international judges serving in mixed courts as superior to those of the respective national judicial systems, international judges themselves have different judicial capabilities. Moreover, the UN and other international institutions have their own challenges, and are often viewed sceptically in states that lack influence on the international stage. One common criticism of the practice of international courts is that the justice they provide has targeted less powerful states while rarely reaching more powerful states.

In such cases, a flat refusal to participate in a court in which the domestic judges represent a majority would not necessarily be in the interests of justice. However, if a state insists on a domestic majority in the court, the major factor in agreeing to that demand should be whether the state is willing to allow other safeguards to prevent against government interference. While all courts, even those in stable judicial systems, should apply proper safeguards to prevent political interference, the depth of protection required may be higher or lower depending on the capacity of the domestic judiciary to

218 Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, see note 36 above.

protect international standards of due process. Whatever the problems specific to a certain situation, negotiators must be creative in attempting to find a balance of authority that both the UN and the state can agree on.

Thus, while there is no hard and fast rule on international majorities, the heavy presumption must be in favour of such a majority. If negotiators steadfastly insist proper safeguards be put in place, and have the support of the international community, we may avoid the inflexibility of an absolute rule requiring an international majority. However, it cannot be stated strongly enough how passionately the UN must protect its legitimacy by ensuring that UN-endorsed trials meet the highest standards of due process. Unless such standards can be otherwise ensured, the UN must insist on a majority of international judges.

5.2 Judicial selection process

One of the most salient features of a fair trial, and one that may compensate against other procedural weaknesses, is that judges are, and are seen to be, independent. Thus, the selection of judges is one of the most important factors in ensuring a fair and just trial. If the method of judicial selection does not adequately demonstrate that the Bench is independent, the trial will not be perceived as fair, and the legitimacy of all of the judges' decisions will be undermined.

5.2.1 Separate nomination and selection authority for judges

Anyone who has influence over the selection and discipline of judges holds the judges' careers in his or her hands. The purpose of isolating judicial appointments from the political branch of government is to keep those with political interests in the outcome of trials from influencing those charged with impartially deciding the law. There is concern that Hun Sen and Sok An handpicked the Cambodian judges that form the majority of the court, as well as choosing the international nominees they found most preferable. In effect, the incorporation of Cambodian selection procedures into the ECCC is tantamount to similarly incorporating the system of patronage that cripples the domestic judiciary. New courts should spread the power to select judges so as to dilute the power held over judges by the politicians who control their careers.

Including additional parties in the selection process is one safeguard against political influence in selection by promoting transparency. In addition, diversification of the authority of nomination and selection is generally advisable. Separation of the authority to nominate and select appointments limits the power the government exercises over the appointees and would allow greater independence of the domestic judges.

The Special Court for Sierra Leone (SCSL) provides an example of this approach. The process of appointment of judges by the Government of Sierra Leone to the SCSL is distinct from the process of appointment for purely domestic judges, but is based on a system of recommendations and consideration of distinguished national jurists.[219] Pursuant to Article 2 of the Agreement on the Establishment of a Special Court for Sierra Leone, '[t]he Government of Sierra Leone and

219 Confirmed by Mr Solomon Moriba of the Public Outreach Department of the SCSL at The Hague, by telephone on 2 September 2010.

the Secretary-General shall *consult* on the appointment of judges…'[220] [emphasis added]. While the language in the agreement requiring that the two sides 'consult' is not strong language, it does provide the added advantage that the Secretary-General is included in the domestic selection conversation, limiting the opportunity for blatant interference.

Similarly, in the War Crimes Section of the State Court of Bosnia and Herzegovina, domestic judges are appointed by the High Judicial and Prosecutorial Council. The Council is composed of 15 members, made up of judges and prosecutors from a range of national and regional level courts and offices.[221] International judges for the War Crimes Section are appointed pursuant to Article 6 of the Book of Rules on the Procedure for the Selection and Appointment of International Judges and Prosecutors. A Panel for the Appointment for International Judges was established by the High Judicial and Prosecutorial Council. The '… majority of the members of the Panel shall be judges' and one member of the panel is an international member of the Council.[222]

The Special Tribunal for Lebanon (STL) represents another solution. All judges are appointed by the Secretary-General. Lebanese domestic judges make up the minority and are chosen from a list of nominations prepared by the Lebanese Government, based on recommendations of the Lebanese Supreme Council on the Judiciary.[223] The Secretary-General selects the international judges from nominations that are submitted from states as well as other competent persons.[224] The acceptance of nominations from non-state actors is unique to the STL. This represents a clear difference from Cambodia, where all aspects of selection power were strongly guarded by the Cambodian negotiators and the selection process lacked transparency.

Thus, at its weakest level, transparency may be promoted through the consultation requirement of the SCSL, which merely keeps the domestic body from acting entirely secret to the international community. Stronger versions of this requirement may include a mixed body that includes both international and domestic participation in the selection of judges.

5.2.2 Involve non-state actors

Tied into transparency and diversification of authority for nomination and selection of judges is increasing the role of non-state actors. Each court is shaped by the political, social and cultural circumstances in the country and the outcome is largely dependent on the various actors involved, the goal of the court and the commitment of the host country. Consultation with a broad array of civil actors, such as civil society, international organisations, national and international judicial bodies, bar associations and academic and human rights organisations is recommended for states establishing war crimes courts to help maintain the integrity of the process. Soliciting and obtaining the voice of civil society would further serve to improve the legitimacy of the court. Specifically, civil society can become more integrated in judicial selection in the following ways:

---

220 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 2, available at: **www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176** (last accessed 11 August 2011).

221 Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Article 4(1).

222 Book of Rules on the Procedure for the Selection and Appointment of International Judges and Prosecutors, Article 6.

223 Security Council Resolution 1757, Annex, UN Doc S/RES/1757 (30 May 2007).

224 *Ibid.*

- helping to establish and promulgate minimum qualifications that selected judges should possess;
- ensuring that qualified personnel are appointed and serve in these courts;
- gathering information about nominees and prospective candidates; and
- monitoring and providing information about the candidates to the public at large.

To make such consultation effective, the lists of candidates must be accessible. If they are not, then consultation processes can attract criticism for appearing to be patronage-based. A consultative approach when making lists of nominees for judicial positions will not only help the selection body for a court accurately determine the most appropriate candidates, but also increase the transparency and the validity of the selection process. Particularly in a post-conflict environment, consultation with independent bodies will help to alleviate concerns of institutional bias and increase public and international confidence in the forum.

5.2.3 Set minimum educational and professional requirements for judges

Given the complexity and gravity of the cases involved, all judges should have relevant experience and education. Standards must be set to ensure that unqualified judges do not serve on the Court. Given the wide variety of standards for judicial service throughout the world, courts must be careful not to set so high a standard so that it makes staffing the Court impossible. However, by setting certain minimum standards, a court can guarantee that many of the least qualified nominees will be excluded. Additionally, objective, minimum criteria for nomination and selection can help ensure that judicial appointments are merit-based rather than politically motivated.

I. Judges should hold degrees in law and have judicial experience

The International Criminal Court (ICC) provides important guidance on the qualifications required for judicial office, based on lessons from the selection of judges at other international courts. The Rome Statute of the ICC demands the familiar formula of experience for judges, stating that they must be 'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices'.[225] The Statute also includes a further, rather basic experience requirement, that candidates for judicial office demonstrate established competence either in criminal law and procedure *or* in relevant areas of international law such as international humanitarian law and human rights law.[226] As such, the ICC could be seen as the first international court to expect judicial appointments to demonstrate at least some experience that is directly relevant to the work of the court. This practice is meant to have the effect of institutionalising a balanced, well-qualified panel capable of managing complex, multi-party litigation drawing from both international and domestic law.

---

225 Rome Statute of the ICC, at Article 36(3)(a).

226 Article 36(3) of the Rome Statute states:
'(b) Every candidate for election to the Court shall:
(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.'

Although the ICC standard seems sufficient, this minimum experience threshold is still low when compared to the experience required for such a demanding judicial role. The original provision in the ICC Draft Statute included a requirement that judges demonstrate competence in both international law and as a criminal trial judge.[227] Some commentators have been highly critical that this basic level of experience is not required. It has been argued that it was this inexperience that has caused the Appeals Chamber to stumble over the basic protections that should have been afforded by the Court in the *Lubanga* case.[228]

The same problem will occur in mixed courts if the judges have little or no professional experience. However, exactly how much experience and competence is sufficient to qualify as a judge on such a court is debatable. The SCSL Statute requires judges to have experience in both international and criminal law. However, its language is significantly weaker than that of the Rome Statute. The SCSL advises that 'due account be taken' of the experience of judges in international and criminal law and avoids more exacting language that would require candidates to have specific qualifications in criminal and international law.[229] In the mixed courts established by the United Nations Interim Administration Mission in Kosovo (UNMIK) in Kosovo, the UNMIK Regulation requires that international judges and prosecutors shall have been appointed and served for a minimum of five years as a judge or prosecutor in their respective home countries.[230] Local judges must have passed the examination for candidates for the judiciary and have relevant work experience in the field of law.

In contrast to the ICC and the SCSL, the East Timor Court did not require its candidates to have experience in criminal or international law, stating only that the commission be guided by 'relevant experience in a legal profession or as a civil servant'.[231] The Court only required that judges had completed their legal training and held a degree in law by a recognised university.[232] Though the autonomous East Timor Transitional Judicial Service Commission selected candidates based on merit,[233] the years of violent conflict in East Timor meant that very few professionals, including lawyers and judges, remained to take up these important roles at the end of the war.[234] The result was that the appointed East Timorese judges had no courtroom experience. Although some training was provided, the judges were simply inexperienced. Courts must avoid judicial selection provisions that are overly broad and give too much discretion and too little guidance to those charged with selecting the judges.

---

227 UN Doc A/Conf.183/2/Add. 1 (1998), available at: **www.un.org/icc/index.htm** (containing the Draft Statute for the ICC).

228 Michael Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts', *New Criminal Law Review*, 12 New Crim L R 529, at footnote 16. Bohlander writes that: 'The other judges in this case had mostly little experience as practitioners, let alone as judges, and although they have professional legal qualifications, much of their actual careers appear to have been spent in government-related work, academia, or diplomacy. Judge Kourula's CV lists him as having served as a district judge in 1979; Judge Kirsch has no judicial experience although he is a member of the Quebec bar and was made a QC in 1988; Judge Song was a Judge Advocate in the Korean Army from 1964 to 1967, ie, a military prosecutor for the first six months and a military judge for two and a half years; Judge Nsereko has been an advocate in criminal cases since 1972, but has no judicial experience, either.'

229 SCSL Statute, at Article 13(2).

230 UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors* (15 February 2000); UNMIK Regulation 2000/34, *Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors* (27 May 2000), section 2(b), available at: **www.unmikonline.org/regulations/2000/re2000_34.htm** (last accessed 11 August 2011).

231 On the Establishment of a Transitional Judicial Service Commission, Regulation No 1999/3, (3 December 1999) at Article 9.3(B).

232 *Ibid*, at Article 9.2.

233 The Commission itself was made up of three East Timorese (including the Chair) and two international experts. It was intended that the international seats would be phased out over time after local expertise had taken root. See Hansjörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 AJIL 46, at 52, available at: **www.asil.org/ajil/recon4.pdf** (last accessed 11 August 2011).

234 According to one report, as a result of the violence '[t]he preexisting judicial infrastructure in East Timor was virtually destroyed', in Strohmeyer, see note 233 above, at 50.

Closely tied to the issue of competence and experience is that of training. For the same reasons that judicial experience is important, possessing a law degree should also be a universal criterion for judges practising in international courts. While it is certain that there are able jurists in domestic courts around the world who do not have a law degree, the complexity of the cases in an international tribunal necessitate having individuals who possess law degrees. Moreover, the job of judges in international courts is not just the technical application of law, but also the interpretation and integration of laws. Therefore, it is necessary for the candidates to have legal training.

II. JUDGES MUST HAVE A PROVEN RECORD OF HIGH INTEGRITY

Invariably, international judicial bodies require judges to be persons of high moral character.[235] The same is true also in the context of internationalised criminal courts.[236] Despite the vagueness of the expression, moral integrity is undoubtedly the first and minimum requirement for judicial office, either internationally or nationally.[237] From the viewpoint of Manley Hudson, the author of *International Tribunals, Past and Future,* it embraces: 'more than ordinary fidelity and honesty, more than patent impartiality. It includes a measure of freedom from prepossessions, a willingness to face consequences of views which may not be shared, a devotion to judicial processes, a willingness to make the sacrifices which the performance of judicial duties may involve.'[238] In the Kosovo context, UNMIK Regulation 2000/57 (on the appointment of local judges and prosecutors) adds the provisions that they must not have participated in discriminatory measures, applied any repressive law, or implemented the dictatorial policies.[239] UNMIK Regulation 2000/34 (which applies to international judges), further prescribes that candidates should not have criminal records. While criminal records seem to be necessarily incompatible with the requirement of high moral character, it is important to be aware that in countries with fledgling political scenes, these individuals may have been criminalised simply for actively resisting opposition. Therefore, criminal records of domestic judges should not be a per se bar to their appointment.

5.3 Oversight

Mixed courts have historically been grounded in nations with fledgling political structures. One characteristic of such environments is the presumption that corruption underlies decision-making processes. For example, Iraq, Lebanon, Rwanda, Sierra Leone and Cambodia respectively rank 2.4, 1.5, 2.1, 2.5 and 4.0 out of 10 on Transparency International's 2010 Corruption Perception Index.[240] Of course this ranking is merely an indicator of the *perception* of corruption; not an affirmative declaration that corruption would actually exist. However, the appearance of corruption may in itself

---

235 Statute of the International Court of Justice, (26 June 1945), Article 2. The Statute provides, eg: 'the Court shall be composed of a body of independent judges, elected from among persons of high moral character.' Other tribunals use language similar to that of the ICJ Statute, calling to elect persons of high moral character (eg, Rome Statute, Article 36.3.a; European Convention on Human Rights, Article 21.1; American Convention on Human Rights, Articles 34 and 52; African Charter on Human and Peoples' Rights, Article 31; ICTY Statute, Article 13).

236 See UNMIK Regulation 2000/34 section 2.c; UNMIK Regulation 2000/57 section 6.1; UNTAET Regulation 2000/15 section 23.2; see note 230 above (incidentally, the provision adds also that local communities must have standing within the community); ECCC Statute, Article 10; UN–Cambodia Agreement, Article 3.3; SCSL Statute, Article 13; United Nations – Sierra Leone Agreement, Article 3.3.

237 See *Judicial Settlement of International Disputes* (Springer Verlag, 1974), at 572. As Judge Elias, of the ICJ, once remarked, not without a certain wit, the requirement of integrity is probably an equivalent of an unimpeachable conduct as a public figure; in other words, the candidate need not be an angel, though he must not be only a little better than a rascal. To Elias, 'Does the International Court of Justice, as it [is] presently shaped, correspond to the requirements which follow from its functions as the central judicial body of the international community?'

238 Manley Hudson, *International Tribunals: Past and Future* (Washington, DC: Carnegie Endowment, 1944), at 32.

239 UNMIK Regulation 2000/57 (6 October 2000) section 6.1, see note 230 above.

240 Transparency International 2010 Corruption Index, available at: **www.transparency.org/policy_research/surveys_indices/cpi/2010/results** (last accessed 11 August 2011).

help to establish that a judiciary is insufficiently independent and impartial to protect the due process rights of litigants.[241]

5.3.1 Establish an Independent Review Committee

Negotiations regarding a corruption oversight mechanism, such as an Independent Counsellor, should begin at the outset of the court negotiation process. In fact, this assessment proposes that an Independent Review Committee, not simply an Independent Counsellor, should be established and publicised specifically to monitor the judicial selection process. The reason that a Committee, comprising one national and one international counsellor, is preferable to a single individual is to further enshrine the notion of independence. Moreover, it would assuage whatever political tension may arise if only one international counsellor sits on the Committee. The effect of such a Committee would undoubtedly be a more independent and impartial judiciary because of the presence of a strong oversight body.

This Committee should be established in an equitable partnership by donor partners. It should be autonomous in its funding, or at the very least, the UN and nation state should contribute evenly to a pool of funds from which the Committee would run. Additionally, we recommend that this Independent Review Committee have the following authority:

I. Authority to initiate and investigate allegations of impropriety and publish findings independent of the national government

An Independent Review Committee would overcome the weakness of the ECCC corruption reporting systems. In the ECCC, Deputy Prime Minister Sok An was the Chairman of the government task force responsible for high-level Cambodian staff appointments at the Court as well as being the individual responsible for assessing the corruption complaints, even though a serious corruption case could easily have implicated either him or people he appointed.[242] Similarly, Kong Srim was put in charge of the ethics monitoring despite the fact that the politicisation of his appointment was suspect. An Independent Review Committee would remove the conduct of the investigation from the same government officials accused of corrupt practices. The Committee must also have the authority to publicly report the findings of its investigation. Such transparency will not only promote public confidence in the process, but additionally donor countries and agencies will be able to make informed decisions on whether to financially support the tribunal. If a government is unwilling to accept these terms, then the international community must cast serious doubt on its ability to ensure an independent and impartial judiciary. In the absence of this crucial bedrock guarantee, the UN should not endorse the creation of a court.

II. Authority to petition for judges to be recused or disqualified

The Independent Review Committee should also be given the authority to petition for judges to be recused or disqualified when judges have a personal or financial interest that may affect their

241 *González del Río v Peru*, (263/1987), 28 October 1992, Report of the HRC, vol II, (UN Doc A/48/40), 1993, at 20.

242 'The Cambodian Tribunal's Trials: Corruption complaints at the Khmer Rouge War Crimes tribunal', *Wall Street Journal*, 2 October 2008, available at: **http://online.wsj.com/article/SB122288746654295045.html** (last accessed 11 August 2011).

impartiality or give rise to the appearance of bias. Bias refers to both actual bias and perceived bias. International law provides at least two divergent standards that the Committee could use to assess bias and the concomitant need for recusal or disqualification. The first standard is a more restrictive approach to judicial independence and impartiality from the unsuccessful recusal motion of Judge Elaraby before the International Court of Justice.[243] The second standard stems from the successful disqualification of Judge Geoffrey Robertson from sitting in a case at the Appeals Chamber of the SCSL.[244]

In the case of Judge Elaraby, the International Court of Justice (ICJ) denied a request by Israel to preclude him from sitting in the *Wall* case. Israel believed that because of the prejudicial views that Elaraby expressed against Israel in a 2001 newspaper interview, he would be biased.[245] The Court concluded that recusal was not necessary as Elaraby had not participated in any case as an agent, counsel or advocate of one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.[246]

In the case of Judge Robertson, the SCSL Appeals team granted the motion requesting his withdrawal from the Special Court's Appeals Chamber, over which Judge Robertson presided. The defence counsel for Issa Sesay, one of the defendants in the RUF case before the SCSL, argued that views expressed by Robertson in a book he authored demonstrated clear bias against RUF members and objectively gave rise to the appearance of bias. In the decision, Judge Robinson explicitly opined on what was to become the dispositive legal test before the Court determinative of guilt or innocence of the accused. The Court ordered that Robertson be disqualified from adjudicating on motions involving alleged members of the RUF for which decisions are pending, concluding that 'an independent bystander… or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality'.[247]

Of these two competing approaches, we concur with Shany and Horovitz that the approach taken by the ICJ in the *Wall* case is excessively restrictive and is out of step with the more robust, recent efforts to seek public legitimacy through embracing high standards of judicial independence and impartiality.[248] Thus, we suggest that the Independent Review Committee be given the ability to petition for the recusal of judges, if it perceives independence and impartiality, using the 'reasonable man' standard described in the *Robertson* case.

If properly established, an Independent Review Committee would promote the transparency and the legitimacy of the Court. Moreover, judicial candidates would be clear as to whom they can report corruption and would be assured that their identities would be kept confidential. Finally, it would put the onus on donor countries to take a stand on whether to continue funding the Court.

Putting such a high priority on the prevention of endemic corruption does carry risk. Delicate issues of national sovereignty underlie such proposals and the likelihood of a country agreeing to such

---

243 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 Jan 2004, [2004] ICJ Rep 3.

244 Shany and Horovitz, see note 15 above, at 113.

245 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, see note 243 above.

246 Legal standard as derived from Article 17(2) of the ICJ Statute; Statute of the International Court of Justice, 26 June 1945, 59 Stat 1055.

247 *Prosecutor v Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No SCSL-2004-15-AR15, A.Ch., 13 March 2004, at para 15.

248 Shany and Horivitz, see note 15 above, at 115.

stringent mechanisms of anti-corruption is debatable. In negotiating the establishment of such a Committee, the UN should accept the probability that additional systematic checks and balances will inevitably result in trial delays. However, as John Ciorciari, the Senior Legal Advisor of the Documentation Center of Cambodia emphasises, 'corruption is one issue that simply cannot be ignored. The ECCC, for example, cannot make survivors of Democratic Kampuchea whole for the abuses they suffered. What the [tribunal] can do is deliver a set of credible verdicts and the promise of a judicial system that will better protect and uphold [a nation's] rights in the future'.[249]

5.3.2 Protect whistleblowers

Over the last few decades, there has been an international emergence of legal protections for whistleblowers.[250] Whistleblower protection laws are intended to make it safe for employees to disclose misconduct that they discover during the course of the judicial selection process. Such protection is increasingly regarded as an important part of international efforts to control corruption.[251] Thus, an important responsibility of the Independent Review Committee would be to protect the identities of whistleblowers.

Several international conventions include whistleblower protection in the effort to tackle corruption. Article 9 of the Council of Europe's Civil Law Convention on Corruption states that: '[e]ach Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.'[252] Article 22 of the Council of Europe's Criminal Law Convention on Corruption states that: 'Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: (a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise cooperate with the investigating or prosecuting authorities; and (b) witnesses who give testimony concerning these offences.'[253] Finally, Article 3(8) of the Inter-American Convention Against Corruption states that state parties should '… create, maintain and strengthen… systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities… '.[254]

The important element becomes *timing* and *publicity*. Such protections must be instituted as soon as the court is established. And, with the help of civil society and non-governmental organisations, judicial personnel and the public must be made aware of the existence of this protection. More importantly, the public should be aware that thorough investigations will be made concerning every report of impropriety.

---

249 John D Ciorciari, 'Justice and Judicial Corruption', available at: **www.cambodiatribunal.org/sites/default/files/resources/Ciorciari_October_2007.pdf** (last accessed 11 August 2011).

250 Elaine Kaplan, 'The International Emergence of Legal Protections for Whistleblowers', *Journal of Public Inquiry* (Fall/Winter 2001).

251 *Ibid.*

252 Council of Europe, *Civil Law Convention on Corruption*, 4 November 1999, available at: **http://conventions.coe.int/treaty/en/treaties/html/174.htm** (last accessed 16 August 2011).

253 Council of Europe, *Criminal Law Convention on Corruption*, 27 January 1999, available at: **http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm** (last accessed 16 August 2011).

254 *Inter-American Convention Against Corruption*, 29 March 1996, available at: **www.oas.org/juridico/english/Sigs/b-58.html** (last accessed 16 August 2011).

5.4 Civil society

Civil society has an important role to play in oversight as well. In 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', Daphna Shraga commends the role of civil society actors in mixed courts. She explains that with the SCSL, the UN Secretariat 'engaged with representatives of civil society to seek their views and address their concerns within the legal and political limitations imposed'.[255] Specifically, local and international non-governmental organisations served to give a voice to child soldiers, balancing the need for judicial accountability with the promotion of child rehabilitation programmes.

Civil society has so far not been used in Cambodia as an instrument to alleviate the deficiencies of the Court. However, groups like LICADHO, Amnesty International, OSJI, the Genocide Project, the Red Cross and the Documentation Center of Cambodia, among others, have been involved in the important task of informing interested states and private observers of documented deficiencies. This type of reporting greatly contributes to strengthening judicial independence by promoting accountability and transparency in the courts.[256]

255 Shraga, see note 61 above, at 20.

256 Interview with Jim Goldston, Executive Director, OSJI, 16 March 2011.

6. Conclusion

The ECCC's mandate is to try Khmer Rouge senior leaders and those who were most responsible for the regime's crimes.[257] As of June 2011, the ECCC has only convicted former prison chief Kaing Guek Eav, who was sentenced to just 19 years in prison for war crimes and crimes against humanity that caused the deaths of at least 14,000 people.[258] Many Cambodians were upset with the verdict, finding it too lenient.[259] Now a legitimately perceived completion of Case 002, involving four top leaders, is in doubt, and it seems that Cases 003 and 004 will not proceed. It is therefore likely that only five suspects will be prosecuted for the whole of the atrocities of the Khmer Rouge period, even though Cambodian civil society has repeatedly expressed that the prosecution of five people for two million deaths is not 'enough'.[260] Amnesty International expressed doubt that even the ten total suspects identified by the prosecution in 2009 would not suffice to fulfil the ECCC's mandate.[261]

The deficiencies of the ECCC began with a failure of leadership on the part of the international community, best exemplified by the General Assembly's Resolution favouring a quicker conclusion of the Khmer Rouge court negotiations over the principles of fair and independent trials. In the Cambodia negotiations, the Secretary-General specifically noted that rather than a mandate to pursue international standards, there was a mandate to quickly establish a court under the framework of the ECCC Law passed by the Cambodian Government in 2001. The problems associated with the ECCC did not arise from a failure of ideas. Rather, these problems are a result of a failure of the international community to ensure that the Court meets international standards of fairness.

The fundamental belief in the ability and responsibility of international courts to reinforce the rule of law is the foundation on which this assessment rests. Where the international community attests its ability to protect human rights and seek justice, international actors must likewise be willing to stand by these causes, even when it is not politically expedient to do so.

The best practices recommended in this assessment leave room for expediency, creativity and flexibility, keeping in mind that any negotiator who holds out for a perfect court will establish no court at all. While few, if any, of the best practices discussed herein are absolute requirements, one absolute requirement does remain – international courts must be established with a mandate from the international community that sufficiently ensures international standards of due process. Only a concerted effort to design structural safeguards will make the attainment of independence and impartiality a non-negotiable and enduring reality.

---

257 UN–Cambodia Agreement, see note 32 above, note 18.

258 'Khmer Rouge Prison Chief Duch Found Guilty', *BBC News*, 26 July 2010, available at: **www.bbc.co.uk/news/world-asia-pacific-10757320** (last accessed 11 August 2011). Duch was sentenced to 35 years, but his term was reduced due to a period of illegal incarceration, as well as time already served.

259 'Anger in Cambodia over Khmer Rouge Sentence', *New York Times*, 26 July 2010, available at: **www.nytimes.com/2010/07/27/world/asia/27cambodia.html** (last accessed 11 August 2011).

260 See, eg, Theary C Seng, CIVICUS: Center for Cambodian Civic Education, 'Letter to the Editor of *Phnom Penh Post*', available at: **www.thearyseng.com/random/298-letter-to-khmer-pppost-editor-ictj-peace-vs-justice-contempt-of-court-condolences-to-reach-sambaths-family-separate-uncambodia-co-prosecutors-public-statements-re-case-003-injustice-deceit-for-kr-victims-editorial-akrvc-press-release/309** (last accessed 11 August 2011).

261 'Document – Cambodia: Extraordinary Chambers in the Courts of Cambodia – New International Co-Prosecutor Should Commit to Fulfilling the Tribunal's Mandate', Amnesty International (4 Dec 2009), available at: **www.amnesty.org/en/library/asset/ASA23/022/2009/en/316c67be-282e-411b-a8a5-4d54af9c6960/asa230222009en.html** (last accessed 11 August 2011).

Given that the first ECCC trial was seen as a compelling and rewarding event for many Cambodians, it may be tempting to set a presumption in favour of making the compromises necessary to simply establish a court, even a flawed court. Some could argue that even where the ECCC fails to meet international standards, it far exceeds the norm in Cambodia. However, more is at stake than increasing the legitimacy of a single trial. While scholars may debate the degree to which the ECCC is a success or failure, there is no doubt that the UN has given its hallmark to a court whose independence fails to meet international standards of due process. In resting the legitimacy of the ECCC on that of the Cambodian judiciary, the ECCC has weakened the UN brand in the realm of internationalised accountability.

In order to prevent such failings in the future, the international community must demand consistent, and consistently implemented, international standards of justice. The international community, aided by the voices of civil society, must then stand by those safeguards throughout negotiations for future courts, with full realisation of the necessary flexibility to address *sui generis* circumstances. While these presumptions are not designed to establish a perfect court, they can, with the support of the international community, meet the goal of providing justice in the gravest situations while maintaining the integrity of the international community as seeking the highest standards of due process.

The UN must balance its desire to support the rule of law in nations where justice may otherwise be hard to find with an unwavering stance that the UN will, under no circumstances, give its hallmark to a court in which the terms threaten the legitimacy of the court and the legitimacy of that hallmark. The purpose of UN support of courts is to ensure that international standards of due process are met, and as such whenever the UN enters negotiations for a mixed court, negotiations must carry the heavy presumption towards protecting international standards by making the court international. In some cases, Cambodia arguably having been one, no amount of creativity and no combination of international safeguards may be strong enough to overcome the presumption in favour of an international majority. In cases where neither an international majority nor the implementation of appropriate safeguards is feasible, the negotiators must be willing, and have the support of the UN and the international community, to abandon negotiations.

In endorsing a mixed court, the UN not only adds its own legitimacy to the court, it also risks its own legitimacy. The hallmark of the UN must count for something, or its ability to encourage justice throughout the world will be greatly curtailed, or possibly even lost entirely. As such, the UN, especially the Member States, must take responsibility for protecting the reputation of UN courts as bastions of justice.

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**