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The potential problems relating to defendant competence to stand trial and the proper means with which to address them

Sarah Schauerte

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM
FOR THE
CAMBODIAN EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA

ISSUE: THE POTENTIAL PROBLEMS RELATING TO DEFENDANT COMPETENCE TO
STAND TRIAL AND THE PROPER MEANS WITH WHICH TO ADDRESS THEM

Prepared by Sarah Schauerte
Spring 2007

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue¹

A pressing problem faced by the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) relates to the fitness of its defendants to stand trial. As expressed in both the 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 (“March Agreement”)² and the Law of the Extraordinary Chambers (“LEC”),³ the purpose of the ECCC is to prosecute those “most responsible” for past atrocities committed under the Khmer Rouge. Part II discusses the factual background, or the atrocities committed under the Khmer Rouge giving rise to the need for prosecution. Part III identifies six individuals likely to stand trial before the ECCC and their prior roles in the Khmer Rouge: Nuon Chea, Ieng

¹ The specific issue addressed relates to the possibility that the defendants brought before the ECCC will be elderly and potentially in poor health. Consequently, the counsel for the accused may state that they are unfit to plead or stand trial. Accordingly, this note shall address what factors related to the elderly such as age, memory loss, loss of mental capacity, physical capacity, poor health, and other similar related conditions would or could affect their fitness to stand trial. It makes both defense and prosecution arguments in citing and analyzing appropriate supporting authority regarding the standards for fitness to stand trial and how these should be applied to ECCC defendants.

² Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“March Agreement”), Art. 1, June 6, 2003. (“The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia...”)[Reproduced in the Accompanying Notebook One at Tab One].

³ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“LEC”), with inclusion of amendments as promulgated on 27 October 2004, Article 1, NS/RKM/1004/006. (“The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”).[Reproduced in the Accompanying Notebook One at Tab Two].

Sary, Khieu Samphan, Kae Pok, Sou Met and Meah Mut.⁴ Had they not died, Pol Pot and Ta Mok would also likely have faced prosecution.⁵ Part IV draws from international and American jurisprudence in assessing defendant competency to stand trial, scrutinizing such issues including the balancing of due process rights as they are affected by fitness to stand trial, involuntary administration of medication, and the level of competency required for self-representation. Part V identifies the main objectives of the ECCC, explaining how the need to expediently prosecute these senior leaders as a means to achieving the goals of punishment may result in a lower threshold for competency as compared to prior war crimes tribunals. Three specific objectives of punishment are identified as particularly important to the ECCC: retribution, deterrence and closure for victims and their families.

B. Summary of Conclusions

- i. Due to the combination of the extremely old age of the defendants and the egregious nature of the crimes with which they may be charged, the ECCC should choose the lesser evil of affording a potentially lower level of due process rights instead of losing the opportunity to prosecute those most responsible.**

Due to the effect of the defendants' age on their competence to stand trial, due process rights may be compromised during the proceedings in order to serve the higher purposes of retribution, deterrence, and closure for victims and victims' families. Although the LEC incorporates Articles 14 and 15 of the International Covenant on Civil and Political Rights

⁴ See STEVEN HEDER AND BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (War Crimes Research Office, 2001). This report provides a comprehensive and thorough analysis for the crimes committed by the Khmer Rouge, along with examining the culpability of the living senior leaders discussed in this note: Nuon Chea, Ieng Sary, Khieu Samphan, Kae Pok, Sou Met and Meah Mut. [Reproduced in the Accompany Notebook One at Tab Three].

⁵ Alex Hinton, Khmer Rouge Leaders Must be Tried, GUELPH MERCURY, August 8, 2006. [Reproduced in the Accompanying Notebook One at Tab Four].

(“ICCPR”)⁶ to protect due process rights, defendants’ poor fitness may require the ECCC to balance these rights with its own objectives of retribution, deterrence and closure. Standards for competence to stand trial may be drawn from precedent, particularly from the International Criminal Tribunal for Crimes Committed in the Former Yugoslavia (“ICTY”). The ICTY Statute affords defendants almost identical rights compared with Article 35 of the LEC.⁷ Further, although not binding on the ECCC, American jurisprudence provides persuasive analysis for approaching issues of competence. Because the United States Supreme Court has examined more intricate issues of fitness than those addressed by the ICTY, such as the level of competence necessary to plead guilty or to waive the right to counsel, and the involuntary administration of medication, its precedent may fill the gaps left by the ICTY.

ii. Defendants should not be permitted to represent themselves in trial proceedings because this may result in the ECCC failing to prosecute them.

Although both international law and American law recognize a criminal defendant’s right to represent himself, this right is not absolute.

Due to the deteriorating physical health of the few potential defendants, the ECCC should stipulate that every defendant chose or be assigned counsel in order to avoid procedural delays. The ICTY Slobodan Milosevic trial demonstrates that if an aging defendant represents himself, this likely creates numerous delays due to the defendant’s higher level of involvement in trial proceedings. This creates particular problems when an elderly defendant exercises his right to self-representation. As occurred in the Milosevic trial, affording the right to self-representation may create such extensive delays that any of the elderly defendants before the ECCC may die

⁶ International Covenant on Civil and Political Rights, Arts. 14 & 15. [Reproduced in the Accompanying Notebook One at Tab Five].

⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 19 May 2003 by Resolution 1481)(hereinafter “ICTY Statute.”)[Reproduced in the Accompanying Notebook One at Tab Six.]

before the completion of their trial. Especially with the case of Nuon Chea, arguably the most culpable of the potential defendants, this cannot be allowed to happen if the purposes of the ECCC are to be properly served.

II. **Factual Background**

The conflict in Cambodia occurred between April 17, 1975 and January 7, 1979, resulting in some of the most horrific acts of violence in history.⁸ Under the Khmer Rouge's brutal three-year reign, at least 1.7 million persons were either systematically murdered or died of starvation.⁹ Overall, this estimate of the death toll constitutes approximately twenty percent of the April 1975 population of 7.3 to 7.5 million people.¹⁰ Not only were certain racial and ethnic groups obliterated, but the Khmer Rouge targeted the educated as a class, murdering anyone it discovered had completed a seventh grade education.¹¹ Torture or death was the fate for all but the peasant farmers, the only ones who were deemed "pure."¹² Doctors, lawyers, monks, teachers and other professionals transformed overnight into farmers in futile attempts to escape the murderous Khmer Rouge.¹³ An examination of available data demonstrates a sharp disparity in the percentage of targeted groups killed. While there was a one hundred percent death rate for

⁸ AARON J. BUCKLEY, THE CONFLICT IN CAMBODIA AND POST-CONFLICT JUSTICE in POST CONFLICT JUSTICE, pg 635 (M. Cherif Bassouini, Ed., Transnational Publishers, Inc., 2002). [Reproduced in the Accompanying Notebook One at Tab Seven].

⁹ Seth Mydans, *Cambodia Approves Tribunal for Leaders of Khmer Rouge*, HOUSTON CHRONICLE, October 5, 2004; available at 2004 WLNR 20947128. [Reproduced in the Accompanying Notebook One at Tab Eight].

¹⁰ STEPHEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, pg 276 (2 Ed. Oxford University Press, 2001). [Reproduced in the Accompanying Notebook One at Tab Nine].

¹¹ Mann (Mac) Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense?*, Southern California Law Review, Vol. 74 at 1580 (2001); citing SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE*, pg 119 (Basic Books, 2002). [Reproduced in the Accompanying Notebook One at Tab Ten].

¹² Id. [Reproduced in the Accompanying Notebook One at Tab Ten].

¹³ Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 Ariz. J. Int'l & Comp. Law 833, 844 (1998). [Reproduced in the Accompanying Notebook One at Tab 11].

rural and urban ethnic Vietnamese, the death rate for urban and rural Khmer “new people” was twenty-five percent and the death rate for rural Khmer “base people” was fifteen percent.¹⁴

Such atrocities do not reflect isolated acts of a new regime, but the Khmer Rouge’s deliberate strategy to create a completely self-reliant and sovereign Khmer Rouge nation.¹⁵ The driving force behind the Khmer Rouge’s purge of anyone vaguely associated with the toppled Lon Nol regime was the belief that “a person who has been spoiled by a corrupt regime cannot be reformed; he must be physically eliminated.”¹⁶ The week after the fall of Phnom Penh, the Khmer Rouge evacuated an estimated two to three million Cambodians from their homes in an orchestrated attempt to restructure the social, political and economic systems of the country. It blamed the former regime for the evacuations despite clear documentation that Pol Pot and other leaders planned them advance.¹⁷ Three decades later, the Khmer Rouge is associated only with horror and atrocity, not the establishment of the “pure Khmer Rouge nation” that Pol Pot and other senior leaders used, even years after the bloodshed, to justify their actions.

Despite the scale and brutality of the atrocities committed in Cambodia during the period of Democratic Kampuchea, no efforts were made to prosecute the notorious members of the Khmer Rouge.¹⁸ The first of the only two trials prior to the establishment of the ECCC was the 1979 “show” trial of Pol Pot and Ieng Sary. Both defendants were sentenced to death in

¹⁴ STEVEN R. RATNER AND JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, pg 276 (Oxford University Press, 2001). [Reproduced in the Accompanying Notebook One at Tab 9].

¹⁵ *Id* at pg 268. [Reproduced in the Accompanying Notebook One at Tab 9].

¹⁶ Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?* 15 Ariz. J. Int’l & Comp. Law 833, 846 (1998). [Reproduced in the Accompanying Notebook One at Tab 11].

¹⁷ *Supra*, Buckley at pg 639. [Reproduced in the Accompanying Notebook One at Tab 7].

¹⁸ Klosterman at 848. [Reproduced in the Accompanying Notebook One at Tab 11].

absentia.¹⁹ The second, the 1997 trial of Pol Pot overseen by the Cambodian government, occurred after Hun Sen took power through a coup. Pol Pot was sentenced to life imprisonment for his crimes against the Cambodian people.²⁰

III. Six likely candidates stand before the ECCC.

A. Despite the uncertainty of the scope of the ECCC's personal jurisdiction, prosecution will likely focus on top Khmer Rouge officials during the period of Democratic Kampuchea.

Article One of the March Agreement and Article One of the LEC identify “senior leaders,” or “those most responsible,” as over whom the court has personal jurisdiction. The focus of prosecution is thus unclear.²¹ Broad interpretation of both articles potentially allows the prosecution of the indispensable mid-level actors who provided direct lines of communication between the Central Committee and the ordinary cadre.²² Many of these perpetrators have been reabsorbed into society, living quietly as farmers or even serving positions in the current government.²³ This creates the concern that their prosecution may cause civil unrest by uprooting prominent members of the Cambodian government and society. A further consideration is the potential practical and financial unfeasibility of prosecuting many of those involved in the

¹⁹ See Generally, BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-1979*. (2 Ed. Yale University Press, 1996). [Reproduced in the Accompanying Notebook One at Tab 12].

²⁰ Elizabeth Becker, *Videotape Shows Pol Pot Facing Khmer Rouge Justice*, NEW YORK TIMES, July 29, 1997; available at 1997 WLNR 4879907. [Reproduced in the Accompanying Notebook One at Tab 13].

²¹ This particular line of analysis, which deserves a more thorough examination, falls outside the scope of this note. For more discussion on this issue, see the memorandum submitted by Sean Morrison in Spring 2007 to the Office of the Prosecutor of the ECCC.

²² Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*. Justice Initiatives, pg 76 (April 2006). [Reproduced in the Accompanying Notebook One at Tab 14].

²³ Seth Mydans, *With No More Pol Pot, the New Khmer Rouge Hopes the World Will Forgive and Forget*, NEW YORK TIMES, April 20, 1998; available at 1998 WLNR 300681 [Reproduced in the Accompanying Notebook One at Tab 15].

Khmer Rouge atrocities. The ECCC would create a more substantive impact by narrowing its scope of prosecution to those identifiable senior leaders attributed the greatest share of the blame. A broader scope of investigation and prosecution may render the process unwieldy, compromising the ECCC's effectiveness.

Expressed intent by the United Nations and Cambodia shows that prosecution will likely be narrow in scope. In establishing the ECCC, negotiations between Cambodia and the United Nations expressed explicit and implicit intentions to limit prosecutions to a handful of senior leaders and other notorious perpetrators of crimes. Discussion most notably focused on prosecuting the leading cadre of the Phnom Penh torture center known as S-21, or Tuol Sleng.²⁴ Tuol Sleng was essentially a school converted into a torture chamber. Of the limited existing documentary evidence chronicling the atrocities committed under the Khmer Rouge, much of it documents the horrors that occurred in Tuol Sleng. Evidence demonstrates that Tuol Sleng “processed” close to at least twenty thousand individuals, suggesting the systematic or mass nature of the killings.²⁵ Of those “processed,” only seven survived to tell about it.²⁶

One of the problems inherent in prosecuting these senior leaders nearly 30 years after their crimes rests in locating credible witnesses willing to testify. Kang Khek Ieu (“Duch”), who served as the chief of the Democratic Kampuchea national security apparatus and as the former warden of the prison responsible for interrogations and executions, will likely provide evidence of state action necessary to convict top leaders of the Khmer Rouge for crimes against

²⁴ Steven Heder, *The Senior Leaders and Those Most Responsible*, Justice Initiatives, pg 54 (April 2006). [Reproduced in the Accompanying Notebook One at Tab 16].

²⁵ Mann Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense?*, Southern California Law Review, Vo. 74:1581, 1600 (2001). [Reproduced in the Accompanying Notebook One at Tab Ten].

²⁶ Nic Dunlop and Nate Thayer, *Duch Confesses*, FAR EASTERN ECONOMIC REVIEW, May 6, 1999. [Reproduced in the Accompanying Notebook One at Tab 17].

humanity.²⁷ He has already proclaimed a willingness to testify against himself and other Khmer Rouge leaders.²⁸ As noted by Steven Heder, a Cambodia expert at London University's School in Oriental Studies, "Duch would in fact be in a key position to close key gaps in the evidence."²⁹ Further, as he is only in his early sixties, Duch may be able to provide a more thorough and accurate account of the atrocities than the older defendants.³⁰ On the flip side, Duch's credibility and motives are questionable due to his own role at Tuol Sleng. The veracity of his statements have already been called into question due to his detailed account of meetings it is documented that he did not attend.³¹

Duch, who was discovered after he gave a journalist an account of his remorse for his actions under the Khmer Rouge, is the only former Khmer Rouge member currently in custody.³² Duch provides one example of a lower level official who may avoid prosecution by incriminating those senior leaders the ECCC most wants to prosecute. Interviews with Duch suggest that as he is now an evangelical Christian, his desire for repentance compels him to cooperate with ECCC proceedings.³³

²⁷ Mann Bunnyanunda at 1600. [Reproduced in the Accompanying Notebook One at Tab Ten].

²⁸ Seth Mydans, *Khmer Rouge Figure Awaiting Interrogation*, PITTSBURGH POST-GAZETTE, May 11, 1999. [Reproduced in the Accompanying Notebook One at Tab 18].

²⁹ Nic Dunlop and Nate Thayer, *Duch Confesses*, FAR EASTERN ECONOMIC REVIEW, May 6, 1999. [Reproduced in the Accompanying Notebook One at Tab 17].

³⁰ Nate Thayer, *'Duch' Implicates Living Khmer Rouge Leaders in Killing*, FAR EASTERN ECONOMIC REVIEW, 18-9 (May 13, 1999). [Reproduced in the Accompanying Notebook One at Tab 19].

³¹ Mann Bunyanunda, p 1599. [Reproduced in the Accompanying Notebook One at Tab Ten].

³² DIANE POKEMPNER, "A CULTURE OF ACCOUNTABILITY" IN BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, 337 (Edwin Mellon Press, 2005). Ta Mok and Duch were both taken into custody at the same time, but Tak Mok died in July of 2006 before he could be officially charged. [Reproduced in the Accompanying Notebook One at Tab 20].

³³ Seth Mydans, *Cambodian Court Faces High Hurdles*, INTERNATIONAL HERALD TRIBUNE, August 6, 2006. [Reproduced in the Accompanying Notebook Two at Tab 21].

B. Of those still-living former top Khmer Rouge officials, scholars have identified six individuals who will likely face prosecution by the ECCC.

A notable report by the War Crimes Research Office at American University and the Coalition for International Justice identifies seven possible candidates for prosecution, six of whom are still living.³⁴

i. Nuon Chea

Commonly referred to as “Brother Number Two,” Nuon Chea served as deputy secretary general of the ruling Communist Party of Kampuchea. He was responsible for all of the party’s organizations and helped to oversee the national security police.³⁵ He also occasionally acted as prime minister for the Democratic Kampuchea government.³⁶ He walked free after surrendering to the Cambodian government in 1998.³⁷

Of the remaining senior leaders, prosecuting Nuon Chea should be the ECCC’s first priority. Journalist Nate Thayer, the last person to interview Pol Pot, describes Nuon Chea as “probably more guilty for the actual killings that went on than Pol Pot himself.”³⁸ As Duch will

³⁴ STEVEN HEDER WITH BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION (War Crimes Research Office, 2001). Tok Mok, the seventh possible defendant identified, died subsequent to the publication of Heder’s and Tittimore’s work. [Reproduced in the Accompanying Notebook Two at Tab Three].

³⁵ Samantha Brown, Reclusive but Free, *Cambodia’s Khmer Rouge Leaders Wait for Trial*; available on-line at http://www.fourelphants.com/current_affairs.php?sid=288. [Reproduced in the Accompanying Notebook Two at Tab 22].

³⁶ Id. [Reproduced in the Accompanying Notebook Two at Tab 22].

³⁷ Michael A. Lev, *20 Years After Vicious Pol Pot Regime Collapsed, Cambodia Still Suffers*, CHICAGO TRIBUNE, January 15, 1999. [Reproduced in the Accompanying Notebook Two at Tab 23].

³⁸ Will the Khmer Rouge Get Away With Murder?; <http://www.pbs.org/frontlineworld/stories/cambodia/thestory.html>. Thayer states that there is more documentary evidence against Nuon Chea than against Pol Pot. This evidence shows that for every single person who came through Tuol Slen, Nuon Chea was given a copy on the briefing of the torture and remarked on when it was appropriate to have them killed. Overwhelming evidence proves personal involvement in at least 14,000 murders personally. [Reproduced in the Accompanying Notebook Two at Tab 24].

testify, while Pol Pot directed the search for “enemies within the party;” after 1975, Nuon Chea assumed responsibility for the “waves of arrests of CPK members in Zone after Zone.”³⁹ Despite the mounting amounts of documentary evidence against him, Nuon Chea in a recent interview expressed no repentance for his past, only pride for his reputation as a communist hard-liner.⁴⁰ In fact, he denies culpability, telling reporters that he does not regret the past because “[he] had nothing to do with ordering the execution of anyone or even suggesting it.”⁴¹ His lack of remorse emphasizes the importance of enforcing respect for the law through punishment.

A procedural impediment, Nuon Chea’s current fitness may potentially affect his competence to stand trial. As of 2002, the now age-eighty Nuon Chea suffers from respiratory problems, which prevent him from speaking longer than a few minutes at a time.⁴² This could potentially delay trial proceedings. One member of the police group assigned to guard Nuon Chea’s palace claimed that his health was “serious;” recently worsening due to his illnesses including diabetes and high blood pressure. He now remains in his home for self-treatment supervised by his wife.⁴³

³⁹ STEVEN HEDER WITH BRYAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR CRIMES OF THE KHMER ROUGE (War Crimes Research Office, 2001). [Reproduced in the Accompanying Notebook One at Tab Three].

⁴⁰ Thet Sambath and Kevin Doyle, *Nuon Chea Says He’s Preparing for Prison*, THE CAMBODIA DAILY, August 2, 2006; available on-line at http://www.camnet.com.kh/cambodia.daily/selected_features/cd-2-8-2006.htm. [Reproduced in the Accompanying Notebook Two at Tab 25].

⁴¹ Matthew Lee, *Out of the Loop*, FAR EASTERN ECONOMIC REVIEW, September 19, 1996. [Reproduced in the Accompanying Notebook Two at Tab 26].

⁴² *Cambodia- Pol Pot’s Shadow. Reporter’s Diary: In Search of Justice. Brother Number Two*; available on-line at <http://www.pbs.org/frontlineworld/stories/cambodia/diary10.html>. [Reproduced in the Accompanying Notebook Two at Tab 26].

⁴³ Id. [Reproduced in the Accompanying Notebook Two at Tab 26].

Despite health problems, Nuon Chea constantly reiterates a willingness to “go to court,” even if he cannot walk there himself.⁴⁴ Further, Nuon Chea is not universally observed as frail or feeble- an interview as recent as August in 2006 found the former leader “surprisingly healthy.”⁴⁵ Because the defense raises the issue of competence to stand trial pursuant to international standards,⁴⁶ defense counsel may opt not to raise it at Nuon Chea’s request.

Nuon Chea’s willingness to stand trial, however, far from guarantees the smooth proceeding of his trial. If Nuon Chea dies before prosecution, Cambodia loses the best means to discovering details of the atrocities committed decades ago by the secretive Khmer Rouge, devaluing the moral and monetary investment in the ECCC.

ii. Ieng Sary

Ieng Sary served as the Deputy Prime Minister in charge of Foreign Affairs during the Period of Democratic Kampuchea.⁴⁷

Along with Pol Pot, Ieng Sary was sentenced to death during a trial in absentia in 1979 on charges of genocide and membership in the Khmer Rouge, which violated the 1994 Law on the Outlawing of the Democratic Kampuchea Group.⁴⁸ Overwhelmingly criticized as a “show trial,” the trial represented one of the only efforts made to prosecute former Khmer Rouge officials prior to the establishment of the ECCC. Ieng Sary was granted amnesty in 1996 following his

⁴⁴ Samantha Brown, *Reclusive But Free, Cambodia’s Khmer Rouge Leaders Wait for Trial*, http://www.fourelphants.com/current_affairs.php?sid=288. [Reproduced in the Accompanying Notebook Two at Tab 22].

⁴⁵ Thet Sambath, *supra* note 25. [Reproduced in the Accompanying Notebook Two at Tab 25].

⁴⁶ *Id.* [Reproduced in the Accompanying Notebook Two at Tab 25].

⁴⁷ Mann (Mac) Bunyanunda at 1587. [Reproduced in the Accompanying Notebook One at Tab Ten].

⁴⁸ Daphna Shrager, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, pp 24 & 30. (Cesare P.R. Romano, Andre Nollkaemper and Jann K. Kleffner, eds.), Oxford University Press, 2004. [Hard Copy Omitted].

defection from the party as part of the government's campaign to obtain the defection of Khmer Rouge guerillas.⁴⁹

iii. Khieu Samphan

Khieu Samphan served as the Chairman of the DK State Presidium. He “defected” from the Khmer Rouge Party with Nuon Chea in 1998.⁵⁰ Available documentation points to Samphan's knowledge of CPK atrocities and suggests that he personally contributed to these crimes by making public statements supporting the underlying policies and by monitoring the manner in which regional and other authorities implemented them.⁵¹

iv. Kae Pok, Sou Met, and Meah Mut

Kae Pok served as a former Secretary of the North/Central Zone and member of the Central Committee. Sou Met served as a chairman of the CPK Military Division, as did Meah Mut.

C. The loss of other top Khmer Rouge officials demonstrates the pressing need for expedient prosecution of those remaining.

The deaths of other leaders within the ECCC's personal jurisdiction illustrate the stark reality that others might also escape prosecution in this manner.

Most notoriously, Pol Pot, General Secretary of the Khmer Rouge and architect of the killing fields, died while under house arrest of respiratory failure in 1998. He was seventy-three years old.⁵² Suspicions remain that he was killed by his comrades.⁵³

⁴⁹ STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, pg 279-280 (War Crimes Research Office, 2001). [Reproduced in the Accompanying Notebook One at Tab Nine.]

⁵⁰ STEVEN HEDER AND BRIAN TITTEMORE. [Reproduced in the Accompanying Notebook One at Tab Nine.]

⁵¹ STEVEN HEDER AND BRYAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE, pg 80 (War Crimes Research Office, 2001). [Reproduced in the Accompanying Notebook One at Tab Nine].

Senior cadres Son Sen and Yun Yat, other potential defendants, also died before the ECCC's establishment.⁵⁴ The former and his family were murdered under Pol Pot's orders in 1997.

Commander Ke Pauk died in February of 2002,⁵⁵ robbing Cambodians of the opportunity to try a man who likely would have been indicted for crimes against humanity and genocide.⁵⁶ Responsible for an estimated ten thousand deaths, Ke Pauk was sixty-eight years old, younger than all of the senior leaders now facing potential charges.⁵⁷

Most recently, potential defendant Tak Mok died on July 21, 2006. As the head of the Southwest Zone and member of the Central Committee, Ta Mok played a central role in implementing the Communist Party's execution policies.⁵⁸ On September 8, 1999, a Cambodian military court charged Ta Mok with genocide subsequent to the Cambodian government informing the U.N. Secretary-General that it intended to try Tak Mok before a Cambodian Court under Cambodian law.⁵⁹ Ta Mok was expected to be one of the first and most important

⁵² Seth Mydans, *Death of Pol Pot: The Analysis; The Demons of a Despot*, NEW YORK TIMES, April 17, 1998; available at 1998 WLNR 297705. [Reproduced in the Accompanying Notebook Two at Tab 27].

⁵³ Seth Mydans, *With No More Pol Pot, the New Khmer Rouge Hope the World Will Forgive and Forget*, NEW YORK TIMES, April 20, 1998; available at 1998 WLNR 3008681. [Reproduced in the Accompanying Notebook One at Tab 15].

⁵⁴ Kek Galubra, *Reconciliation in International Justice: Lessons from other Tribunals*, Justice Initiatives, pg 151 (April 2006). [Reproduced in the Accompanying Notebook Two at Tab 28].

⁵⁵ Luke Hunt, *Candidates for Khmer Rouge Trial Found Dead*, AGENCEE FRANCE PRESS, February 15, 2002; available at 2002 WLNR 2341228. [Reproduced in the Accompanying Notebook Two at Tab 29].

⁵⁶ Id. [Reproduced in the Accompanying Notebook Two at Tab 29].

⁵⁷ Buckley at pg 653. [Reproduced in the Accompanying Notebook One at Tab Seven].

⁵⁸ Supra, Heder at pg. 87. [Reproduced in the Accompanying Notebook One at Tab Three].

⁵⁹ Brian D. Tittmore, *Khmer Rouge Crimes: The Elusive Search For Justice*, 7 Hum Rts. Br. 3, 5 (1999). [Reproduced in the Accompanying Notebook Two at Tab 30].

defendants to be tried.⁶⁰ After his 1999 capture in Anlong Veng, a former Khmer Rouge stronghold near the Thai Border, Ta Mok spent seven years in a military prison in Phnom Penh, waiting for prosecution.⁶¹ He died after suffering from a number of illnesses including high blood pressure and stomach and respiratory problems.⁶²

IV. LAW AND ARGUMENT

A. Due to the age and physical deterioration of potential defendants, further delays in ECCC proceedings could prevent potential defendants from facing prosecution.

From the beginning, the process of establishing the ECCC was marked with delay. The March Agreement between the United Nations and Cambodia on May 13, 2003, reflected years of stalled negotiations.⁶³ Four years later, no one has been charged, although scholars have identified those former leaders likely facing indictment.⁶⁴ Groups such as Human Rights Watch believe that “political interference has brought the whole process to a screeching halt.”⁶⁵ For example, subsequent to a week of negotiations between the Cambodian and international judges of the ECCC,⁶⁶ Cambodian personnel acted on instruction from government officials to delay the

⁶⁰ Alex Hinton, *We Can't Let the Khmer Rouge Escape*, WASHINGTON POST, August 4, 2006; available at 2006 WL 13480799. [Reproduced in the Accompanying Notebook Two at Tab 31].

⁶¹ *Detained Khmer Rouge Military Leader Ta Mok Dies Before Trial*, ASIAN POLITICAL NEWS, July 31, 2006; available at 2006 WL 13740532. [Reproduced in the Accompanying Notebook Two at Tab 32].

⁶² *Id.* [Reproduced in the Accompanying Notebook Two at Tab 32].

⁶³ Kathryn Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 Nw. U.J. Int'l Hum.Rts. 549-550 (Spring 2006). [Reproduced in the Accompanying Notebook Two at Tab 33].

⁶⁴ Nate Raymond, *A Supplement to Corporate Counsel: Global Litigation: Trends, Rules of Law*, CAMBODIA, CORPORATE COUNSEL, Vol. 06, No. 11, November 2006; westlaw publication page references unavailable. [Reproduced in the Accompanying Notebook Two at Tab 34].

⁶⁵ *Cambodia: No Justice in This World*, THE ECONOMIST, December 23, 2006, available at 2006 WL 22128522. [Reproduced in the Accompanying Notebook Two at Tab 35].

⁶⁶ Pursuant to the LEC, the ECCC trial and appellate chambers consist of both Cambodian and international judges.

adoption of internal rules for the ECCC.⁶⁷ Because prosecutions cannot proceed without first adopting internal rules of procedure, these delays may create serious problems. Failing to expediently prosecute those “most responsible” may result in the inability to prosecute them at all. Like Pol Pot and Ta Mok, the other likely candidates for prosecution: Nuon Chea, Khieu Samphan, and Ieng Sary, whom are now age seventy-nine, seventy-seven, and seventy-six, respectively, could die as free men, unjudged.⁶⁸

Although health problems associated with age are not easily predictable, the age and previous infirmities of individual potential defendants somewhat predict future health-related problems. Of the four most prominent names that remain, three are now in their late seventies and report having medical problems.⁶⁹ Because many of the leaders fled to the jungle along the border between Cambodia and Thailand, they now suffer from cerebral malaria and poor health.⁷⁰ Accordingly, it is of utmost importance that the ECCC prosecute those most responsible lest it forever lose the opportunity.

B. The LEC does not explicitly require that its defendants be competent to stand trial.

The LEC does not explicitly require that a defendant must be competent before he can stand trial. The LEC enumerates defendants’ rights in Article 35.⁷¹ It incorporates the rights

⁶⁷ *Cambodia: Government Interference in the Khmer Rouge Tribunal*, U.S. FEDERAL NEWS, December 5, 2006; available at 2006 WLNR 21039493. [Reproduced in the Accompanying Notebook Two at Tab 36].

⁶⁸ Alex Hinton, *We Can’t Let the Khmer Rouge Escape Justice*, WASHINGTON POST, August 4, 2006; available at 2006 WLNR 13480799. [Reproduced in the Accompanying Notebook Two at Tab 31].

⁶⁹ Seth Mydans, *Cambodian Court Faces High Hurdles*, INTERNATIONAL HERALD TRIBUNE, August 4, 2006; available on-line at <http://www.ihf.com/articles/2006/08/04/news/cambo.php>. [Reproduced in the Accompanying Notebook Two at Tab 21].

⁷⁰ Elizabeth. Becker, *Videotape Shows Pol Pot on Trial, Facing the Khmer Rouge’s Justice*, NEW YORK TIMES, July 29, 1997; available at 1997 WLNR 4879907. [Reproduced in the Accompanying Notebook Two at Tab 13].

⁷¹ LEC, Art. 35 [Reproduced in the Accompanying Notebook One at Tab Two].

afforded to criminal defendants in Articles 14 and 15 of the ICCPR,⁷² and it explicitly affords the following guarantees:

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing;
- c. to be tried without delay;
- d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it; and
- e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.⁷³

Article 35 of the LEC mirrors Article 21 of the ICTY Statute⁷⁴ and Article 20 of the ICTR Statute.⁷⁵ Accordingly, the ECCC can benefit from the ICTY's and ICTR's interpretation of the scope of defendants' due process rights.

⁷² International Covenant on Civil and Political Rights. [Reproduced in the Accompanying Notebook One at Tab Five].

⁷³ Law of the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("LEC"), Article 35. [Reproduced in the Accompanying Notebook One at Tab Two].

⁷⁴ Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 21 (hereinafter "Statute of ICTY") (as amended 19 May 2003 by Resolution 1481). [Reproduced in the Accompanying Notebook One at Tab Six].

⁷⁵ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, Art. 20 (hereinafter "ICTR Statute") (as amended 14 August 2002 by Resolution 1431). [Reproduced in the Accompanying Notebook Two at Tab 37].

C. The ECCC should follow ICTY precedent relating to competence to stand trial.

i. The ECCC should adopt the ICTY's definition of competence and its position that the requirement of competence to stand trial is inferred.

“International law” is not law in the traditional legislative or penal sense, but a symbiotic fusion of law, politics and the competing interests of sovereignty. It is accepted by states as required behavior due to treaty or custom.⁷⁶ As international tribunals show consistency in applying the same legal test for fitness to stand trial, the ECCC should adopt it also as a means to establishing its legitimacy by respecting uniform international standards. The integrity of the ECCC may otherwise be undermined, subject to the same criticism levied at the Nuremberg trials and early ad hoc tribunals for Yugoslavia and Rwanda. In these proceedings, rules of evidence and procedure were considered largely “technical,” and thus, to some extent, dispensable.⁷⁷

One decision of the ICTY Trial Chamber provides the most comprehensive framework for defendant competence to stand trial. In *The Prosecutor v. Pavle Strugar*,⁷⁸ Trial Chamber II formulated the legal test relative to assessing a defendant's fitness to stand trial by analyzing the capacities a defendant requires to effectively exercise his rights under Articles 20 and 21 of the ICTY Statute. These include the following: to plead, to understand the nature of charges, to

⁷⁶ Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 Am. U. Int'l L. Rev. 321, 349 (2000). [Reproduced in the Accompanying Notebook Two at Tab 38].

⁷⁷ Richard May and Marieke Wierda. *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha*, 37 Colum. J. Transnat'l L. 725 (1999). [Reproduced in the Accompanying Notebook Two at Tab 39].

⁷⁸ *The Prosecutor v. Pavle Strugar*, IT-01-42-T (May 26, 2004). [Reproduced in the Accompanying Notebook Two at Tab 40].

understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.⁷⁹

The Trial Chamber did not provide a bright-line test for holding a defendant incompetent. It held that though fitness to stand trial is connected with a defendant's physical and mental condition, it is not confined to the presence of a given disorder: "*The issue is not whether the accused suffers from particular disorders, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him.*"⁸⁰

Although like the LEC, the ICTY Statute does not explicitly provide for a defendant's fitness to stand trial, the Trial Chamber found the provision of material assistance by way of implication.⁸¹ It reasoned that the procedural rights afforded in Articles 20 and 21 presuppose that a defendant has a level of mental and physical capacity with which to exercise them.⁸² Accordingly, the legal test it formulated was whether the accused can effectively exercise those rights afforded him pursuant to Articles 20 and 21 of the ICTY statute. Similarly, in determining defendant competence to stand trial, the ECCC should consider whether he can effectively exercise the rights afforded to him in Article 35 of the LEC.

ICTY decisions subsequent to *Strugar* follow its precedent. In rejecting a defense motion to declare a defendant unfit to stand trial,⁸³ *Prosecutor v. Vladimir Kovavic*, for example, emphasized *Strugar's* point that the threshold test for fitness is *whether the capacities to*

⁷⁹ *Id.*, para 36. [Reproduced in the Accompanying Notebook Two at Tab 40].

⁸⁰ *Id.*, para 35. [Reproduced in the Accompanying Notebook Two at Tab 40].

⁸¹ *Id.*, para 21. [Reproduced in the Accompanying Notebook Two at Tab 40].

⁸² *Id.* [Reproduced in the Accompanying Notebook Two at Tab 40].

⁸³ See, eg., *Prosecutor v. Jovica Stanisic*, IT-03-69 (27 April 2006). [Reproduced in the Accompanying Notebook Two at Tab 41].

*effectively exercise his rights are present at such a level that it is possible for the accused to participate in the proceedings and to sufficiently exercise his rights- in other words, to make his defense.*⁸⁴

Most recently, the ICTY Trial Chamber in *Prosecutor v. Jovica Stanisic et. al.* examined whether a defendant's medical condition compromised his right to a fair and expeditious trial pursuant to Articles 20(1) and 21(4) of the ICTY Statute.⁸⁵ Following the jurisprudence established in *Strugar*, the Trial Chamber found that, by the "balance of probabilities," the three medical reports submitted by the defense did not demonstrate the defendant's inability to participate effectively in his defense; nor did it establish an "adequate reason" to hold an inquiry into the defendant's competence to stand trial.⁸⁶

ii. The ECCC should rely on medical reports submitted by experts as a means to assessing defendant competence.

The ICTY relies on medical reports submitted by experts to assess defendant fitness to stand trial. For instance, in *Prosecutor v. Vladimir Kovacevic*, decided on April 12, 2006, the Trial Chamber requested its medical experts and the leading psychologist responsible for the defendant's treatment to answer six questions related to his mental health.⁸⁷ These questions, in

⁸⁴ *Prosecutor v. Vladimir Kovacevic*, IT-01-42/2-1, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, para. 27 (April 12, 2006). [Reproduced in the Accompanying Notebook Two at Tab 42].

⁸⁵ *Prosecutor v. Jovica Stanisic et. al.*, Decision on Stanisic's Defense's Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, Case No. IT-03-69 (April 27, 2006). [Reproduced in the Accompanying Notebook Two at Tab 41].

⁸⁶ *Id.* [Reproduced in the Accompanying Notebook at Tab 41].

⁸⁷ *Prosecutor v. Vladimir Kovacevic*, IT-01-42/2-I, para. 18 (12 April 2006). These questions were as follows: 1) Does the Accused understand the reason for and the purpose of the criminal proceedings brought against him in the Prosecutor's indictment? 2) Will the accused be capable of entering an informal plea to the charges in the Indictment, if he is brought to trial? 3) Does the Accused realize the consequences of a possible conviction? 4) Will the Accused, if he is brought to trial, be able to adequately instruct his Defense Counsel for the purposes of mounting a defence, including the identification and examination of witnesses? 5) Will the accused be able to take, with full awareness, the decision of whether or not to testify at trial and offer relevant answers to questions posed to him by his Counsel, the Prosecution and the Trial Chamber? 6) Has there been any development in the

effect, addressed whether the defendant could effectively exercise his rights protected in Article 21 of the ICTY Statute. These questions specifically addressed those due process rights afforded in Article 35(a), (b), (d) and (e) of the LEC.⁸⁸ They are, however, unfortunately publicly unavailable due to confidentiality reasons. The Trial Chamber relied on the legal test for fitness established in *Strugar*, but the reasoning of these experts' conclusions used in applying this test were omitted from the public version of the opinion.⁸⁹

The obvious practical problem in requiring expert medical reports is time constraint. Requiring expert medical opinion in order to assess competence delays proceedings regardless of whether the experts conclude that a given defendant is fit to stand trial.

iii. As does the ICTY, the ECCC should delegate to the defense the burden to prove, by the balance of probabilities, a defendant's incompetence to stand trial.

The defense bears the burden to prove a defendant unfit to stand trial.⁹⁰ The standard of that burden, "the balance of probabilities," essentially requires it to be more likely than not that the defendant is unfit to stand trial. This is the same standard applied to a defense of diminished or lack of mental responsibility at the time a crime was committed.⁹¹

circumstances that can account for any significant change in the findings included in the last reports filed...? [Reproduced in the Accompanying Notebook Two at Tab 42].

⁸⁸ LEC, *supra*, Article 35. [Reproduced in the Accompanying Notebook One at Tab Two.]

⁸⁹ Prosecutor v. Vladimir Kovacevik, IT-01-42/2-I, para. 30-43 (April 12, 2006). [Reproduced in the Accompanying Notebook Two at Tab 42].

⁹⁰ Prosecutor v. Pavle Strugar, IT-01-42-T para 38 (May 26, 2004). [Reproduced in the Accompanying Notebook Two at Tab 40].

⁹¹ Order of Esad Landzo's Submission Regarding Diminished or Lack of Mental Capacity, IT-96-21 (18 June 1998). [Reproduced in the Accompanying Notebook Two at Tab 43].

D. The European Court on Human Rights’ similar position on competence compared with the ICTY strengthens its validity.

Similar to the ICTY’s position, the European Court on Human Rights holds that a defendant is “unfit to plead” if by reason of a disability, he has “insufficient intellect to instruct his solicitors and counsel, to plead to the indictment, to challenge jurors, to understand the evidence, and to give evidence.”⁹² This parallels the legal test for fitness established in *Strugar* and through American jurisprudence, suggesting its acceptance as an international norm.

As decided in *T. v. United Kingdom*, in which the court analyzed a juvenile’s fitness to stand trial, “the question whether or not a defendant is fit to plead must be decided by a jury upon the written or oral evidence of at least two medical experts.”⁹³

The European Court holds that those rights enumerated in Article 6 of the European Convention,⁹⁴ which are identical to those afforded within the ICTY statute, “guarantee the right of an accused to participate effectively in a criminal trial.”⁹⁵ In *Stanford v. The United Kingdom*, the European court ruled in favor of a criminal defendant who alleged violation under Article 6. It found that a defendant’s inability to hear courtroom proceedings precluded him from effectively participating in his trial. The court held that the rights contained within Article 6 implicitly guaranteed a defendant the right to effective participation: “to defend himself in person;” “to examine or have examined witnesses;” and “to have the free assistance of an

⁹² Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, 2003, Art. 6. [Reproduced in the Accompanying Notebook Two at Tab 46].

⁹³ *T. v. The United Kingdom*, 16 December 1999. [Reproduced in the Accompanying Notebook Two at Tab 45].

⁹⁴ Article 6 substantively provides all guarantees contained within Article 35 of the LEC. [Reproduced in the Accompanying Notebook Two at Tab 46].

⁹⁵ *Stanford v. The United Kingdom*, 1994 Eur. Ct. H.R. 16757/90. [Reproduced in the Accompanying Notebook Two at Tab 47].

interpreter if he cannot understand or speak the language used in court.”⁹⁶ Accordingly, the European Court applied the same logic used in *Strugar* to infer the granting of procedural due process rights presupposes a level of mental and physical capacity with which to exercise them.

E. American jurisprudence, which addresses nuances of the issue of competency not analyzed by international courts, provides a useful guide for addressing problems unique to the ECCC.

i. The United States Supreme Court holds a similar position on the standard for competence and the burden of proof compared with the ICTY.

American jurisprudence provides a useful guide for analyzing defendants’ due process rights because it is often referred to in international decisions. Although not binding, American norms of due process provide a useful yardstick to measure the integrity of trial proceedings. In order for an international court to pursue justice in the most effective manner, these due process norms should be as finely interwoven into the court’s procedure as possible.⁹⁷

The United States Supreme Court (“Court”) holds that a defendant has the fundamental right not to stand trial when it is more likely than not that he is incompetent.⁹⁸ In *Pate v. Robinson*, the Court found that not observing procedures adequate to protecting a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.⁹⁹

The American test for incompetence is well-settled, set forth first in *Dusky v. United States* in 1960. This test for competency is whether a defendant has “sufficient present ability to

⁹⁶ *Id* at para 26. [Reproduced in the Accompanying Notebook Two at Tab 47].

⁹⁷ Christian DeFrancia, *Due Process in the International Criminal Courts: Why Procedure Matters*, 87 Va.L.Rev.1381, 1383 (2001). [Reproduced in the Accompanying Notebook Two at Tab 48].

⁹⁸ *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996). [Reproduced in the Accompanying Notebook Two at Tab 49].

⁹⁹ *Pate v. Robinson*, 383 U.S. 375 (1966). [Reproduced in the Accompanying Notebook Two at Tab 50].

consult with his lawyer with a reasonable degree of rational understanding...[and] a rational as well as factual understanding of the proceedings against him.”¹⁰⁰ It is therefore substantially similar to the test applied by the international tribunals.

The Court holds that a defendant found competent at the commencement of trial may later be deemed incompetent as the proceedings continue. In *Drope v. Missouri*,¹⁰¹ the Court warned trial courts to be alert to circumstances suggesting a change that would render the defendant unable to meet the standards of competence to stand trial. Although the Court noted the absence of fixed or immutable signs invariably indicating the need for further inquiry to determine fitness to proceed, these may include the following: evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial.¹⁰² This may be particularly helpful to the ECCC proceedings, as problems arising due to old age are often sudden and unpredictable. The issue of competence may arise during the ECCC proceedings, rather than prior to their commencement.

Also like the ICTY, the Court holds that the defense bears the burden to prove, by the preponderance of evidence, a defendant’s incompetence to stand trial.¹⁰³ The burden is delegated to the defense based on analysis of the limited scope of due process rights. Once a defendant is provided access to procedures for evaluating competency, no basis remains for holding that due process “further requires the State to assume the burden of vindicating the defendant’s constitutional right by persuading the trier of fact that the defendant is competent to stand

¹⁰⁰ *Dusky v. United States*, 562 U.S. 402, 402 (1960). [Reproduced in the Accompanying Notebook Three at Tab 51].

¹⁰¹ *Drope v. Missouri*, 420 U.S. 162 (1975). [Reproduced in the Accompanying Notebook Three at Tab 52].

¹⁰² *Id.* [Reproduced in the Accompanying Notebook Three at Tab 52].

¹⁰³ *Medina v. California*, 505 U.S. 437 (1992). [Reproduced in the Accompanying Notebook Three at Tab 53].

trial.”¹⁰⁴ Obviously, requiring the State to first prove competence before commencing proceedings would also create judicial gridlock, one impediment particularly dire to the ECCC given the advanced age of its defendants.

Due to the significant impact of an erroneous decision of fitness, the defense bears the lowest of three available standards of proof.¹⁰⁵ If a defendant cannot effectively communicate with counsel, he may be unable to exercise other rights deemed essential to a fair trial.¹⁰⁶

ii. American jurisprudence provides guidance regarding the standard for competence to waive counsel and to plead guilty.

The ECCC may utilize the Court’s analysis of competence to other elements of trial proceedings. In the United States, the same competence standard applies to pleading guilty and waiving counsel as it does to standing trial.¹⁰⁷ A criminal defendant may not waive his right to counsel or plead guilty unless he does so “competently and intelligently.”¹⁰⁸ In *Godinez v. Moran* in 1993, the Court found that although the decision to plead guilty is a “profound one,” it found no need to apply a standard higher than that applied in *Dusky* because higher level of competence was not necessary to plead guilty compared with to stand trial.¹⁰⁹ “[The decision to plead guilty]

¹⁰⁴ Id at 366.[Tab 53].

¹⁰⁵ *Cooper v. Oklahoma*, 517 U.S.at 363. There are three different standards for burden of proof in the United States: preponderance of the evidence (lowest level), clear and convincing (intermediate level) and beyond a reasonable doubt (highest level). [Reproduced in the Accompanying Notebook Two at Tab 49].

¹⁰⁶ *Riggins v. Nevada*, 504 U.S. at 139. [Reproduced in the Accompanying Notebook Three at Tab 54].

¹⁰⁷ *Godinez v. Moran*, 509 U.S. 389 (1993) [Reproduced in the Accompanying Notebook Three at Tab 55].

¹⁰⁸ *Johnson v. Zerbst*, 304 U.S. 458 (1938). [Reproduced in the Accompanying Notebook Three at Tab 56].

¹⁰⁹ *Godinez v. Moran*, 509 U.S at 398. [Reproduced in the Accompanying Notebook Three at Tab 55].

is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.”¹¹⁰

The *Godinez* court also found that waiving the right to counsel did not require a higher level of competence. It found that a defendant may waive counsel at his own detriment, rejecting the respondent-defendant’s argument that a higher standard for competence was necessary because a pro se defendant required “greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.”¹¹¹ The Court did not however, resolve the issue of whether once a defendant chooses to represent himself, he is held to a higher level of competence than a defendant assisted by counsel. The court distinguished between a defendant’s right to waive counsel and his right to self-representation, noting that a criminal defendant’s ability to represent himself does not bear on his ability to choose this self-representation.¹¹²

iii. American jurisprudence provides persuasive analysis for permitting the involuntary administration of medication to aging defendants.

The Court also addressed whether a defendant may be administered medication in order to render him competent for trial without offending his due process rights. Two Court cases laid the framework to establish that the Constitution permits the government to involuntarily administer antipsychotic drugs in order to render a mentally ill defendant competent to stand trial on serious trials.¹¹³ The Court in *Sell v. the United States* in 2003 used this framework to outline

¹¹⁰ *Id.* [Tab 55].

¹¹¹ *Id.* at 399. [Tab 55].

¹¹² *Id.* [Tab 55].

¹¹³ *Washington v. Harper*, 494 U.S. 210; *Riggins v. Nevada*, 504 U.S. 127 (1992). [Reproduced in the Accompanying Notebook Three at Tab 57].

the four requirements for the constitutionality of involuntary medication.¹¹⁴ First, an important governmental interest must be at stake. Both serious crimes against a person and property qualify as important governmental interests because the government seeks to protect through the application of criminal law the basic human need for security.¹¹⁵ Secondly, involuntary medication must significantly further state interests by the substantial likelihood that it will render the defendant competent to stand trial.¹¹⁶ Third, involuntary medication must be necessary to further important state interests because alternative, less intrusive treatments are unlikely to achieve substantially the same results.¹¹⁷ Last, the administration of drugs is medically appropriate, or in the patient's best interest in light of his medical condition.¹¹⁸

All four requirements set forth in *Sell* can be met by administering medication to the ECCC defendants. The exact analysis relating to these four requirements will vary from case to case, but general comments can be made. First, prosecuting for crimes against humanity, genocide and war crimes certainly qualifies as an "important governmental interest."¹¹⁹ Secondly, medication administered to treat illnesses associated with advanced age will likely improve defendants' mental and physical condition, enabling them to stand trial. The challenge is finding the least intrusive means of improving defendants' fitness to the point that they can competently stand trial. Last, given that the medication administered to defendants also improves

¹¹⁴ *Sell v. United States*, 539 U.S. 166 (2003). [Reproduced in the Accompanying Notebook Three at Tab 58].

¹¹⁵ *Riggins*. [Reproduced in the Accompanying Notebook Three at Tab 54].

¹¹⁶ *Sell v. United States*, 539 U.S. at 181. [Reproduced in the Accompanying Notebook Three at Tab 58].

¹¹⁷ *Id.* [Reproduced in the Accompanying Notebook Three at Tab 58].

¹¹⁸ *Id.* [Reproduced in the Accompanying Notebook Three at Tab 58].

¹¹⁹ LEC Article Four gives the ECCC power to prosecute crimes of genocide; LEC Article Five gives the ECCC power to prosecute crimes against humanity; and LEC Article 6 gives the ECCC power to prosecute for grave breaches of the Geneva Conventions of 12 August 1949. [Reproduced in the Accompanying Notebook at Tab Two].

their health, which is in their best interest, this constitutes a minor intrusion of liberty.

Administering involuntary medication to ECCC defendants may therefore pass constitutional muster under *Sell*.

F. Defendants should not be afforded the right to self-representation in order to serve the greater goal of, and defendant right to, a fair and expedient trial.

i. Both international law and American law recognize a criminal defendant's right to self-representation.

International law recognizes a criminal defendant's right to self-representation. Among other international court statutes, the ICTY Statute,¹²⁰ ICTR Statute,¹²¹ Rome Statute of the International Criminal Court,¹²² and the European Convention on Human Rights¹²³ all afford a criminal defendant the right to self-representation.

The United States Supreme Court recognizes a criminal defendant's right to self-representation. In *Faretta v. California*, the Court held that natural reading of the sixth amendment of the United States Constitution implied a right of self-representation.¹²⁴ In holding that forcing a criminal defendant to accept a state-appointed public defender violates his constitutional right to conduct his own defense, the Court stated: "This Court's past recognition of the right to self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature

¹²⁰ ICTY Statute, Art. 21(4)(D). [Reproduced in the Accompanying Notebook One at Tab Six].

¹²¹ ICTR Statute, Art. 20(4)(D). [Reproduced in the Accompanying Notebook Two at Tab 37].

¹²² Rome Statute, Art. 67(1)(D). [Reproduced in the Accompanying Notebook Three at Tab 59].

¹²³ European Convention on Human Rights, Article 6(3)(c). [Reproduced in the Accompanying Notebook Two at Tab 46].

¹²⁴ *Faretta v. California*, 422 U.S. 806, 821 (1975). [Reproduced in the Accompanying Notebook Three at Tab 60].

form a consensus not easily ignored.”¹²⁵ In so holding, the Court rejected the argument that the right to self-representation should be denied due to a defendant’s superior ability to defend himself with counsel’s guidance compared to by his own ‘unskilled efforts.’ “But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him.”¹²⁶

The Supreme Court’s analysis is particularly applicable to ECCC defendants, as it is uncertain whether defendants will be assigned attorneys from the international community or from Cambodia. If, due to the unavailability of qualified attorneys in Cambodia, defendants are assigned international counsel, defendants’ distrust of international attorneys may compel them to assert the right to self-representation. Both Nuon Chea and Khieu Samphan have expressed a desire to represent themselves before the ECCC.¹²⁷ As Nuon Chea stated in explaining his reasons for potentially representing himself in the proceedings: “[International defense] lawyers from the outside understand the law but they don’t understand us. They cannot explain our actions.”¹²⁸ Nuon Chea does, however, acknowledge his health as “his weakness” when it comes to defending himself at trial, supporting the argument that rather than endure the countless delays inevitable in allowing ECCC defendants to defend themselves, the ECCC should categorically deny this right to serve the greater purpose of a fair and expedient trial.¹²⁹

¹²⁵ Id at 816. [Reproduced in the Accompanying Notebook Three at Tab 60].

¹²⁶ Id. at 834. [Reproduced in the Accompanying Notebook Three at Tab 60].

¹²⁷ *Khmer Rouge’s Nuon Chea Plans to Defend Self at Trial*, ASIAN POLITICAL NEWS, December 22, 2003; 2003 WLNR 6532302. [Reproduced in the Accompanying Notebook Three at Tab 79].

¹²⁸ Thet Sambath. [Reproduced in the Accompanying Notebook Two at Tab 25].

¹²⁹ ASIAN POLITICAL NEWS, Reproduced in the Accompanying Notebook Three at Tab 82].

ii. Both international law and American law acknowledge that the right to self-representation is not absolute.

While international law recognizes a criminal defendant's right to self-representation, it acknowledges exceptions. For example, Rule 80(B) of the ICTY Rules on Procedure and Evidence provides: "[A] Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom."¹³⁰

Two specific cases from the ICTR and ICTY illustrate the limits to the right to self-representation. Only one case brought before the ICTR alluded to the imposition of defense counsel, in the context of a request for replacement or withdrawal of counsel. In *Prosecutor v. Jean-Bosco Barayagwiza*, the defendant refused to appear in court and instructed his counsel not to represent him in any respect in the trial. In finding that the defendant was boycotting the trial and obstructing the course of justice, the Trial Chamber denied allowing the withdrawal of counsel.¹³¹

Even more on point, the ICTY has addressed the issue of the right to self-representation in arguably its most famous case, *Prosecutor v. Slobodan Milosevic*.¹³² The first case before the ICTY to address self-representation, the issue arose primarily because the deteriorating health of the aging defendant constantly called into question his ability to represent himself. **This is the**

¹³⁰ ICTY Rules of Procedure and Evidence, Rule 80(B). [Reproduced in the Accompanying Notebook Three at Tab 61].

¹³¹ *Prosecutor v. Jean-Bosco Barayagwiza*, Decision on Defence Counsel Motion to Withdraw, Case No. ICTR-97-19-T (November 2, 2000). [Reproduced in the Accompanying Notebook Three at Tab 62].

¹³² *Prosecutor v. Slobodan Milosevic*, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, Case No. IT-02-54-AR73.7 (September 22, 2004). [Reproduced in the Accompanying Notebook Three at Tab 63].

case the ECCC should keep in mind when deciding whether defendants should be allowed to exercise the right to self-representation. In *Milosevic*, trial proceedings commenced on February 12, 2002, and terminated on March 14, 2005 upon Milosevic's death on March 11, 2005.¹³³ The ICTY Trial Chamber early on recognized Milosevic's right to represent himself.¹³⁴ Milosevic's adamant insistence on exercising this right, combined with Milosevic's continuously poor health, created such delay that the Trial Chamber on September 22, 2004 granted the prosecution's motion to assign counsel to Milosevic.¹³⁵ During the two-year presentation of the Prosecution's case, proceedings were suspended thirteen times due to Milosevic's ill health, for a total of 66 days. While the commencement of the defense case was initially scheduled for June 8, 2004, further delays due to Milosevic's poor health caused its postponement until August 31, 2004. Milosevic died before a decision was handed down.

In its decision to assign defense counsel, the ICTY Trial Chamber in *Milosevic* provided precedent potentially helpful to the ECCC. If the ECCC's aging defendants choose to exercise their right to represent themselves, the similar circumstances may provide a useful framework for deciding whether to grant this request. The ICTY Chamber specifically addressed the issue of whether the right of an accused set out in Article 21 of the ICTY Statute to defend himself in person is subject to qualification; and, if it is, whether the circumstances warranted assigning

¹³³ Case Information Sheet, Prosecutor v. Milosevic, Case No. IT-02-54; available on-line at <http://www.un.org/Icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf>. [Reproduced in the Accompanying Notebook Three at Tab 64].

¹³⁴ Prosecutor v. Milosevic, Status Conference, Case. No. IT-99-37-PT (August 30, 2001). [Reproduced in the Accompanying Notebook Three at Tab 65].

¹³⁵ Prosecutor v. Milovic, Reasons for Decision on Assignment of Defence Counsel, Case No. IT-02-54 (September 22, 2004). In reaching this decision, the ECCC examined the procedural history of Milosevic's trial, specifically those events, hearings, orders, and physical and mental examinations relative to assessment and/or determination of Milosevic's fitness to represent himself. [Reproduced in the Accompanying Notebook Three at Tab 63].

counsel to Milosevic. In holding that counsel should be assigned to the defense, the Trial Chamber stated:

The fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious. The concern of the Chamber is that, based on the medical reports, there is a real danger that this trial might either last for an unreasonably long time or, worse yet, might not be concluded should the accused continue to represent himself with the assistance of counsel. On the other hand, the Chamber is satisfied that, if counsel is assigned to the accused, measures can be devised to ensure that the trial continues in a manner that it both fair and expeditious.¹³⁶

In holding that Milosevic's right to self-presentation was not absolute, the Court found that allowing the ailing former leader would violate another right afforded under Article 21 of the ICTY Statute: the right to a fair trial .¹³⁷

[The Trial Chamber] is not obliged to indulge the wish of an accused to conduct his own defense where his capacity to do so is so impaired that, were he to continue to do so, there would be a material risk that he would not receive a fair trial. The mere assertion on the part of the Accused of his right to defend himself does not ensure an effective defense in circumstances where he is seriously ill and regularly prevented for protracted periods from acting in his own defense.¹³⁸

In essence, the Trial Chamber specifically held that the right to represent oneself must yield when it is necessary to ensure that the trial is fair.¹³⁹ It relied on the jurisprudence of past tribunals, including the ICTY, ICTR, and the Special Court for Sierra Leone in reaching the conclusion that there may be circumstances when it is competent and appropriate for a Trial Chamber to insist that the defense is presented by counsel and not by the accused in person.¹⁴⁰

¹³⁶ The Prosecutor v. Milosevic, Reasons for Decision on Assignment of Defence Counsel, para. 1., Case No. IT-02-54-T (September 22, 2004). [Reproduced in the Accompanying Notebook Three at Tab 63].

¹³⁷ ICTY Statute, Art. 21. [Reproduced in the Accompanying Notebook Three at Tab 6].

¹³⁸ Prosecutor v. Milosevic, Reasons for Decision on Assignment of Defence Counsel, para. 32, Case No. IT-02-54-T (September 22, 2004). [Reproduced in the Accompanying Notebook Three at Tab 63].

¹³⁹ Id. at para. 34. [Reproduced in the Accompanying Notebook Three at Tab 63].

¹⁴⁰ Id. at para 35. [Reproduced in the Accompanying Notebook Three at Tab 63].

Allowing an ECCC defendant to exercise his right to represent himself creates two problems. One, his fitness would come more into play. As assistance of counsel would not be present, the level of fitness necessary for a fair trial would increase. Secondly, and correlatively, problems associated with fitness become more likely to delay court proceedings, potentially denying a defendant his right “to be tried without delay.”¹⁴¹ Accordingly, like the ICTY Trial Chamber previously decided in the *Milosevic*, the ECCC should stipulate that a defendant’s right to fair and expedient trials outweighs his right to represent himself.¹⁴² Because the right to defend oneself is recognized as non-absolute, and due to the ECCC’s prerogative of trying a defendant before his death, the right to self-defend should give way to these other concerns.

V. THE PURPOSES OF PUNISHMENT ARE BETTER SERVED IF THE ECCC APPLIES A MORE LIBERAL STANDARD FOR COMPETENCE IN ORDER TO ASSURE ITS DEFENDANTS ARE HELD RESPONSIBLE FOR THEIR ROLE IN THE KHMER ROUGE ATROCITIES.

Ideally, the ECCC would be able to seamlessly apply standards derived from American and international jurisprudence, affording the due process guarantees outlined in Article 35 without impeding the ECCC’s ability to efficiently and justly prosecute those “most responsible.” The reality, however, is that due to the passage of time since the period of Democratic Kampuchea, the ECCC may be engaged more in a balancing of due process rights compared with granting due process rights. Due to the advanced age of the defendants, the ECCC must balance the implied right to be competent to stand trial with other rights afforded in Article 35 of the LEC such as the rights to a fair and expedient trial.¹⁴³

¹⁴¹ LEC, Art. 35(c). [Reproduced in the Accompanying Notebook Three at Tab 63].

¹⁴² Id. Art. 35(d).

¹⁴³ See, e.g., LEC, Art. 35(c), “[The right] to be tried without delay.” [Reproduced in the Accompanying Notebook One at Tab Two.]

Although punishment serves numerous purposes, three stand out as major objectives of the ECCC: retribution, deterrence, and closure. As noted by other war crimes tribunals, retribution and deterrence are generally the two primary purposes of punishing war criminals.¹⁴⁴ Closure is important due to the length of time victims and their families have waited for answers regarding the operation of the Khmer Rouge.

A. Retribution

The theory of retribution rests on the basic premise that the infliction of punishment rectifies the moral balance insofar that punishment is what the perpetrator deserves. “A sentence must reflect the predominant standard of proportionality between the gravity of the offense and the degree of responsibility of the offender.”¹⁴⁵ The ICTY and ICTR have both recognized retribution, along with deterrence, as the primary purpose of punishment.¹⁴⁶ For Cambodians, retribution is undoubtedly one of the most fundamental purposes of trying former leaders of the Khmer Rouge, simply due to the length of time the leaders have been allowed to live freely in Cambodia without facing consequences for their actions.

Relating to Cambodia, a fundamental problem from a retributive perspective is the fact that while many were responsible for crimes and atrocities committed during the period of Democratic Kampuchea, the LEC provides only for the punishment of “senior leaders” and “those most responsible.”¹⁴⁷ One could argue that this selective mode of punishment undermines the retributive function of punishment.

¹⁴⁴ See *Prosecutor v. Kambanda*, ICTR-97-23-S, para. 20 (Sept. 4, 1998); See *Prosecutor v. Stakia*, IT-97-24-T, para. 900 (July 31, 2003). [Reproduced in the Accompanying Notebook Three at Tab 66].

¹⁴⁵ *Prosecutor v. Akayesu*, ICTR-96-4-S, para. 40 (Oct. 2, 1998). [Reproduced in the Accompanying Notebook Three at Tab 67].

¹⁴⁶ *Prosecutor v. Todorovic*, IT-95-9/17/1-T, para. 288 (July 31, 2002). [Reproduced in the Accompanying Notebook Three at Tab 68].

While it may appear that others who committed crimes during that area are “getting away” with their acts, the reality is that prosecution of all persons responsible is economically and practically unfeasible. In contrast, prosecuting those who actually orchestrated the killings is the first priority from a retributive perspective. Leaders and those in superior positions in the chain of command are, owing to their positive governance obligations, more deserving of prosecution and weightier punishment for their involvement in mass atrocity.¹⁴⁸ It should be cautioned, however, that although selective prosecution and the use of “exemplary trials” are accepted in virtually all legal systems, one risk is arbitrariness in selection. As noted by Michael P. Scharf, director of the Frederick K. Cox Center of International Law at Case Western Reserve University, to avoid this risk, the criteria used must reflect appropriate distinctions based upon degrees of culpability, sufficiency of evidence, and other relevant factors.¹⁴⁹ Accordingly, the ECCC’s prosecution of those “most responsible” should focus on those the evidence suggests bear the highest degrees of culpability.

Here, the retributive purpose of punishment may be undermined if a defendant does not have proper capacity to defend himself. Since every defendant is presumed innocent as long as a court has not given a definitive judgment,¹⁵⁰ one cannot assume that those leaders “most responsible” are guilty until they are proven guilty beyond a reasonable doubt. Accordingly, as ECCC defendants theoretically should be afforded the same rights as a defendant ultimately absolved of all responsibility.

¹⁴⁷ LEC, Article One.[Reproduced in the Accompanying Notebook One at Tab Two].

¹⁴⁸ Richard Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*. 6 Duke J. Comp. & Int’l L. 5, 7 (1995). [Reproduced in the Accompanying Notebook Three at Tab 70].

¹⁴⁹ MICHAEL P. SCHARF AND NIGEL RODGLEY, “INTERNATIONAL LAW PRINCIPLES ON ACCOUNTABILITY” in POST CONFLICT JUSTICE, pg. 95 (M Cherif Bassiouni, ed. Transnational Publishers, Inc., 2002). [Reproduced in the Accompanying Notebook Three at Tab 71].

¹⁵⁰ LEC, Art. 35. [Reproduced in the Accompanying Notebook One at Tab Two].

At the same time, however, substantial documentary evidence implicates those few the ECCC will choose to prosecute as “most responsible.” Due to the extreme likelihood that these individuals are actually guilty of the crimes of which they are accused, the ECCC may opt to not necessarily lower the standard previously applied by other war crimes tribunals, but to be more liberal in its perception of defendant capability to effectively contribute to their defense. At the same time, however, the ECCC must face the reality that the physical and mental deterioration associated with old age may delay its proceedings. Accordingly, the best way to address these potential problems is to anticipate them, looking to past precedent, particularly the Milosevic debacle, to determine whether there were particular mistakes or reasons for delay that the ECCC could take care to prevent.

B. Deterrence

From a deterrence perspective, punishment is inflicted not because the offender deserves it, but because of the utilitarian and consequentialist effect of that punishment: reducing recidivism, or re-offending by the perpetrator.¹⁵¹ As the judge Gabrielle Kirk McDonald, who presided over the ICTY’s first trial, stated: “We are here to tell people that the rule of law is to be respected.” In *Prosecutor v. Rutaganda*, the ICTR noted that in addition to retribution, the punishment of an accused must be directed “over and above....as a deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international and humanitarian law and human rights.”¹⁵² As the United Nations Commission on

¹⁵¹ Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 Nw. U.L.Rev. 539, 560 (Winter 2005). [Reproduced in the Accompanying Notebook Three at Tab 72].

¹⁵² *Prosecutor v. Rutaganda*, ICTR-96-3, para. 456 (December 6, 1999). [Reproduced in the Accompanying Notebook Three at Tab 73].

Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have concluded, impunity is one of the main reasons for the continuing of grave violations of human rights throughout the world.¹⁵³ Rather than reinforcing respect for the law and the government, failing to prosecute former senior leaders of the Khmer Rouge breeds contempt for the law and encourages future violations.

As scholar Diane Pokempner gleaned from interviews with Cambodians during the summers of July 2001 and March 2002, for some Cambodians, the value of the ECCC is primarily symbolic and prospective- a warning sign to the present order. The idea they hope it will convey is that at some point, even the highest leaders could be called into account for their crimes.¹⁵⁴

There are two different types of deterrence: general and specific. Specific deterrence, which focuses on the goal of ensuring that the particular offender does not recidivate, has not been a focus of the international war crimes tribunals because “the likelihood of persons convicted...ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide, or grave breaches is so remote as to render its consideration [in sentencing] unreasonable and unfair.”¹⁵⁵ Rather, international war crimes tribunals place specific emphasis on general deterrence.¹⁵⁶ In Cambodia’s case, the prevention of crimes on the same scale as those committed by Khmer Rouge officials constitutes general deterrence.

¹⁵³ United Nations on Human Rights: Report on the Consequences of Impunity, U.N. Doc. E/CN.4/1990/13; reprinted in 3 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 18, 19 (N. Kritz ed., 1995).

¹⁵⁴ DIANE POKEMPHER, BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, pg. 340-1 (Jaya Ramji and Beth Van Schaack, Eds., Edwin Mellon Press, 2005). [Reproduced in the Accompanying Notebook One at Tab 20].

¹⁵⁵ Prosecutor v. Kunarc, IT-96-21-T, para 840 (Feb. 22, 2001). [Reproduced in the Accompanying Notebook Three at Tab 74].

Deterrence plays a central purpose in ECCC prosecutions. Cambodia is characterized by a “culture of impunity,” in which officials, for the most part, remain immune from consequences for their actions. As noted by Pokempner: “There is also the present-day impunity, codified in law and in practice, of almost any Cambodian official for wrongdoing against those who are weaker.”¹⁵⁷ By prosecuting those who, until now, were permitted to hide safely in the woodwork of modern society, this clearly conveys the message that further acts of violence will not be tolerated, better enabling Cambodia to reach its end goals of peace and a structured legal system.

Already, the purpose of deterrence is undermined by the deaths of other “senior leaders” before their prosecution. Although unlikely that atrocities at the level of those committed by the Khmer Rouge will occur again, Cambodia remains plagued with crimes for which officials are not held accountable and its culture of impunity. Accordingly, to promote deterrence, the trials should proceed in order to enable Cambodia to transition to a peaceful society. Allowing senior leaders to die before they are held accountable holds irresponsible those actually “most responsible”

C. Closure

The ECCC is unique because it will prosecute crimes that potentially occurred over three decades ago. On one hand, one might assume that this passage of time diminishes the importance of closure for several reasons. First, due to the massive scope of the genocide, which eliminated a significant portion of the population, investigating every victim is impossible. Second, as the hope that a loved one may be alive has been extinguished over the last thirty years, family

¹⁵⁶ Prosecutor v. Niyitegeka, ICTR-96-14-T, para 484 (May 16, 2003) [Reproduced in the Accompanying Notebook Three at Tab 75].

¹⁵⁷ DINAH POKEMPNER, “THE TRIBUNAL AND CAMBODIA’S TRANSITION TO A CULTURE OF ACCOUNTABILITY” in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, pg. 339 (Jaya Ramji and Beth Van Schaak, Eds., Edwin Mellon Press, 2005). [Reproduced in the Accompanying Notebook One at Tab 20].

members of victims no longer need to see their names in writing to confirm their deaths. Third, because such a long time period has passed since the atrocities occurred, Cambodians no longer have as pressing a need to have their stories heard and legitimized.¹⁵⁸

On the other hand, the absolute failure for either the international community or the Cambodian government to assign responsibility creates a pressing need for closure for Cambodian citizens. This delay in prosecution is due partially to the Khmer Rouge's adeptness at disguising chains of command and concealing the truth regarding the orchestration of the genocidal regime.¹⁵⁹ When the Khmer Rouge fled the Capital, it left behind more than half a million documents chronicling their killings of fellow Cambodians.¹⁶⁰ In a survey of Cambodians, almost one hundred percent of those surveyed wanted to know the truth behind the horrific acts that occurred during the period of Khmer Rouge.¹⁶¹ The ECCC proceedings represent a long-awaited response to Cambodians' desire for closure through the establishment of a thorough and accurate historical record.

One question necessarily raised in prosecuting only a select few officials is whether omitting to prosecute others will prevent the obtainment of a thorough historical record. The unfortunate reality is that although the documentary record pointing to the role of specific individuals is quite extensive for some atrocities, particularly the operation of the interrogation centre of Tuol Sleng, documentary evidence directly implicating individuals in other atrocities is unavailable due to the uneven nature of record-keeping in Democratic Kampuchea and the loss

¹⁵⁸ Jaya Ramja, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 Fletcher F. World Aff. 137, 153 (2000). [Reproduced in the Accompanying Notebook Three at Tab 76].

¹⁵⁹ *Id.* at 144 [Reproduced in the Accompanying Notebook Three at Tab 76].

¹⁶⁰ Jon Swain, *Khmers Try to Bury Their Evil With Pol Pot*, TIMES NEWSPAPERS LIMITED, August 3, 1997. [Reproduced in the Accompanying Notebook Three at Tab 77].

¹⁶¹ Laura McGrew, *supra* at 142. [Reproduced in the Accompanying Notebook Three at Tab 69].

of many documents since 1979.¹⁶² As the Group of Experts appointed by the United Nations concluded subsequent to its investigation in Cambodia in 1998, trying only a select few is prudent for three major reasons. First, trying numerous high-level officials would be “logistically and financially impossible for any sort of tribunal that respects the due process rights of defendants. Second, reopening the events through criminal trials on a massive scale would impede the national reconciliation important to Cambodia. Third, the legal questions surrounding the responsibility of many persons at the low levels, particularly the youthful offenders, and complex and suggests that these persons should not be tried.¹⁶³ Accordingly, although some may argue that trying a few senior leaders may not provide the thorough historical record necessary to achieve closure, this represents the best means possible.

The ECCC proceedings may serve as a means for transitioning Cambodia to a forward-looking society rather than one focused upon the past. By acknowledging and accounting for past crimes under the Khmer Rouge, the ECCC removes the uncertainty that has plagued Cambodians for generations.

VI. CONCLUSION

Unfortunately, the ECCC cannot control its greatest obstacle to effectively prosecuting those within its personal jurisdiction: the advanced age of its defendants. Through examining international and American jurisprudence, however, the ECCC may find effective means to addressing those problems associated with defendants’ old age rather than risk losing the opportunity to prosecute them. Most importantly, ECCC defendants must not be permitted to

¹⁶² Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, Para. 55, 53rd Session (1999); available on-line at <http://www1.umn.edu/humanrts/cambodia-1999.html>. [Reproduced in the Accompanying Notebook Three at Tab 78].

¹⁶³ *Id* at Para 106. [Reproduced in the Accompanying Notebook at Tab 78].

defend themselves due to the inevitable delays this creates. Although some may criticize this as violating due process rights afforded under Article 35 of the LEC, substantial evidence demonstrates that automatically assigning counsel serves the greater objective of granting defendants a fair and expedient trial.

Relating to the other nuances and issues arising regarding defendant competency to stand trial, international and American jurisprudence provides a useful blueprint to guide the ECCC in addressing potential problems and concerns. The ECCC's overarching objective, however, should be to use this jurisprudence, particularly that from the *Milosevic* trial. It can learn from the mistakes of the past to prevent the unnecessary delays which would prohibit those most responsible from being held accountable for their actions.