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How will international criminal procedural law supplement uncertainties or gaps in Cambodian criminal procedural law during the course of the CEC proceedings; and what are the major impediments in implementing international procedural safeguards on a domestic level?

Sarah Schauerte

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

MEMORANDUM FOR THE CAMBODIAN EXTRAORDINARY CHAMBERS

ISSUE #5:

How will international criminal procedural law supplement uncertainties or gaps in Cambodian criminal procedural law during the course of the CEC proceedings; and what are the major impediments in implementing international procedural safeguards on a domestic level?

Prepared by Sarah Schauerte

Fall 2006

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Law Review Articles

1. Araujo, Father Robert. Sovereignty, Human Rights and Self-Determination: The Meaning of International Law. 24 Fordham Int'l L.J. 1477 at 1489 (2001).
2. Bush, Jonathon A. *Respondents: Lex Americana: Constitutional Due Process and the Nuremberg Defendants*. 45 St. Louis L.J.515 (Spring 2001).
3. DeFrancia, Christian. Due Process in International Criminal Courts: Why Procedure Matters. 87 VA L. Rev. 1381 (2001).
4. Dickinson, Laura. *The Promise of Hybrid Courts*. 97 A.J.I.L. (April 2003).
5. Donovan, Daniel Kemper. *Recent Development: Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*. 44 Harv. Int'l L.J. 551 (Summer 2003).
6. Klein, Katheryn. *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 (Spring, 2006).
7. Leigh, Monroe. *Editorial Comment: Witness Anonymity is Inconsistent With Due Process*. 91 A.J.I.L. 80 (January 1997).
8. Lieberman, Michael. *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*. 186 Mil. L. Rev. 164 (Winter 2005).
9. Mundis, Daryl A. *Current Development: New Mechanisms for the Enforcement of International Humanitarian Law*. 95 A.J.I.L. 934 (October, 2001).
10. Scharf, Michael P. *Conceptualizing Violence: Present and Future Developments in International Law: Pane II: Adjudicating Violence: Problems Confronting the International Law and Policy on War Crimes Against Humanity: The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*. 60 Alb. L. Rev. 861 (1997).
11. Wald, Patricia. *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*. 5 Yale Hum. Rts. Dev. L.J. 217 (2002).

Books

12. Citation Omitted
13. Buckley, Aaron J. *The Conflict of Cambodia and Post-Conflict Justice in Post-Conflict Justice* 3-54 (M. Cherif Bassiouni, ed., Transnational Publishers, Inc., 2002).
14. Hammer, Peter J. and Urs, Tara. *The Elusive Face of Cambodian Justice*, in *Bringing the Khmer Rouge to Justice*, 13-58 (Ramji, Jaya and Schaack, Beth, eds., The Edwin Mellen Press, 2005).
15. Heder, Steve. *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, in *Bringing the Khmer Rouge to Justice*, 377-424 (Ramji, Jaya and Schaack, Beth, eds., The Edwin Mellen Press, 2005).
16. Nike, Howard E. *Reflections of a Legal Anthropologist on the Trial of Pol Pot and Ieng Sary in Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, 19-29 (2001).
17. Quigley, John E. *Introduction in Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, 1-18 (2001).
18. Shraga, Daphna. *The Second Generation U.N.-Based Tribunals: A Diversity of Mixed Jurisdictions in Internationalized Courts and Tribunals: Sierra Leone, East Timor and Cambodia*. (Cesare, P.R. and Nollkamper, Andre, Eds et al), 2004.
19. Meijer, Ernestine. *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rogue: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*. In *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Cesare, P.R. and Nollkaemper, Andre, Eds et. al), 2004.
20. PoKempner, Dinah. *The Tribunal and Cambodia's Transition to a Culture of Accountability*, in *Bringing the Khmer Rouge to Justice*, 333-358 (Ramji, Jaya and Schaack, Beth, eds. The Edwin Mellen Press, 2005).
21. Ratner, Steven R. & Abrams, Jason S. *The Khmer Rogue Rule Over Cambodia: A Historical Overview in Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*. Second Edition. (Oxford University Press, 2001).
22. Scharf, Michael P. & Rodley, Nigel. *International Law Principles on Accountability, Post-Conflict Justice* 89-96 (M. Cherif Bassiouni, Ed., Transnational Publishers, Inc., 2002).

Journal Articles and Symposiums:

23. An, Sok. *The Khmer Rogue Tribunal: What it Means for Cambodia*. In *Justice Initiatives*, Open Society for Justice Initiatives, 25-31 (Spring 2006).
24. Askin, Kelly Dawn. *The Investigation and the Prosecution* in *Justice Initiatives* at 76 (April 2006).
25. Bertodano, Sylvia de. *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*. 4 J. Int'l Crim. Just. 285. (1 April 2006).
26. Boyle, David. *The Rights of Victim: Participation, Representation, Protection, Reparation*. 4 J. Int'l Crim. Just. 307 (1 April 2006).
27. Citation Omitted
28. Cockayne, James. *Cambodian Extraordinary Chambers: Justice at Long Last?* 4 J. Int'l Crim. Just. 327 (May 2006).
29. Citation Omitted
30. Goldstein, James A. *An Extraordinary Experiment in Transitional Justice*. In *Justice Initiatives*, 1-6 (Spring 2006).
31. Heder, Steve. *The Senior Leaders and Those Most Responsible*. In *Justice Initiatives*, 56 (April 2006).
32. Lieberman, Michael. *Salvaging the Remains: The Khmer Rogue Tribunal on Trial*. 186 Mil. L. Rev. 164 (Winter 2005).
33. Lejmi, Mohamed Ali. *Problems Caused by the Passage of Time Since the Alleged Commission of Crimes*. 4 J. Int'l Crim. Just. 300 (May 2006).
34. Linton, Suzannah. *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*. 4 J. Int'l Crim. Just. 327 (1 April 2006).
35. Linton, Suzannah. *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*. *Criminal Law Forum* 12: 185-246 (2001).
36. Magliveras, Konstantinos D. *Difficulties and Status of Efforts to Create an International Criminal Court in Cambodia*. *Asia-Pacific Journal on Human Rights and the Law* 2, 105-135 (2002).
37. Nice, G. and Vallieres-Roland, P. *Trials of Imperfection*. *Leiden Journal of International Law*, 383-397 (2001).

38. PoKempner, Dinah. *The Khmer Rouge Tribunal: Criticisms and Concerns*, Justice Initiatives, Open Society for Justice Initiatives, 32 (Spring 2006).
39. Poeuv, Socheata. *Memory, Justice and Pardon: What Does it Take to Heal?* in Justice Initiatives, 47 (April 2006).
40. Reiger, Caitlan. *Marrying International and Local Justice: Practical Challenges Facing the Tribunal*. In Justice Initiatives, 101 (April 2006).
41. Sluiter, Goran. *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*. 4 J. Intl Crim. Just. 314 at 319 (May 2006).
42. Starygin, Stan and Seith, Johanna. *Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code*. 2005 Sing. J. Legal Stud. 170 (2005).
43. Wald, Patricia M. *Symposium: International Criminal Tribunals in the 21st Century: Iraq, Cambodia, and International Justice*, 21 Am.U. Int'l L. Review 541 (2006).
44. Williams, Sarah. *The Cambodian Extraordinary Chambers-A Dangerous Precedent for International Justice?* 53 ICLQ 227 (January, 2004).
45. Zacklin, Ralph. *The Failings of Ad Hoc International Tribunals*. 2 J. Int'l Crim. Just. 541 (June 2004).

Other Sources:

46. Amnesty International. *Kingdom of Cambodia: Urgent Need for Judicial Reform?* AI Index: ASA 23/004/2002 (19 June 2002).
47. BBC News, *Key Figures in the Khmer Rouge*, available online at <http://news.bbc.co.uk/go/pr/fr/-/hi/world/asia-pacific/2856771.stm>.
48. Human Rights Watch. *Cambodia Trial Must Meet International Standards*, 12 February 2002, available on-line at http://hrw.org/english/docs/2002/02/12/cam-Bod3735_txt.htm.
49. Human Rights Watch. *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, 18 February, 1999, available on-line at <http://hrw.org/asia/cambodia.php>.
50. Citation Omitted
51. Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 53rd Session, 54 Year, Agenda Item 110(b) (15 March 1999).

52. Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, 27 September 2002, U.N. Doc. A/57/230, §17.

Statutes, Agreements, Cases and Codes

53. *African Charter on Human and People's Rights* (Banjul Charter), Adopted by the OAU on June 27, 1981, 21 I.L.M. 59; entered into force on October 21, 1986.
54. *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*, 6 June 2003 (March Agreement"), entered into force 29 April 2005, U.N. Doc. A/RES57/228B(Annex)(13 May 2003).
55. *American Convention on Human Rights*, Signed on November 22, 1969, 9 I.L.M 673; entered into force on July 18, 1978.
56. *Arvo O. Karttmen v. Finland*, Communication No. 387/1989, views adopted by U.N. G.A. on 23 October 1992, 46th Session.
57. *Basic Principles on the Independence of the Judiciary*, endorsed by the G.A. in resolutions 40/32 of 29 November and 40/146 of 13 December 1985.
58. *Basic Principles on the Role of Lawyers*, Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba, 27 August to 7 September 1990.
59. Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, *Prosecutor v. Tadic*, U.N. Doc. IT-94-I-T, 5078-4037 (14 November 1995).
60. European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force as amended on November 4, 1950, 312 U.N.T.S. 221, E.T.S. 5 as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155.
61. *International Covenant on Civil and Political Rights*, opened for signature December 16, 1966, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
62. *Kostovski v. the Netherlands*-11454/85 (1989) ECHR 20 (20 November 1989).
63. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006).

64. M. Gonzalez del Rio v. Peru, Communication No. 263/1987, views adopted on 28 October 1992, 46th Session.
65. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res.2200, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
66. *Prosecutor v. Tadic*, Opinion and Judgment, U.N. Doc. IT-94-I-T, 17687-17388 (May 7, 1997).
67. Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period, Decision of the Supreme National Council of Cambodia, 10 September 1992 [“UNTAC Code”].
68. *Rome Statute*, International Criminal Court, adopted by Resolution ICC-ASP/2/Res 3, adopted 12 September 2003, entered into force 1 July 2002.
69. State of Cambodia Law on Criminal Procedure, adopted by National Assembly of the State of Cambodia on 28 January 1993 and promulgated by Decree No. 21 of Council of State of the State of Cambodia; also available on-line at <http://www.cdpcambodia.org/soclaw.asp>.
70. 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 and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994; Adopted by U.N. S.C. Resolution 955 (1994) of 8 November 1994, Amended by S.C. Resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002.
71. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the Former Yugoslavia since 1991, U.N. Doc. 5/25704, annex (1993).
72. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996
73. *Unofficial Translation of the Constitution of the Kingdom of Cambodia*, entered into force on September 21, 1993 at its 2nd Plenary Session, Amendments passed 4th March 1999, <http://www.cdpcambodia.org/constitution.asp>.
74. *Valiente v. the Queen*, (1985), 2.S.C.R.
75. *Universal Declaration of Human Rights*, G.A. res 217(A) (III), U.N. Doc A/810 (1948).

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue¹

Pursuant to Article 12(1) of 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 (hereinafter “March Agreement”), the procedure of the Extraordinary Chambers of Cambodia (hereinafter “ECC”) shall be in accordance with existing Cambodian criminal procedural law with exceptions in the following instances: 1) where Cambodian law does not deal with a particular matter; 2) where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law; or 3) where there is question regarding the consistency of such a rule with international standards.² In these instances, guidance may be sought in procedural rules established at the international level.³ This memo first addresses which due process rights may require interpretation, defining, or further protection by the Tribunal due to the above-mentioned omissions or ambiguities in Cambodian procedural law. Specifically, the Tribunal likely must examine the permissibility of trials in absentia; balance the due process rights of the accused with the necessary protection of

¹ Per agreement with the United Nations, The Extraordinary Chambers in the Courts of Cambodia (hereinafter “ECC”) is to be governed by Cambodian law and procedure. In addition, the Law on the Establishment of the Tribunal (hereinafter “LEC”) and 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 (hereinafter “Agreement”) provide that the Tribunal shall have subject matter jurisdiction over the Crime of Genocide, Crimes Against Humanity, and Grave Breaches of the Geneva Conventions as Defined under treaty and customary international law. Moreover, the Agreement stipulates that Articles 14 and 15 of the International Covenant of Civil and Political Rights (hereinafter “ICCPR”) shall be respected in the proceedings of the Tribunal.

What features of Cambodian law and procedures are likely to diverge from those international law provisions, requiring resolution by the Tribunal?

²Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 12(1), UN GAOR 3d Comm., 57th Sess., Annex Agenda Item 109(b), U.N. Doc. A/57/806 (2003) [hereinafter “March Agreement”] [Reproduced at Tab 53].

³ Id. [Reproduced at Tab 53].

witnesses; and determine whether former amnesties may serve as a bar to prosecution. Second, this memo addresses the practical impediments to due process rights, among these including a possible lack of an independent and impartial judiciary; and the discretion of ECC officials in consulting international standards.

B. Summary of Conclusions

Article 13(1) of the March Agreement provides that those prosecuted by the ECC shall be afforded the same minimum due process guarantees enumerated in Articles 14 and 15 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”).⁴ Pursuant to Article 12 of the March Agreement, when Cambodian criminal procedural law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a rule, or where there is a question regarding the consistency of a rule with international standards, guidance may be sought in procedural standards at an international level.⁵

Brief Conclusion Regarding Three Procedural Issues Requiring Resolution by the Tribunal

- i. Although Cambodian criminal procedural law is marginally unclear regarding prohibition of trials in absentia, these will likely be prohibited as running contrary to international due process standards; and, if permitted, serve to decrease the legitimacy of the ECC proceedings.
- ii. As has been done in previous war crimes tribunals, the ECC must balance the due process rights of the accused with necessary protective measures for witnesses.

⁴ March Agreement supra Note 2, Art. 13(1). Rights explicitly enumerated in Art. 13(1) include: the right to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defense; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her. [Reproduced at Tab 53].

⁵ Id. Art. 12. [Reproduced at Tab 53].

Because such measures are not elaborated upon in existing Cambodian criminal procedure, finding this balance will likely represent a significant task for the Tribunal.

- iii. Despite the lack of a specific provision in the March Agreement or the LEC, previously-granted amnesties and pardons will not likely bar prosecution before the ECC.

Practical Impediments to Enforcement of International Due Process Standards

- i. Due to dubious Cambodian commitment to holding Khmer Rogue officials accountable and the possible carryover of domestic corruption into the ECC, judicial impartiality and independence may be prevented. Two significant contributing problems are the Cambodian control by numbers and voting by way of super-majority.
- ii. Because ECC prosecutors and judges are granted discretion in their decision to consult international standards, this leaves room for arbitrariness and inconsistencies in application.

As this memo addresses, the ECC possesses enormous potential to hold former Khmer Rogue; bring justice and afford closure for the victims; and provide a historical record of the atrocities committed during the Period of Democratic Kampuchea. Simultaneously, however, an important and formidable task of the Tribunal rests in the awkward merging of Cambodian criminal procedural law and international due process standards.

II. Factual Background

The United Nations and Cambodia engaged in negotiations for the establishment of a tribunal to try former members of Cambodia's Khmer Rouge party beginning in 1997.⁶ U.N. Special Representative for Human Rights in Cambodia Thomas Hamberger persuaded the new government to formally request aid from the United Nations in assisting to bring justice to members of the Khmer Rouge for the atrocities they committed between 1975 and 1979.⁷ These talks derailed after five years, largely due to United Nations concerns that the Cambodian plans for the Khmer Rouge Tribunal failed to ensure impartiality, impartiality, and objectivity.⁸ The current provisions relating to the structure and composition of the ECC reflect these uneasy negotiations between the United Nations and the Cambodian government regarding the ECC's establishment.⁹

Two of the early procedural issues that arose were the inter-related concerns relating to the proper application of Cambodian law of criminal procedure and whether there was a "controlling" source of domestic criminal procedural law. Other than the 1993 Constitution,¹⁰ Cambodian criminal procedural law is governed by two major instruments: the United Nations Transitional Authority in Cambodia (hereinafter "UNTAC Code")¹¹ and the State of Cambodia

⁶ Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*. 44 Harv. Int'l L.J., 551 at 551 (Summer 2003). [Reproduced at Tab 5].

⁷ Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in *Post-Conflict Justice* (M. Cherif Bassiouni, Ed), pg. 647 (2001). [Reproduced at Tab 13].

⁸ Id. [Reproduced at Tab 13].

⁹ Donovan, *supra*. [Reproduced at Tab 5].

¹⁰ Unofficial Translation of the Constitution of the Kingdom of Cambodia, entered into force on September 21, 1993 at its 2nd Plenary Session, Amendments Passed on March 4th, 1994. [Reproduced at Tab 73].

¹¹ Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period, Decision of the Supreme National Council of Cambodia, 10 September 1992 [hereinafter "UNTAC Code"]. [Reproduced at Tab 67].

(hereinafter “SOC”) Law on Criminal Procedure. Two conflicting views exist on priority. Because SOC was adopted after the UNTAC code, it may have abrogated that law.¹² On the other hand, UNTAC might control because SOC was adopted during a period of “transition:” between the signing of the Paris Peace Agreements in October 1991 until the adoption of the Constitution in 1993.¹³ Accordingly, a problem presented early on was whether one of two sources of Cambodian criminal procedural law controlled in case of conflict or whether guidance should immediately sought at the international level. Then, another problem exists because Cambodia is currently in the process of drafting another criminal procedural code. If this is adopted by the Cambodian government, it is unclear whether it would become the procedural law for the tribunal, thereby changing the rules midstream.¹⁴

Legal Argument

III. With Ambiguity, Comes Freedom: The Problem in Protecting Ambiguous

International Standards of Justice

A fundamental problem in upholding international due process standards exists when it is uncertain what falls under the definition of “international standards.” Some commentators argue that it is difficult to discern non-derogable rules and principles of international criminal law because there is no clear theoretical foundation at their basis.¹⁵ Nonetheless, a general framework

¹² Goran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*. 4 J. Int’l Crim. Just. 314 at 319 (My 2006). [Reproduced at Tab 41].

¹³ Id. [Reproduced at Tab 41].

¹⁴ Dinah Pokempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, In *Justice Initiatives*, 32, at 38 (April 2006).

¹⁵ G. Nice and Roland P. Valleires-Roland, *Procedural Innovations in War Crimes Trials*. 3 *Journal of International Criminal Justice*. 354, 357 (2005). [Reproduced at Tab 37].

for international due process standards has emerged, as crystallized in the ICCPR, to which one hundred fifty-four states, including Cambodia, are parties.¹⁶

International due process standards come from a variety of sources reflecting the general practices and views of the international community. As noted by Article 38(1) of the International Court of Justice Statute, sources of international law include: international conventions; international custom, as evidence of a general practice accepted as law; general principles of law recognized by the community of nations; and judicial decisions and teachings of the most highly qualified publicists...¹⁷ This body of sources presents a comprehensive, albeit imperfect notion of fundamental international standards of due process which has served as a guideline for international judicial bodies.

There are, however, a number of due process rights over which controversy has recently arisen regarding whether they meet this definition of “basic” or “absolute.” Derogation from these rights has been challenged particularly in other modern war crimes tribunals; and various ambiguous or uncertain provisions of Cambodian criminal procedural law necessarily require resolution by the Tribunal. In particular, three issues may emerge: the permissibility of trials in absentia; the proper balancing of a defendant’s due process rights with necessary witness protective measures; and whether previously-granted amnesties will serve as a bar to prosecution.

¹⁶ International Covenant on Civil and Political Rights, opened for signature December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. G.AOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. [Reproduced at Tab 60].

¹⁷ Statute of the International Court of Justice. [Reproduced at Tab 76]

A. Cambodian procedural law permitting trials in absentia may run contrary to international due process standards.

Cambodian criminal procedural law permits the trial, judgment and sentencing of an absent criminal defendant.¹⁸ Article 13 (“Rights of the Accused”) of the March Agreement stipulates that all criminal defendants enjoy the minimum guarantees afforded in Articles 14 and 15 of the ICCPR, further stating that: “such rights shall, in particular, include the right to a fair and public hearing; to be presumed innocent until proven guilty; to engage a counsel of his or her defense; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.”¹⁹ Although Article 14(3)(D) of the ICCPR provides the accused’s right to be present during his trial,²⁰ the drafters of the Law of the Extraordinary Chambers (hereinafter “LEC”), which law governing the Cambodian Extraordinary Chambers (hereinafter “Cambodian Extraordinary Chambers”) opted not to include it in the list of due process rights already included within the ICCPR. Article 35 of the LEC provides “minimum guarantees” to the accused, but it does not mention a prohibition against trials in absentia in its enumerated list of due process guarantees.²¹ Notably, instead of applying the entire ICCPR, the drafters of the LEC instead chose to list specific rights contained within it. This might permit “picking and choosing” of those procedural rights to apply from

¹⁸ State of Cambodia Law of Criminal Procedure, Art. 111 and 114. It should be noted, however, that Art. 111 permits trials in absentia only in the event that the defendant is properly summoned but fails to appear. [Reproduced at Tab 69].

¹⁹ March Agreement *supra* [Reproduced at Tab 54].

²⁰ ICCPR, *supra* Art. 14(3)(D). Dec. 16, 1966, 999 UNTS 171. [Reproduced at Tab 60].

²¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Reach Kram No. NS/RKM/0801/12. [Reproduced at Tab 63].

Articles 14 and 15 of the ICCPR. Because the personal jurisdiction of the Extraordinary Chambers is limited to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the [March] Agreement,”²² some of these individuals may be particularly elusive or deceased due to the passage of time- thus unavailable for prosecution. Given the narrow scope of the ECC’s personal jurisdiction, the right against trials in absentia may have been deliberately excluded so as not to impede the prosecutions from proceeding.

Having acknowledged the possible motive for permitting trials in absentia, we now address whether this violates international standards of due process. Early post-WWII tribunals provided for trials in absentia. For example, Martin Borman, Nazi Party Chancellor Head Secretary and Private Secretary to Hitler, was sentenced to death by the Nuremberg Tribunal in his absence.²³ However, commentators note that recent international tribunals provide much more comprehensive due process protections, as representing the development of the uniform application of standards. As Father Robert Araujo, professor at law of Gonzaga University observed, “...fifty years have elapsed since the Nuremberg prosecutions began and human wisdom has become increasingly conscious of the prohibitions against violating fundamental human rights...”²⁴ The 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 (hereinafter “ICTR”) and the Statute of the International Criminal Tribunal for Former Yugoslavia (hereinafter “ICTY”) statutes both

²² *Id.* Art. 2. [Reproduced at Tab 63].

²³ Jonathan A. Bush. *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*. 45 St. Louis U.L.J. 515, 523 (2001). [Reproduced at Tab 2].

²⁴ Father Robert Araujo. *Sovereignty, Human Rights and Self-Determination: The Meaning of International Law*, 24 Fordham Int’l L.J. 1477 at 1489 (2001). [Reproduced at Tab 1].

prohibit trials in absentia;²⁵ as does the Rome Statute of the International Criminal Court, to which Cambodia is a party.²⁶ Accordingly, one might argue that the Extraordinary Chambers' prohibition against trials in absentia is a prerequisite to its legitimacy. Because the March Agreement and LEC represent almost a decade's long period of negotiation between the United Nations and Cambodia, it does not seem likely that the United Nations would approve a tribunal that allowed trials in the absence of the major defendants.

Therefore, despite the practical purpose of permitting trials in absentia and their debatable allowance within the State of Cambodia Law on Criminal Procedure (hereinafter "SOC"), trials in absentia appear impermissible within the ECC. Trials in absentia have not been permitted in recent international criminal proceedings, save in cases in which an accused in custody disrupted or refused to attend the proceedings. As noted by Goran Sluiter, professor in international procedure at the University of Amsterdam, "such a general rule against trials in absentia can without difficulty be considered a part of the international standards in the sense of Article 12(1) [of the March Agreement]."²⁷ This is evidenced by other recent international criminal proceedings, in which trials in absentia are prohibited save for cases in which the accused, once called to the courtroom, waives the right by disrupting the proceedings.²⁸ Because, as mentioned

²⁵ Statute for the International Criminal Tribunal for the Former Yugoslavia, Art. 21 UN Doc. 8/25/704 at 36, annex (1993), adopted by Security Council on May 25, 1993 [hereinafter "ICTY Statute"]; 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 and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994, Art. 20, , adopted by Security Council Resolution 955 (1994). [hereinafter Rwanda statute]. [Reproduced at Tabs 70 and 71].

²⁶ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, reprinted in the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, Official Records (1998) [hereinafter "Rome Statute"]. [Reproduced at Tab 68].

²⁷ Goran Sluiter. *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*. 4 J. Int'l Crim. Just. 314, 319. (May 2006). [Reproduced at Tab 41].

²⁸ Id. [Reproduced at Tab 41].

above, the March Agreement specifically incorporated Article 14 of the ICCPR, and SOC permits trials in absentia under limited circumstances, one might assume that the ECC will follow the general prohibition against trials in absentia.

In contrast, Article 4(4) of the UNTAC Code implicitly provides for trials in absentia because it states that there is an extra 15-day period added in the case of a judgment pronounced in absentia. Article 5 of the UNTAC Code (which also grants the prosecutor the right to appeal) also says that appeals can be heard in absentia. Accordingly, the tribunal likely must resolve whether Cambodian criminal procedural law is uncertain or ambiguous in permitting trials in absentia; and, if they are permitted, whether this runs contrary to international standards.

Unlike the August 1979 proceedings against Pol Pot and Ieng Sary, which were not supported by other governments or international organizations,²⁹ the prosecution of senior Khmer Rogue members by the hybrid tribunal has the capacity for legitimate criminal procedures due to extensive and continued U.N. involvement, both in the shaping of the March Agreement and LEC and in financial support. The trials and sentencing of Pol Pot and Ieng Sary were conducted in absentia, largely regarded by the international community as “sham” trials intended to assert the legitimacy of the new government.³⁰ In light of this negative history, it is crucial that if the ECC chooses to use trials in absentia, it does so only when absolutely necessary and when in accordance with the international standards recognizing specific exceptions to a general disallowance against trials in absentia.

²⁹ Hammer, Peter J. and Urs, Tara. *The Elusive Face of Cambodian Justice in Bringing the Khmer Rogue to Justice*, 13-58. [Reproduced at Tab 14].

³⁰ *Id.* [Reproduced at Tab 14].

Limited Exceptions to the General Prohibition Against Trials in Absentia

Neither the ICTY nor the ICTR statute stipulates that the right to be present is absolute by specifically providing against derogation. Article 63(2) of the Rome Statute provides exceptions to the requirement that the accused must be present at trial.³¹ These narrow exceptions, however, are provided only in those instances mentioned above in which the accused makes the conscious choice not to be present. States find it unacceptable when trials in absentia are conducted without the accused's presence at any stage of the proceedings.³² Because of the importance of these war crimes tribunals, which aim both to offer an accurate historical record of past atrocities and to bring justice to the victims, trials in absentia are largely prohibited in order to preserve the legitimacy of the proceedings. “ ‘Show trials’ diminish the court’s authority by creating an image of a ‘powerless institution delivering hollow judgments.’ Trials in absentia are perceived as a sign of judicial weakness- the practice has always been a last-resort measure.”³³

Proponents of trials in absentia argue that they are necessary for the effective and efficient running of the criminal justice system. Trials in absentia require less investigatory work by police, less time for trial, and less expense.³⁴ Another issue particularly relevant to the ECC is the argument that if an accused person is not available for prosecution, a trial in absentia protects

³¹ Rome Statute *supra*, Art. 63(2): “If the accused, being brought before the Court, continues to disrupt the trial, the Court may remove the accused and shall make provisions for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as it is strictly required.” [Reproduced at Tab 68].

³² Stan Stargym and Johanna Seith. *Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code*, Sing. J. Legl Stud. 170, at 172 (2005). [Reproduced at Tab 42].

³³ *Id.* [Reproduced at Tab 42].

³⁴ *Id.* [Reproduced at Tab 42].

the victims' rights to bring the perpetrators to justice and mitigates the difficulties with obtaining or preserving the evidence if the accused is not caught within a reasonable period of time.³⁵

Cambodia presents a unique situation due to the passage of time since the commission of the crimes to be tried. One might argue that because of the importance of providing some historical record of the atrocities and bringing victims closure, the trials should be allowed to proceed following a reasonable search for an elusive perpetrator.

Simultaneously, however, because the atrocities rendered by Khmer Rouge members occurred nearly three decades ago, one might also argue that the most important objective of the tribunal is to publicly bring these members to justice. As the last trials for which Cambodia is remembered are the “sham” trials of Pol Pot and Ieng Sary, it is vital that the proceedings of the ECC not resemble these in the attributes for which they were most criticized. Most notorious, of course, is the absence of the defendants.

B. Witness Protection Measures: Finding the Balance

The LEC balances the rights of the accused with those of the witness in Article 33: “The Court shall provide for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim’s identity.”³⁶ This provision affords less protection than the similar statutes for the Rwanda and Yugoslavia tribunals, which, in addition to providing for in-camera proceedings and the protection of the witness’s identity, state: “The International Tribunal shall provide in its

³⁵ Id. [Reproduced at Tab 42].

³⁶ LEC *supra*, Art. 33. [Reproduced at Tab 63].

rules of procedure and evidence for the protection of victims and witnesses.”³⁷ Both the Rwanda and the Yugoslavia tribunals go further in providing for the protection of witnesses in their Rules of Procedure and Evidence.³⁸ The LEC also falls far short, both in specificity and substantive content, of the witness protective measures afforded by the Rome Statute of the ICC.³⁹ On face, Article 33 of the LEC raises two preliminary concerns: 1) It does not explicitly provide for witness protection either before or after the proceedings; and 2) unlike the statutes for the Rwanda and Yugoslavia tribunals, it affords specific protection only to “victims.” Pursuant to the discretionary power granted to the court in Article 33, those fitting into the category of “witnesses” but not “victims” could theoretically be granted no protection by the court without violating the LEC.

As with any court procedure, the accused’s due process rights must be balanced with necessary protections afforded to the witnesses. A right articulated in Article 14(2)(e) of the ICCPR, and reinforced in both Article 13 of the March Agreement and Article 35 of the LEC, is for the accused “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Here, trial proceedings differ from most domestic proceedings due to the absence of a jury. Though the value of having a witness testify in court may be somewhat diminished by judges functioning as both the finders of fact and of law, experience may give them an edge in assessing the credibility of witness testimony despite how it is presented. Obviously, however,

³⁷ ICTY Statute, Art. 22 [Reproduced at Tab 70]; Statute for Rwanda, Art. 21 [Reproduced at Tab 71].

³⁸ See Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia, Rule 69, Rule 75(A); Rules of Procedure and Evidence of the Tribunal for Rwanda, Rule 69, 75(A). [Reproduced at Tab 72]. The provisions for witness protection are virtually identical as applied to the Yugoslavia court compared with the Rwanda Court.

³⁹ See Rome Statute, Art. 68, which, *inter alia*, enumerates those factors taken into consideration when determining what protective measures shall be employed, including age, gender, health, and the nature of the crime. [Reproduced at Tab 68].

the ECC must not be too lenient in permitting anonymous witness testimony. In the *Tadic* trial, for example, some contended that despite the Tribunal's detailed rules of procedure, it treaded dangerously close to denying the defendant a fair trial by allowing certain prosecution witnesses to testify anonymously and to permit the prosecution to base much of its case on hearsay.⁴⁰

Another issue is whether allowing the anonymous testifying of witnesses denies the right of the accused to "a fair and public trial" under article 14(1) of the ICCPR.⁴¹ Such arguments give weight to the issue of whether denying an accused's right under Article 14 of the ICCPR represents a substantial infringement, and whether the right should be construed as absolute.

Recent international court decisions have held that an accused's right to a fair and public trial under Article 14 of the ICCPR is not absolute, depending on individualized circumstances warranting the giving of anonymous witness testimony. Most notably, in the first case tried by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter "ICTY"), *Prosecutor v. Tadic*,⁴² Trial Chamber II of the ICTY ruled in a preliminary motion for protective measures to allow for the use of measures, including confidentiality and anonymity, to protect witnesses.⁴³ The majority opinion, written by Judge McDonald, concluded that the use of anonymous witnesses is consistent with the Statute of the

⁴⁰ Michael P. Scharf, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Tribunal Since Nuremberg*. 60 Alb. L. Rev. 861 at 871 (1997). [Reproduced at Tab 10].

⁴¹ ICCPR, *Supra*, Art. 14. [Reproduced at Tab 61].

⁴² Opinion and Judgment, *Prosecutor, v. Tadic*, U.N. Doc. IT-94-I-T, 17687-17388 (May 7, 1997). [Reproduced at Tab 66].

⁴³ Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, *Prosecutor v. Tadic*, U.N. Doc. IT-94-I-T, 5078-4037 (McDonald Judgment), 5036-5013 (Stephen dissent)(Aug. 10, 1995) [hereinafter Protective Measures Decision]. [Reproduced at Tab 59].

International Criminal Tribunal for the Former Yugoslavia (Statute)⁴⁴ and the Rules of Procedure and Evidence.⁴⁵ Notably, the Trial Chamber rejected the notion of applying international standards, as defined by other judicial bodies, to resolve procedural questions, instead opting to consider its own “unique requirements.”⁴⁶ Though the Protective Measures decision acknowledged that “in principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument,” judge McDonald qualified the general rule by stating: “however, the interest in the ability of the defendant to establish facts must be weighed against the interest in anonymity in the witness...a fair trial means not only fair treatment to the defendant but also to the prosecution and witnesses.”⁴⁷

A similar balancing test was employed in the ECHR *Kostovski v. Netherlands*,⁴⁸ which preceded the ICTY Protective Measures Decision in *Tadic*.⁴⁹ *Kostovski* indicated safeguards that can be taken to “redress any diminution of the right to a fair trial” due to anonymous testimony. Although Judge McDonald borrowed these guidelines from the *Kostovski* case, he emphasized that “these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses.”⁵⁰ Guidelines borrowed include: 1) the judge’s ability to observe the demeanor of the

⁴⁴ ICTY statute *supra*, Art. 13(2)(C). [Reproduced at Tab 71].

⁴⁵ Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 9th Sess, at 1, U.N. Doc. IT/32/Rev. 7(1996)(as amended). [Reproduced with statute at Tab 70].

⁴⁶ Protective Measures Decision, *supra* at 5068. [Reproduced at Tab 59].

⁴⁷ *Id* at 5053. [Reproduced at Tab 59].

⁴⁸ *Kostovski, v. The Netherlands*, Eur. Ct. H.R. (ser A.) at 19-21 (1989). [Reproduced at Tab 62].

⁴⁹ Protective Measures Decision, *supra*, at 5049-5050 (McDonald, J). [Reproduced at Tab 59].

⁵⁰ *Id* at 5048 [Reproduced at Tab 59].

witness, 2) the judge's right to be aware of the identity of the witness; 3) the affording of defense counsel ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, and 4) the release of the witness's identity once there are no longer reasons to fear for the security of the witness."⁵¹

In the context of the Extraordinary Chambers, adequate witness protection is imperative to the legitimacy, adequacy and thoroughness of the proceedings. As one commenter noted:

“it is understandable that some victims might hesitate to support the CEC in absence of assurances that their participation is not held against them before, during, or after the trials. ...Regardless of the reality of any risk, given the high levels of trauma still suffered by many Khmer Rogue victims, further measures will be needed to reassure them.”⁵²

Current Cambodian criminal procedural law provides few specific modes of witness protection. As mentioned, Article 33 of the LEC allows “in-camera proceedings;” and the UNTAC Code prohibits witness “coercion.”⁵³

Trials may be severely compromised by victims' and witnesses' refusal to testify. Given that few defendants fall under the ECC's personal jurisdiction;⁵⁴ combined with the deficiencies in witness testimony caused by the passage of time,⁵⁵ the ECC theoretically may be more willing to grant additional measures of protection to ensure important witness testimony. One issue that

⁵¹ Id. [Reproduced at Tab 59.]

⁵² David Boyle, *The Rights of Victim: Participation, Representation, Protection, Reparation*. ICJ 4 2 307,309 (April 2006). [Reproduced at Tab 26].

⁵³ Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, Decision of the Supreme National Council of Cambodia, art. 23 and 55, 10 September 1992, available online at http://www.alrc.net/doc/mainfile.php/unar_cat_cam_2003/321 [hereinafter “UNTAC Code”]. [Reproduced at Tab 67].

⁵⁴ LEC, Art. 1: “The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in 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 recognize by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.” (Emphasis Added) [Reproduced at Tab 63].

⁵⁵ Mohamed Ali Lejmi, *Prosecuting Cambodian Genocide: Problems Caused by the Passage of Time Since the Alleged Commission of Crimes*, 4 J. Int'l Crim Justice, 300 at 301 (2006). [Reproduced at Tab 33].

might emerge is what safeguards may be employed unique to the Cambodian tribunal; and which might be borrowed and modified from other tribunals. Among others, these might include: providing separate entrances for victims and witnesses (so they may control how they encounter defendants or their supporters), counselors during the course of the trial, monitoring and social services afterwards, and options for relocation.⁵⁶

A correlative issue is what means may be used for protection without exceeding the scope of the intent of Article 33 of the LEC or violating international due process standards. The Tribunal might consider Cambodia's status as a party to the Rome Statute, which holds that the ICC must "permit their [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court."⁵⁷ This must be consistent with defendants' rights.⁵⁸ As mentioned above, the ECC might look for guidance to measures used by other international tribunals, comparing its circumstances to those considered in procedural decisions made by other courts in its determination of "necessary" witness protection measures. Interestingly, since *Tadic*, the ICTY has not granted the extreme remedy of complete witness anonymity.⁵⁹

As in *Tadic*, witness protective measures are most likely to be sought by the Co-Prosecutors pursuant to Article 20 of the LEC.⁶⁰ Provisions for protective measures represent a

⁵⁶ Dinah Pokempner, *The Khmer Rouge Tribunal: Criticisms and Concerns* in *Open Society Justice Initiatives*, 32, 42 (Spring 2006). [Reproduced at Tab 38].

⁵⁷ Rome Statute, *supra* art. 68(3). [Reproduced at Tab 68].

⁵⁸ *Id.* [Reproduced at Tab 68].

⁵⁹ Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA L. Rev. 1381, 1410 (2001); and Patricia M. Wald, *Dealing With Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale Hum. Rts. Dev. L.J. 217, at 223 (2002). [Reproduced at Tab 3].

⁶⁰ LEC, *supra* Art. 20 states: "The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If necessary, and if there are lacunae in existing procedures, the Co-Prosecutors may seek guidance in procedural rules established at the international level." [Reproduced at Tab 63].

“gap” in existing criminal procedural law, which must be filled by balancing the rights of the witness or victim with those of the defendant as is consistent with international law. Because of the continuing influence of the Khmer Rouge party, as compared with measures recently employed by other international tribunals, the ECC may be able to employ more extreme modes of protection without a finding of a violation of the accused’s due process rights. Take, for example, the ICTY’s Rules of Procedure’s provisions allowing for the exclusion of the press and the public from proceedings for various reasons including the safety or non-disclosure of the identity of a victim or witness from the public.⁶¹ Depending on what the ECC deems “necessary,” such provisions may provide exceptions to the accused’s general due process rights as afforded in the ICCPR and Cambodian criminal procedural law. Particularly noteworthy is the fact that the trials are to take place on a military base in Phnom Penh.⁶² Given that the military is afforded immunity from legal process in respect of all acts performed by them in their official capacity, this may prove intimidating to potential witnesses⁶³ Fear that the military may be used for political retaliation might lead to the requirement of additional protection.

The importance of witness protection to the tribunal’s legitimacy should not be underestimated. Bringing the men responsible for the atrocities that wiped out literally one fifth of the nation’s population is a matter of not only moral obligation, but also of profound social and political significance to the people. As noted by the Group of Experts for Cambodia:

⁶¹ ICTY Rules of Procedure and Evidence, Rule 79(A) on Closed Sessions provides that: “the Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of: i) public order or morality; ii) safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or iii) the protection of the interests of justice.” [Reproduced at Tab 72].

⁶² Id, Art. 43: “The Extraordinary Chambers established in the trial court, the appeals court and the supreme court shall be located in Phnom Penh.” [Reproduced at Tab 63].

⁶³ Id, art. 42. [Reproduced at Tab 63].

For accountability first and foremost is a statement to the millions of Cambodian victims and their relatives and friends that their cries have at last been heard, providing the survivors with a sense of justice and some closure on the past. Justice is also a critical element for repairing the damage done to that society by the massive human rights abuses and for promoting internal peace and national reconciliation. By having those who committed the abuses identified and punished, Cambodian's can better understand their own past, finally place this most tragic period and those responsible for it behind them, and work together to build a peaceful and better future.⁶⁴

Providing witnesses with adequate means of protection, thus facilitating their active role in the proceedings, diminishes the image engrained in the international community of Cambodia's 1979 "show trials" and demonstrates the nation's departure from its tradition of impunity and movement towards accountability of top officials. Victim involvement in the proceedings enhances their overall legitimacy by injecting their perspectives into the case and lending additional transparency into the outcome of the case.⁶⁵

C. Allowing amnesties to stand may undermine the perceived legitimacy of the ECC.

One unresolved issue between the UN and Cambodia following the establishment of the Tribunal was whether previously-granted amnesties to former Khmer Rouge officials precludes their prosecution by the ECC. Article 11(1) of the March Agreement states: "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement." Article 40 of the LEC states: "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law." There is, however, no explicit invalidation of previously-granted amnesties and pardons. Article 11(2) of the March Agreement reads, in pertinent part: "...there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with

⁶⁴ Report of Group of Experts, ¶2. [Tab 51].

⁶⁵ Jonathan Doak, *Victims' Right in Criminal Trials: Prospects for Participation*. 32 J. of Law and Society, 294 at 315 (2005). [Reproduced at Tab 29].

regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.” This provision represents a minor victory for the Cambodian government in its negotiations with the United Nations, as the latter previously insisted on a provision that previous pardons or amnesties would not be a bar to prosecution.⁶⁶

Only one individual falls under the provisions of Article 11(2) of the March Agreement. Ieng Sary, the Deputy Prime Minister and Minister for Foreign Affairs of Democratic Kampuchea, who was sentenced to death in 1979 on the charge of genocide and for the crime of membership in the Khmer Rouge in violation of the 1994 Law on the Outlawing of the Democratic Kampuchea Group, was granted amnesty in 1996 by a Decree signed by King Sihanouk.⁶⁷ Ieng Sary, now seventy-six years old, lives in a luxury villa in Phnom Penh, as well as maintains a home in Pailin.⁶⁸

Due to the horrific nature of the offenses for which he was convicted, Ieng Sary’s amnesty may not be honored during the course of the ECC proceedings. Disregarding the issue of whether the amnesty itself was legitimate, the tribunal must address whether honoring the amnesty represents either a miscarriage of justice or de-legitimizes the Tribunal in the eyes of the international community; or, conversely, whether re-trying Ieng Sary for his prior acts constitutes

⁶⁶Human Rights Watch, “Cambodia: Tribunal Must Meet International Standards,” (February 12, 2002), available on-line at http://hrw.org/english/docs/2002/02/12/cambod3735_txt.htm. [Reproduced at Tab 48].

⁶⁷ Daphna Shraga, *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. [Reproduced at Tab 19].

⁶⁸ BBC News, *Key Figures in the Khmer Rouge*, available at <http://news.bbc.co.uk/go/pr/fr/-/hi/world/asia-pacific/2856771.stm>. [Reproduced at Tab 47].

a violation of the double jeopardy clause contained within the ICCPR⁶⁹ Notably, while both Articles 14 and 15 of the ICCPR are incorporated into the March Agreement,⁷⁰ the LEC makes no provision against double jeopardy despite explicitly affording other rights to the accused.⁷¹ Moreover, the LEC grants the co-prosecutors of both the trial and appellate courts to appeal both courts' verdicts;⁷² The SOC also includes the prosecutor as among those possessing the right to appeal.⁷³ Accordingly, while the LEC may not explicitly state that amnesties are not a bar to prosecution, it is strongly inferred in Cambodian criminal procedural law. Both the investigation and possible prosecution of Ieng Sary may become matters of dispute between the Cambodian and international investigating judges and co-prosecutors, requiring settling by a Pre-Trial Chamber of five judges as provided in Article 20 of the LEC. Ieng Sary will be prosecuted if less than four judges rule not to proceed.

In its decision of whether to honor Ieng Sary's amnesty, the government might consider the far-reaching implications of the ECC's legitimacy. Like other war crimes tribunals, the ECC embraces two major prerogatives: 1) to record accurately and truthfully those crimes at issue in order to provide a historical record; and 2) to provide justice for those affected by the acts committed between 1975 and 1979. Allowing Ieng Sary's amnesty to stand may undermine these prerogatives.

⁶⁹ ICCPR, Art. 14(7). "No one shall be liable to be tried or punished again for an offense in which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." [Reproduced at Tab 61].

⁷⁰ March Agreement, Art. 12. [Reproduced at Tab 54].

⁷¹ LEC, Art. 35. [Reproduced at Tab 63].

⁷² Id, Art. 17. [Reproduced at Tab 63].

⁷³ SOC, Art. 161 [Reproduced at Tab 69.]

Relative to the first prerogative, trials affording full due process rights represent the most authoritative rendering of the truth. Prosecuting Ieng Sary may “generate a comprehensive record of the nature and the extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out.”⁷⁴ In contrast, permitting Ieng Sary to escape prosecution may leave many victims with unanswered questions. Turning to the second prerogative, allowing Ieng Sary’s amnesty to stand may undermine the CEC’s responsibility to provide justice. First, holding Ieng Sary accountable for a crime as abominable as genocide is a duty owed to both living and deceased victims, giving significance to their suffering and serving as a partial remedy for their injuries.⁷⁵ Second, failing to prosecute may breed further cynicism about the rule of law and distrust of the political system.⁷⁶ Despite the passage of time since the atrocities committed, many victims’ emotional scars remain fresh.⁷⁷ Allowing Ieng Sary to remain in his “luxury villa” may be perceived, both by the Cambodian populace and the international community, as furthering the tradition of impunity of governmental officials. It suggests that even those “most responsible” under Article 1 of both the March Agreement and the LEC are above the law, thereby undermining the legitimacy of the ECC.

Conversely, prosecuting Ieng Sary may potentially cause civil unrest, as reflected in Cambodia’s adamant refusal to provide in the LEC that previously-granted amnesties would not bar prosecution. When the Cambodian government outlawed the Khmer Rouge in 1994, Ieng

⁷⁴ Michael P. Scharf and Nigel Rodley, *International Law Principles on Accountability*, in *Post-Conflict Justice*, pp 90 (M. Cherif Bassiouni, Ed), 2001. [Reproduced at Tab 22].

⁷⁵ Id. [Reproduced at Tab 22].

⁷⁶ Id. [Reproduced at Tab 22].

⁷⁷ See Socheata Poeuv, *Memory, Justice and Pardon: What Does it Take to Heal?* In Justice Initiative, pp 47-59 (April 2006). [Reproduced at Tab 39].

Sary was granted amnesty following his defection from the party as part of the government's campaign to obtain the defection of Khmer Rouge guerillas⁷⁸ The Khmer Rouge is not obsolete as a political party, and persistent political instability in Cambodia leaves officials otherwise interested in Ieng Sary's prosecution reluctant to sacrifice any popular support of the current regime.⁷⁹ Even if the victims of the Khmer Rouge party strongly support Ieng Sary's prosecution, the decision whether to prosecute may come down to a political one.

In a sense, the decision whether to honor Ieng Sary's amnesty represents a double-edged sword for the Tribunal. As mentioned, despite the persuasive policy justifications for his prosecution, doing so may violate the double jeopardy provision included in Article 14 of the ICCPR, which Cambodia both ratified and agreed to honor in the March Agreement. This may be circumvented by arguing that the 1979 trials of Ieng Sary and Pol Pot were "show trials" lacking the fundamental elements of due process and a verdict based on the evidence.⁸⁰ Because of the marked substantive defects in his trial, Ieng Sary was not convicted in accordance with the law and penal procedure of Cambodia pursuant to Article 14 of the ICCPR. Furthermore, it may be argued that the nature of Ieng Sary's crime prohibits his entitlement to amnesty. Genocide, a crime of both universal jurisdiction and in violation of customary law, may fall within a category of those crimes for which amnesty is not available in accordance with international standards.

⁷⁸ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Second Edition), pp 279-280 (2001). [Reproduced at Tab 21].

⁷⁹ Daniel Kemper Donovan, *Recent Developments: Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*. 44 Harv. Int'l L.J. 551 at 552 (Summer, 2003). [Reproduced at Tab 5].

⁸⁰ Howard J. De Nike, *Reflection of a Legal Anthropologist on the Trial of Pol Pot and Ieng Sary*, in *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, Howard J. De Nike, John Quigley and Kenneth J. Robinson, Eds., pp 20 (2000). [Reproduced at Tab 16].

II. Broken Enforcement Mechanisms: Major Impediments to Effective Protection of Due Process Rights.

A. The lack of judicial impartiality and independence may prevent adequate protection of the defendants' fundamental due process rights.

International standards regarding the qualification as an “independent” or “impartial” judiciary have been defined and refined since the adoption of the Universal Declaration of Human Rights in 1948.⁸¹ They are codified in the following relevant universal legal instruments: article 14 of the ICCPR (1966);⁸² Basic Principles on the Independence of the Judiciary (1985);⁸³ Guidelines on the Role of Prosecutors (1990); and Basic Principles on the Role of Lawyers (1990).⁸⁴ Regional legal instruments also reinforce these international standards, including: Article 6(1) of the European Convention on Human Rights (1950);⁸⁵ Article 8(1) of the American Convention on Human Rights (1969);⁸⁶ and Article 7(1) the African Charter on Human and People’s Rights (1981).⁸⁷

⁸¹ Universal Declaration of Human Rights, Art., 10, adopted by GA on December 10, 1948 by UN GA Res. 217 (III 1948). “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charges against him.” [Reproduced at Tab 75].

⁸² ICCPR, supra [Reproduced at Tab 61].

⁸³ Basic Principles on the Independence of the Judiciary. [Reproduced at Tab 57].

⁸⁴ Guidelines on the Role of Prosecutors [Reproduced at Tab 74].

⁸⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(1), entered into force as amended on November 4, 1950, 312 U.N.T.S. 221, E.T.S. 5 as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155. “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” [Reproduced at Tab 60].

⁸⁶ American Convention on Human Rights, Art. 8(1), Signed November 22, 1969, 9 I.L.M. 673, entered into force on July 18, 1978. “Every person has the right to a hearing, with due process guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him...” [Reproduced at Tab 55].

⁸⁷ The African Charter on People’s Rights (Banjul Charter), Art. 7(1)(b) and Art. 7(1)(d), adopted by OAS on June 27, 1981, 21 I.L.M. 59, entered into force on Oct. 21, 1986. [Reproduced at Tab 53].

The right to trial by an independent and impartial judiciary, enumerated in Article 14(1) of the ICCPR⁸⁸ and Article 10 of the Universal Declaration of Human Rights,⁸⁹ has been unambiguously defined by the Human Rights Committee as “an absolute right that may suffer no exception.”⁹⁰ The United Nations Human Rights Committee has held that the notion of impartiality “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”⁹¹ Impartiality is also commonly construed as the basic requirement that a judge not be dependent on or linked to a party in a trial either financially or at the family level.⁹² Independence of the judiciary, as it is defined in Principle One of the Basic Principles on the Independence of the Judiciary, entails the independence or separation of the judiciary from the other branches of government.⁹³ “This status or relationship of independence of the judiciary ‘involves both individual and institutional relationships: the individual independence of a judge as reflected in

⁸⁸ ICCPR, Art. 14(1). “...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.” [Reproduced at Tab 61].

⁸⁹ Universal Declaration of Human Rights, Art. 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.” [Reproduced at Tab 75].

⁹⁰ Communication No. 263/1987, *M. Gonzalez del Rio v. Peru* (Views adopted on 28 October 1992) in UN doc GAO, A/48/40 (vol. II), para 5.2. [Reproduced at Tab 64].

⁹¹ Communication No. 387/1989, *Arvo O. Karttmen v. Finland* (Views adopted on 23 October 1992) in UN doc GAOR, A/48/40 (vol 11), p 120, para 7.2. [Reproduced at Tab 56].

⁹² Administration of Justice, Rule of Law and Democracy: Right to an Effective Remedy in Criminal Proceedings, E/CN.4/Sub.2/2005/13, ¶100.

⁹³ Basic Principles on the Independence of the Judiciary, Principle 1, GA Resolution 40/146 of 13 December 1985. [Reproduced at Tab 57].

such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches.”⁹⁴

Enumerated Provisions for an Independent and Impartial Judiciary in Cambodian Criminal Procedural Law

On paper, Cambodian criminal procedural law provides for the independence and impartiality of the judiciary. Article 10 of the LEC provides for the selection of chamber judges “who have high moral character, a spirit of impartiality and integrity, and who are experienced, particularly in criminal law or international law. ¶ Judges shall be independent in the performance of their functions, and shall not accept or seek instructions from any government or any other source.”⁹⁵ The detailed provisions of Article one of the UNTAC code incorporate the Basic Principles on Independency of the Judiciary into domestic law. Further, Article 38 of the UNTAC Code addresses bribery and allows for the prosecution and removal from office of officials who engage in bribe-taking or accept other inducements for a return favor. Article 58 of the UNTAC code criminalizes those who corrupt or attempt to corrupt officials by promising money, property, professional position or any benefit in exchange for certain actions. Lastly, Cambodia’s liberal constitution (last amended in 2004) provides for the “separation of powers” of the executive, legislative, and judicial branches in Article 51; and Article 128 states that the judiciary “shall be an independent power” tasked “to guarantee and uphold impartiality and protect the rights and freedoms of the citizens.”⁹⁶

⁹⁴ (1985) 2.S.CR Valiente v. The Queen 673, to be found at http://www.lexumontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html, at p. 2. [Reproduced at Tab 74].

⁹⁵ LEC *supra*, Art. 10. [Reproduced at Tab 63].

⁹⁶ The Constitution of the Kingdom of Cambodia, Adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993, at the 2nd Plenary Session. [Reproduced at Tab 73].

Impediments to Preserving Judicial Impartiality and Independence in Practice in Domestic Cambodian Criminal Procedure

Despite Cambodian legislative textual provisions for judicial impartiality and independence, these may not translate in actual application. Suzanne Linton, Director of the LLM Programme on Human Rights at the University of Hong Kong, identified numerous obstacles to effective implementation. The first impediment is the ECC's establishment as part of the domestic courts of Cambodia despite the in-practice lack of respect for the separation of powers.⁹⁷ The vast majority of Cambodian judges are closely associated with the Cambodian People's Party (hereinafter the "CPP"); and powerful elements of the government such as important political figures, the security apparatus, and the Ministry of Justice are widely believed to exert overt and covert influence over the investigating judges and trial courts. These include threats and physical assaults on judges; or the simple realization among judges that their tenure, and often their prospect of future livelihood, depends on the approval of political elements.⁹⁸ Put simply, judicial impartiality and independence is prevented by external elements and influences. This argument is supported by research conducted on Cambodia by international bodies revealing a weak judicial system, highly prone to corruption, executive interference and influence peddling.⁹⁹

⁹⁷ Linton, Suzanne. *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*. Cockayne, James. Ed. Symposium: Cambodian Extraordinary Chamber- Justice at Long Last? 4 J. Int'l Crim. Just. 327, 327 (May, 2006). [Reproduced at Tab 34].

⁹⁸ Report of the Group of Experts for Cambodia established pursuant to GA resolution 52/135, UN Doc.A/53/850-S/1999/231, Annex (18 February 1999), 129, available online at <http://www1.umn.edu/humanrts/cambodia-1999.html>. [Reproduced at Tab 50].

⁹⁹ See Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, 27 September 2002, UN Doc. A/57/230, § 17; GA Resolution on Situation of Human Rights in Cambodia, 28 February 2002, UN Doc A.RES/56/169; and Commission on Human Rights resolution 2003/79 on Situation of human rights in Cambodia, 25 April 2003 §5. [Reproduced at Tab 51].

Second, Cambodian judges wield judicial control by majority of numbers as provided by the LEC.¹⁰⁰ Accordingly, if bias factors into the Cambodian judges' decisions, this possesses potential to affect the legitimacy or fairness of the proceedings. Third, voting by way of super-majority has the propensity to create a Cambodian voting bloc.¹⁰¹ Fourth, there are inadequate provisions for guaranteeing the personal security of judges; fifth, no binding codes of judicial conduct exist; and sixth, there are inadequate criminal sanctions for interference with the course of justice and the impartiality of the judiciary.¹⁰²

Because of the above-noted doubts about the quality of the Cambodian judiciary, the United Nations expressed in negotiations a strong preference for a majority of international judges and a simple majority voting system.¹⁰³ Despite U.N. lobbying, however, in the final agreement, Cambodian judges comprise the majority of the trial court, the appeals court, and the supreme court of the ECC pursuant to Article 9 of the LEC. It is therefore conceivable that the judiciary of the ECC may suffer the same drawbacks faced by the domestic Cambodian judiciary.

¹⁰⁰ LEC supra, Art. 9. Pursuant to Article 9 ("Composition of the Extraordinary Chambers'), Cambodian judges outnumber international judges in the trial chambers, appeals chambers, and supreme court chambers of the Extraordinary Chambers. [Reproduced at Tab 63].

¹⁰¹ Id Art. 14. Pursuant to Article 14 ("Decisions of the Extraordinary Chambers"), decisions in all three courts of the Extraordinary Chambers must be by way of a "super-majority" (ie majority plus one judge). [Reproduced at Tab 63].

¹⁰² Linton, supra at 327. [Reproduced at Tab 34].

¹⁰³ Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rogue: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal.* In *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia.* Romano, Cesare P.R. and Nollikaemper, Andre, Eds et al. 207-232, 218, Oxford University Press, 2004. [Reproduced at Tab 19].

Practical Impediments to the Independence and Impartiality of the ECC

i. Judicial impartiality and independence may be precluded by external influences.

As noted above, the judiciary of the ECC is a hybrid of international and domestic systems. At least some of the judiciary's susceptibility to outside influence will presumably be mitigated by international influences. In correlation, because the Chambers are comprised of both Cambodian and international judges, possible ignorance regarding international due process requirements of the former will be lessened by the latter's presumably superior expertise. Also, as noted in reference to the hybrid tribunals established in East Timor, Sierra and Kosovo, the appointment of international judges in these highly-sensitive cases may have aided in enhancing the perception of the independence of the judiciary and therefore its legitimacy.¹⁰⁴ Further, the March Agreement protects against partiality in Article 3(7), which provides that "the judges shall be appointed for the duration of the proceedings," thus removing some of the risk for political influence.

International Influence and Financial Backing: Is It Enough?

Despite the stigma of corruption attached to the Cambodian judiciary, the ECC might not experience some of those factors contributing to such corruption. In contrast to "regular judges," who receive several hundred dollars per month, the judges appointed to the CEC will receive the astronomical sum of sixty-five thousand dollars a year.¹⁰⁵ A past criticism of the Cambodian judiciary is that despite the presence of persons of character in the judiciary, they could easily be

¹⁰⁴ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 A.J. I.L. 295 at 306 (April 2003). [Reproduced at Tab 4].

¹⁰⁵ Patricia M. Wald, *Symposium: International Criminal Tribunals in the 21st Century: Iraq, Cambodia, and International Justice*, 21 Am. U. Int'l Law. Rev. 541, 555 (2006). [Reproduced at Tab 43].

“bought.”¹⁰⁶ ECC’s higher salary offers somewhat of a buffer to economic seduction. Further, corruption might be decreased by the international community’s financial investment in the tribunal, which affords it greater scrutiny by the eyes of the international community compared with Cambodian domestic courts. The international community has shown enormous support for the Cambodian Extraordinary Chambers. The cost of the Khmer Rouge tribunal is estimated at around \$61.5 million U.S. dollars, and fifteen countries have contributed to this expense. Japan’s contribution of \$21 million U.S. dollars amounts to fully fifty percent of the total international share of the budget.¹⁰⁷ These donations by countries with a history of respect for due process rights not only decrease the chances for corruption, but bring the ECC an air of legitimacy lacked by Cambodian domestic courts. At the same time, however, a notable underlying problem is that these states, referred to collectively as “The Group of Interested States” (hereinafter “GIS”), have been criticized as having done little to ensure their money is well-invested. As of April 2006, GIS has not established a monitoring mechanism, published benchmarks of performance it expects the EC to meet, or even declared publicly its commitment to ensure the EC adhere to fundamental standards of international human rights and humanitarian law.¹⁰⁸

The question here is whether increasing the salaries of the Tribunal judges, combined with international influence, guidance and scrutiny will suffice for overcoming the deeply-entrenched problems of the Cambodian judiciary.

¹⁰⁶ *Report of the Group of Experts supra*. [Reproduced at Tab 50].

¹⁰⁷ Sok An. *The Khmer Rouge Tribunal: What It Means for Cambodia*, in *Justice Initiatives: A Publication of the Open Society Justice Initiatives*, 1, 29 (Spring 2006). [Reproduced at Tab 23].

¹⁰⁸ James A. Goldstein. *An Extraordinary Experiment in Transitional Justice*, in *Justice Initiatives*, page 4 (Spring 2006). [Reproduced at Tab 30].

A Potential Commitment Problem in Holding Khmer Rogue Members Accountable

One concern with the tribunal is the questionability of the government's commitment to holding Khmer Rogue members accountable. Accountability could create the following problems for the Cambodian government: embarrass those members with ties to the Khmer Rogue during the period of Democratic Kampuchea; interfere with the government's policy of granting de facto amnesties to the Khmer Rogue members; and threaten the general culture of impunity from which Cambodia's current governmental members benefit significantly.¹⁰⁹ In fact, in the excruciatingly long negotiations which occurred between Cambodia and the United Nations, Cambodia ultimately succeeded in convincing the United Nations to create an international tribunal with an extraordinarily limited personal jurisdiction focused on "senior leaders of Democratic Kampuchea."¹¹⁰ Steve Heder, political scientist and law professor at the London University School of Oriental and African Studies, noted: "The most important reason for the narrowness of the personal jurisdiction seems obvious: to screen from scrutiny those members of the Royal Government who were 'small fish' during the DPK era, including Prime Minister Hun Sen and other members of the (CPP) which dominates the political scene."¹¹¹ Indeed, of those members comprising the "famously huge" 2004 Cambodian cabinet, none belong in the category of "those most responsible" falling within the ECC's personal

¹⁰⁹ Stephen J. Ratner and Jason S. Abrams. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*. (Second Edition). Oxford University Press, 2001, page 309. [Reproduced at Tab 21].

¹¹⁰ LEC, supra Art. 1. [Reproduced at Tab 63].

¹¹¹ Steve Heder. "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea." In *Bringing the Khmer Rouge to Justice*. Ramji, Jaya and Schaak, Ben, Eds. The Edwin Mellon Press, Lewinston, Queenston and Lampeter, 377-425, 410 (2005). [Reproduced at Tab 15].

jurisdiction..¹¹² If Heder is correct, the continued influence of these former Khmer Rouge members might result in the same judicial manipulation that characterizes the Cambodian judiciary.

Simultaneously, however, Article One of the LEC does not necessarily require such a narrow interpretation of jurisdiction. As observed by Kelly Dawn Askin, senior legal officer of International Justice with the Open Society Justice Initiative, the terms “those who were most responsible” may be interpreted broadly to permit some flexibility to prosecute both persons near the top of the hierarchy and also the most brutal or notorious physical perpetrators, as well as those indispensable mid-level actors who provided direct lines of communication between the Central Committee and the ordinary cadre.¹¹³ Broader application under Article One, if used, may serve to penetrate the general veil of impunity worn by Cambodian officials. Therefore, once the trials are completed, they may have, in addition to providing justice to victims, “created space and opportunity within Cambodia’s domestic judicial system, along with creating space and opportunity within Cambodia to begin broader justice and accountability initiatives.”¹¹⁴ In other words, by not avoiding prosecuting certain individuals for political reasons, and equally affording proper due process protections, the Tribunal will establish a standard for Cambodian domestic courts to follow.

Arguably, the ECC will likely adopt Heder’s approach of construing personal jurisdiction in a limited fashion rather than the broader application advanced by Askin. Because of Cambodia’s deeply-entrenched “culture of impunity,” the civil discontent that could be caused

¹¹² Steve Heder, *The Senior Leaders and Those Most Responsible* in Justice Initiatives at 56 (April 2006). [Reproduced at Tab 31].

¹¹³ Kelly Dawn Askin, *The Investigation and the Prosecution*, in Justice Initiatives at 76 (April 2006). [Reproduced at Tab 24].

¹¹⁴ *Id.* [Reproduced at Tab 24].

by prosecuting members of the government; and the enormous increase in time and resources it would take to try additional former Khmer Rouge members, the ECC will probably limit its personal jurisdiction only those literally “most responsible.”

The ECC’s Composition of a Majority of Cambodian Judges, Combined with Voting by Way of the Super-Majority, May Permit the Same Corruption Persistent at the Domestic Level

International concerns, particularly those expressed by the United Nations, reflected an early uneasiness with the ECC’s composition of a majority of Cambodian judges.¹¹⁵ The tribunal’s composition of a majority of Cambodian judges may carry with it the same problems of corruption existent at the domestic level. The Agreement’s establishment of system in which Cambodian judges are afforded majority status introduces a potentially corruptive and obstructive element, as these judges lack “the physical [and] professional security to simply decide to behave differently.”¹¹⁶ Cambodian judges complain openly about receiving instructions in cases from the highest political authorities and threats to their safety if they do not rule accordingly. Physical attacks have occurred frequently since 1993, including a 2003 attack in which a prominent judge was assassinated in broad daylight on a Phnom Penh Street.¹¹⁷ Given this legacy of manipulation of the Cambodian judiciary, one difficulty is separating this problem, as well as removing the stigma, from those members selected to serve on the ECC.

Another concern expressed by the United Nations, and indeed a source of debate in the promulgating the LEC, is the requirement of a “super-majority” for all decisions made by the

¹¹⁵ Sylvia de Bertodano, Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers. ICJ (285) [Reproduced at Tab 25].

¹¹⁶ Human Rights Watch, Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement, Apr. 2003, <http://hrw.org/backgrounder/asia/cambodia040303-bck.htm> [hereinafter “Serious Flaws.”] [Reproduced at Tab 49].

¹¹⁷ Id. [Reproduced at Tab 49].

trial court, appeals court, and supreme court of the ECC. Basically, this system requires the following: every decision rendered by the trial court, comprised of five judges, must have an affirmative vote by four judges; every decision rendered by the appeals court, comprised of seven judges, must have an affirmative vote by at least five judges; and every decision rendered by the supreme court, comprised of nine judges, requires an affirmative vote of at least six judges.¹¹⁸ This means that every decision must have the approval of at least one international judge. As noted by U.N. Secretary-General Kofi Annan, the super-majority arrangement at the heart of the March Agreement not only virtually guarantees a voting bloc by the Cambodian judges; but it also allows any investigation or prosecution backed by Cambodian co-prosecutors or co-judges to go ahead.”¹¹⁹ Even if the international judges vigorously protest a spurious investigation or prosecution, it will be permitted to go ahead pursuant to Article 20.¹²⁰

Another uneasiness expressed by the United Nations with this “super majority” is that it could result in a deadlock in decision-making. If no supermajority decides for either a conviction or an acquittal in a given case, the LEC does not provide the next procedural step. This mechanism will also affect the dozens of pre-trial and interlocutory decisions that the Trial and Supreme Court Chambers will be required to make prior to final judgment. Unless the judges quickly reach a common understanding on the application of the supermajority mechanism in cases of no positive decision, trials stand considerable delay.¹²¹

¹¹⁸ LEC, supra art.9 and 14. [Reproduced at Tab 63].

¹¹⁹ Dinah PoKempner, “The Khmer Rouge Tribunal: Criticisms and Concerns,” supra at 37. [Reproduced at Tab 38].

¹²⁰ LEC, supra Art. 20. Pursuant to the terms of Article 20, in case of disagreement among the co-prosecutors, the issue will be sent to a Pre-Trial Chamber for resolution with no provision for appeal. If less than four of these judges agree that the prosecution should not proceed, it proceeds. [Reproduced at Tab 63].

¹²¹ Caitlan Reiger, “*Marrying International and Local Justice: Practical Challenges Facing the Khmer Rouge Tribunal*” in Justice Initiatives, at 101 (April 2006). [Reproduced at Tab 40].

A Hypothetical Illustrative of Potential Deadlock Problems Caused by the Super-Majority

One potential “worst-case” scenario is if a trial of a senior Khmer Rouge member presented sufficient evidence to prove him guilty of a crime against humanity. If the three international judges in the Supreme Court Chamber voted “guilty” and the four Cambodian judges all voted “not guilty” as a result of outside influence, neither unanimity nor the required “super-majority” would exist. The final decision of the Supreme Court would contain both the views “guilty” and “not guilty” and would not lead to a conviction. The Khmer Rouge leader would then go free.¹²²

The above example demonstrates that the system, as is, has the potential to lead to complete deadlock. Because this system has explicit United Nations approval and in the example all of the rules of the March Agreement have been followed exactly as it should, the criticism that it was a mock trial would be countered by arguing that the United Nations had legitimized such proceedings. In this scenario, a de facto mock trial would have taken place, but a mock trial based on an agreement to which the United Nations consented.¹²³ Because the system laid down in the March Agreement has explicit United Nations approval, the United Nations could not invoke Article 28 of the March agreement to withdraw cooperation from the Extraordinary Chambers¹²⁴ This outcome runs contrary to the purpose of the internationally-supported tribunal, which is predicated on the final political transformation of Cambodia to a constitutional

¹²² Ernestine Meijer, *supra* at 220. [Reproduced at Tab 19].

¹²³ *Id.* [Reproduced at Tab 19].

¹²⁴ March Agreement, *supra* art. 29. (“Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present agreement.”) [Reproduced at Tab 54].

monarchy accepted and sustained by the world community.¹²⁵ It undermines the goals of the tribunal, which are to bring to end the impunity of the Khmer Rouge leadership, or to strike a blow against Cambodia's present-day "culture of impunity," or both.¹²⁶

ii. The Cambodian judiciary's lack of competence may prevent the ECC's independence and impartiality.

In its 1999 report on Cambodia, the United Nations Group of Experts identified the lack of a trained cadre of judges, lawyers and investigators as one of the major impediments to a fair and effective judiciary.¹²⁷ World Bank data from 2004 revealed that one in six of Cambodia's one hundred seventeen judges, one in nine of its Supreme Court judges, and one in ten prosecutors had law degrees.¹²⁸ As the Group of Experts noted in its report submitted to the Secretary-General, one of the legacies of Cambodia's decades of civil conflict is the lack of a qualified legal profession in Cambodia. Indeed, when the United Nations Transitional Authority in Cambodia (UNTAC) set up in 1992, "it found the legal system a complete shambles, with court personnel not only ignorant of law but sometimes barely literate, and basic supplies, like pencils and papers, lacking."¹²⁹ Moreover, those attorneys who entered the profession during the years of the People's Republic of Kampuchea or the State of Cambodia received their training under a system in which the courts were not independent. Although there may be enough qualified judges by way of training to serve on the bench for trials of Khmer Rouge members,

¹²⁵ 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*. Ramji, Jaya and Schaack, Beth Van., eds. The Edwin Mellen Press, New York and London, page 335 (2005). [Reproduced at Tab 20].

¹²⁶ Id at 334. [Reproduced at Tab 20].

¹²⁷ Report of the Group of Experts, *Supra*, VIIA 2, 127. [Reproduced at Tab 50].

¹²⁸ Linton, *supra*; citing World Bank, 'Cambodia at the Crossroads,' Report No. 3063-KH, November 2004. [Reproduced at 34].

¹²⁹ Dinah PoKempner, *supra* at 34. [Reproduced at Tab 38].

“the enormity of the Khmer Rouge’s atrocities and the effect they appear to have had on every household means that it would be difficult to find a judge free of the appearance of bias or prejudice.¹³⁰ This goes to show that prejudice may work both ways: on one hand, judges may fall victim to external influences and pressure; on the other hand, pre-conceived notions of officials’ guilt may color their perception of evidence received at trial.

Another problem is the LEC’s specific requirement that the domestically-trained Cambodian attorneys and judges refer to, and apply, international standards and law.¹³¹ Article 10 of the LEC provides that the judges appointed to serve in the Extraordinary Chambers be “experienced, particularly in criminal law or international law.” It may be difficult to find Cambodian judges well-versed in international procedural criminal law, as evidenced by judges’ current practice of seeking the opinion of the Ministry of Justice on the interpretation of articles and the determination of offenses.¹³² Although the Minister of Justice’s recommendations enable the judges to apply laws and procedures correctly, some critics express recognize this as a necessary evil: though this involvement weakens the independence of the judiciary, it is necessary under the present circumstances, in which the judges are not sufficiently experienced to perform their work without guidance.¹³³ The Cambodian judges’ looking to guidance elsewhere may undermine the legitimacy or competence of the tribunal in the eyes of the international community. On the other hand, the hybrid between an international and domestic

¹³⁰ Report of the Group of Experts, *Supra*, VIIA.2.,127. [Reproduced at Tab 50].

¹³¹ LEC *supra* Art. 20. [Reproduced at Tab 63].

¹³² Katheryn Klein, *Bringing the Khmer Rogue to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*. 4 *Nw. U.J. Int’l Hum Rts.* 549 (Spring 2006). [Reproduced at Tab 6].

¹³³ Klein, *supra* at *23. [Reproduced at Tab 6].

court might provide a vital framework the Cambodian judiciary may use as a blueprint in ascertaining proper application of international procedural rules.

Issues must be resolved by the trial chamber by a super-majority. It remains to be seen whether there will be a deviation between the consensus reached by Cambodian judges versus international judges on procedural issues, as opposed to those reached on the substantive reasons. The influence by international judges represents an opportunity for Cambodian judges to gain expertise in their application of international procedural law.

B. Textual manipulation may prevent officials of the Extraordinary Chambers from consulting international standards.

i. Ambiguity of those articles of the LEC providing for “guidance in procedural rules at the international level” leaves their meaning up for interpretation.

The LEC provides several instances in which officials of the Extraordinary Chambers may consult international law to resolve ambiguities and uncertainties in Cambodian criminal procedure. Article 20 of the LEC grants such discretion to the co-prosecutors: “The co-prosecutors shall prosecute in accordance with existing procedures in force. If necessary, and if there are lacunae in these existing procedures, the co-prosecutors may seek guidance in procedural rules established at the international level.”¹³⁴ This same discretion is afforded to ECC trial court judges¹³⁵ and ECC appeals court judges.¹³⁶ There is no such provision relative to defense attorneys.

Facially, a number of problems emerge with granting this discretionary power to court officials. First, there is the use of the word “necessary.” Cambodian criminal procedure is governed by the UNTAC Code, SOC, and the Constitution. These instruments raise two

¹³⁴ LEC supra Art. 20.[Reproduced at Tab 63].

¹³⁵ LEC supra Art. 33. [Reproduced at Tab 63].

¹³⁶ LEC supra Art. 36. [Reproduced at Tab 63].

problems: 1) conflict in their provisions; and 2) a question of priority. An example of the former is opposition between Article 24 of the UNTAC Code, which allows the defense to call its own witnesses and present its own evidence to the court; and Articles 130, 132 and 133 of the SOC law, which do not provide for this right but instead attribute the judge a far more prominent role in the presentation of evidence. The question here is whether the co-prosecutor, trial court, or appeals court will find it “necessary” to “seek guidance at an international level” even if Cambodian procedural law contains conflicting standards. A point worthy of note is that while other provisions of the LEC use the mandatory language “shall,” the permissive language “may” is employed relative to the decision to seek guidance at an international level. Accordingly, the Tribunal might be required to resolve some, if not all, of the following questions:

- a. If UNTAC and SOC law conflict, does this require necessary guidance at an international level?
- b. When UNTAC and SOC law conflict, will one always necessarily take priority over the other and why?
- c. If neither UNTAC nor SOC takes priority over the other, are there domestic sources which can be consulted prior to seeking guidance at an international level?

ii. “Guidance at an international level” provides no real indication of where such guidance should be sought.

The second problem is interpreting what is intended by “guidance at an international level.” Some critics have pointed out that the right granted not only to the Chambers, but also to the Co-Investigating Judges and Co-Prosecutors, to “pick and choose what they want from procedural rules at the international level to fill in the gaps in domestic law...has the potential

not just to create chaos, but also allows for tremendous arbitrariness.”¹³⁷ It is also unclear which procedural rules established at the international level should be used to clarify weaknesses in the Cambodian law. Potential options include the ICCPR, the Rome Statute of the ICC, the statute of the ICTR and the statute of the ICTY. Though the existence of multiple options may appear capable of causing confusion, this is a misconception due to the substantial similarity of most international criminal procedural codes.”¹³⁸

Because international sources conflict regarding the specific nuances of due process provisions, the ambiguous wording “guidance at an international level” provides no clear guidance for consultation of international sources. Moreover, one might argue that “borrowing” from international procedural law prevents the setting of true precedent because the procedures used do not necessarily carry over into Cambodian domestic law. If international criminal procedural law trumps domestic criminal procedural law when the latter is ambiguous, uncertain or conflicting, it remains to be seen whether the international law chosen to “fill in the gaps” will be accepted as precedent-setting in a domestic context.

ii. Although Cambodian procedural law may appear on its face to be compatible with international norms, this may not be followed in practice.

Even if the LEC meets international due process standards, the relevant inquiry is whether the ECC follows these standards in actual practice. As one commentator observed, “[an on-paper examination of Cambodian criminal law] demonstrate[s] that most of the human rights that advocates believe should be involved in the criminal process already exist, in theory.”¹³⁹ In

¹³⁷ Linton, *supra* at 331. [Reproduced at Tab 34].

¹³⁸ Lieberman, Michael. *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*. 186 *Mil. L. Rev.* 164, *178 (Winter 2005). [Reproduced at Tab 8].

¹³⁹ Wald, Patricia M. *International Criminal Tribunals in the 21st Century: Iraq, Cambodia and International Justice*. 21 *Am. U. Int'l L. Rev.* 541 at 552 (2006). [Reproduced at Tab 43].

fact, Article 12 of the March Agreement provides that the ECC “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 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.” Article 9 of the ICCPR, however, which protects against arbitrary arrest and detention, was not explicitly enumerated in the March Agreement. This leads one to question why the Cambodian and U.N. negotiators chose to include only articles 14 and 15 in the March Agreement rather than applying the entire ICCPR.

This omission may represent a deliberate attempt to circumvent the application of international due process norms. This argument is supported by examining a crucial difference between article 33 of the CEC and article 33 of the Draft Khmer Rouge Statute, which provided that trials were to be conducted “in accordance with existing procedures in force. Guidance may also, as necessary, be sought in procedural rules established at the international level.” Due to the alteration of the statute to its final form, emerging international procedural standards will only be consulted if there is a gap in the domestic procedural law.¹⁴⁰ Unlike the Draft Khmer Statute, it is now less clear whether international trial standards are guaranteed.

As one last point on this issue, it must be re-emphasized that decision-making in the CEC is governed by the rule of the super-majority. Accordingly, if procedural matters of the Chambers, like the substantive matters, are to be resolved with the requirement of a super-majority, procedural matters may encounter the same bloc potentially faced by substantive matters, preventing effective development and protection of international due process standards.

The Discretionary Power of International Consultation Need Not Necessary Entail Abuse

¹⁴⁰ Daryl A. Mundis, *Current Development: New Mechanisms for the Enforcement of International Humanitarian Law*, 95 A.J.I.L. 934, 941 (October 2001). [Reproduced at Tab 9].

Despite the dangers faced by the discretionary power granted to the CEC in consulting international standards, serious infringement of due process rights compared with international standards does not appear likely. The CEC appears intent on bringing members of the Khmer Rouge to justice, and Cambodian criminal procedural law does not substantially deviate from the standards recognized by the international community. U.N. scrutiny and the role played by international judges may be able to blend domestic and international criminal procedural law in a way to offer an unprecedented legitimization of the Cambodian judiciary.

Conclusion

Although the LEC was carefully crafted to safeguard both victims' and defendants' rights for the dual purposes of rendering justice for human rights atrocities committed by the Khmer Rouge Party during the Period of Democratic Kampuchea and to legitimize the Tribunal in the eyes of the international community, several aspects of Cambodian domestic criminal procedure may fail to live up to international standards. As the trials commence, trials in absentia; appropriate witness protection measures; and whether previously-granted amnesties may serve as a bar to prosecution all may become issues requiring resolution by the Tribunal.

Individual procedural nuances aside, the major impediment to protection of international procedural standards remains a problem in enforcement. Due to various practical problems, including pressure exerted by external political forces, corruption, and incompetence, the ECC may suffer from some of the same drawbacks faced by the domestic courts. Because of monitoring by the United Nations and the presence of international judges, however, the ECC may be able to side-step some of the problems persistent at a domestic level.

Further, the tribunal's discretionary power regarding legal interpretation may impede, given the super-majority voting requirement and the Tribunal's composition of a majority of

Cambodian judges. One might anticipate that U.N. influence and the presence of international judges may foreclose textual manipulation. Because procedural issues are resolved from within the tribunal, which is comprised of a majority of Cambodian judges, the tribunal has the potential to provide the Cambodian judiciary with experience and legitimacy.

Despite these cautionary points, international procedural guidelines are likely to be adhered to during the proceedings of ECC. Cambodian criminal procedural law already respects internationally-recognized due process rights on paper, and an internationally-financed tribunal presided over by a minority of international judges provides the necessary materials for the enforcement of these rights.