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**LAWFARE AND INTERNATIONAL TRIBUNALS:
A QUESTION OF DEFINITION?
A REFLECTION ON THE CREATION OF THE “KHMER ROUGE TRIBUNAL”**

*Robert Petit**

I. INTRODUCTION

I must confess that in over twenty-one years of criminal prosecution, both national and international, I had never encountered the term “lawfare” until I received the invitation to attend this conference. After my initial research and the different presentations here, I understand better why. It seems to me that this term has essentially evolved out of a U.S. military and political context and therefore has had little resonance in international criminal law.¹ From the various attempts at definitions, it does appear to boil down to the use of the judicial system to further political aims, which, I submit, is an essential function of any system of laws.² That those aims seem to run counter to prevailing norms or government interest does not appear to change the nature of the system itself which, if it is sound, will assert itself through the proper application of those very laws. Laws are used to express and define the society that elaborates them. They are an evolving reflection of that society, and equating that process to armed conflict seems to me to distort their purpose.

If, however, we intend lawfare to equate to what is more traditionally viewed as political interference in the application of justice, then yes, lawfare is practiced in International Criminal Law. For example, it is quite clear that political considerations played a fundamental part in the creation of the Extraordinary Chambers within the Courts of Cambodia (ECCC), for which I was the first International Co-Prosecutor.

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¹ See, e.g., Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>; Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, 82 INT'L L. STUD. SER. US NAVAL WAR COL. 221, 227 (2006); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 879 (2009).

² Symposium, *Lawfare!*, Frederick K. Cox International Law Center, Case Western Reserve University School of Law (2010), available at http://law.case.edu/Lectures.aspx?lec_id=235.

Bringing to justice those responsible for the 1.7 million victims of the Khmer Rouge regime would seem such a morally imperative endeavor as to be devoid of political ambiguity. Yet, the creation of the ECCC was probably the clearest example in International Criminal Law of a judicial process beset by political wrangling and used for other ends than justice.³ That the ECCC has achieved any measure of justice for the victims is a testament not to its political architects to whom this must come as a surprise, but rather to the dedication of its judicial officers. This presentation will provide an overview of this paradox.

II. FIRST SOME HISTORY

In April 1975, a Communist movement commonly known as the Khmer Rouge took power in Cambodia after a protracted fight against a U.S. supported regime.⁴ Inspired by the most extreme currents of previous Communist regimes, the Khmer Rouge proceeded to implement a radical reengineering of Cambodian society with combined results more extreme than any of these previous regimes.⁵ Literally overnight, the Khmer Rouge abolished all individual rights, forcibly evacuated all major cities to compel the population to live and work exclusively in collective farming cooperatives, and press-ganged hundreds of thousands of men, women and children into slave labor on massive public works projects. Over the course of the Khmer Rouge's three years, eight months, and twenty days in power, they mercilessly hunted down and executed hundreds of thousands of perceived enemies, inside and outside their own Party.⁶ In part because of having depleted their own ranks through massive purges, the Khmer Rouge regime eventually collapsed as the result of a Vietnamese-led invasion but remained a militarily relevant guerrilla force for the next two decades.⁷

Prominent among the new governors of Cambodia were ex-Khmer Rouge commanders and other Party cadre who had defected to the Vietnamese to escape purges and who now served as Cambodian figureheads for the new government.⁸ Eventually rising to the top would be a former lower level Khmer Rouge cadre, Hun Sen, who would become Prime Minister of the new regime in the 1980s and remains so today.⁹

³ Ben Ehrenreich, *Cambodia's Wandering Dead*, HARPER'S MAG., Apr. 2009, at 58, 61–62.

⁴ DAVID CHANDLER, *A HISTORY OF CAMBODIA* 255 (4th ed. 2008); BEN KIERNAN, *THE POL POT REGIME* 7–8 (2d ed. 2002).

⁵ Chandler, *supra* note 4, at 255; PHILIP SHORT, *POL POT: ANATOMY OF A NIGHTMARE* 364–65 (2004).

⁶ Short, *supra* note 5, at 367.

⁷ *Id.* at 399–401, 430–32.

⁸ Chandler, *supra* note 4, at 277, 279–80.

⁹ Short, *supra* note 5, at 424.

Faced with the massive crimes committed by the Khmer Rouge and their continued military activities, in 1979 the new Cambodian regime put on trial in absentia two of the Khmer Rouge leaders, Pol Pot, the head of the movement, and Ieng Sary, its Foreign Minister.¹⁰ Despite the quality of the evidence amassed, the 1979 trial was a typical Soviet-type show trial where justice was a distant second goal to the primary objective of destroying the political credibility of a movement that, thanks to Cold War politics, still retained international support in spite of its obvious criminal nature.¹¹ After this egregiously flawed attempt at accountability, no other form of justice would be forthcoming for the victims of the Khmer Rouge until the late 1990s.

The evolution of the Cambodian political landscape post-Khmer Rouge era is a complex subject and much discussed by numerous scholars. For the purpose of this presentation, I would summarize it thusly: the former Khmer Rouge elements of the government installed by the Vietnamese, led by amongst others Hun Sen, eventually came out on top with Vietnamese backing and via their often ruthless use of political, military and police powers. By 1997, then Co-Prime Minister Hun Sen and his supporters inside the Cambodia People's Party were in a position to assert dominance over long-time non-Communist rivals, notably the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC), whose head was also a Co-Prime Minister.¹² A Hun Sen-led coup in 1997 largely destroyed FUNCINPEC, leaving Hun Sen and his allies in the Cambodia People's Party to advance to total control of Cambodia, the situation that exists today.¹³ At the same time, the Khmer Rouge movement collapsed from within, encouraged by Hun Sen's use of politically engineered defections coupled with the threat of judicial accountability.¹⁴

Most significantly, in August 1996, Ieng Sary, formerly the leader of one remnant of the Khmer Rouge, defected to the Government.¹⁵ A few weeks thereafter, in September, he was granted a pardon for his sentence in absentia and granted immunity from prosecution under a 1994 law that outlawed the Khmer Rouge.¹⁶ However, the language of these dispositions did not seem to preclude subsequent prosecution for any crimes committed, and indeed this is what has been argued with some success before the ECCC.¹⁷

¹⁰ Chandler, *supra* note 4, at 280.

¹¹ *Id.*

¹² Short, *supra* note 5, at 438–439.

¹³ *Id.* at 441.

¹⁴ *See generally id.* at 432–443.

¹⁵ *Id.* at 437.

¹⁶ Seth Mydans, *An Amnesty in Cambodia*, N.Y. TIMES, Sep. 18, 1996, at A13.

¹⁷ *Id.*

Somewhat paradoxically, the success of the defection policy brought forward the debate on impunity for the Khmer Rouge. In early 1997, taking advantage of the apparent willingness to confront this issue, a U.N. independent human rights envoy managed to convince both Co-Prime Ministers to sign a letter requesting the U.N.'s assistance in trying those responsible for the crimes of the Khmer Rouge.¹⁸ It has been reported that the reaction to the June 21 letter by the U.N.'s Secretariat as well as some of the P5 was less than enthusiastic. Indeed, the United Nations quickly asserted that it did not have the powers under Chapter 7 of the U.N. Charter to create such a mechanism. Yet, in December 1997, a U.N. General Assembly Resolution noted the lack of accountability for the crimes of the Khmer Rouge and talks with the Government of Cambodia continued.¹⁹

At the time, the Khmer Rouge was still a military force, though weakened by defections and decreasing international support.²⁰ The most significant remaining Khmer Rouge force was nominally led by an ailing Pol Pot and his Second-in-Command, Nuon Chea.²¹ Clearly initiating a justice process was a way to further undermine support for the Khmer Rouge, both internally and internationally. However, appetite for justice proved to be somewhat short-lived even after the death of Pol Pot in early 1998. A draft Security Council Resolution circulated by the United States and calling for the establishment of an International Criminal Tribunal for the Former Yugoslavia type tribunal was not even tabled. Moreover, the Government of Cambodia asserted that it did not want to discourage further defections by too much talk about prosecution and started to assert that contrary to the June 1997 letter, any proceedings must be of a national character.²² The discussions with the United Nations were soon to become more like negotiations between parties with different agendas.

III. RELUCTANT PARTNERS

The respective positions of the parties were drawn early. In July 1998, the United Nations appointed a Group of Experts to review the possibility of accountability.²³ That same year—following the bloody coup against his erstwhile FUNCINPEC coalition partners—Hun Sen's Cambodia People Party claimed a much-disputed victory in national elections

¹⁸ Craig Etcheson, *Designing Justice for Cambodia's Khmer Rouge*, in INTERNATIONAL HUMANITARIAN LAW: PROSPECTS 191, 192. (John Carey, William V. Dunlap, R. John Pritchard eds., 2006).

¹⁹ G.A. Res. 52/135, ¶7, U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

²⁰ Short, *supra* note 5, at 439–440.

²¹ *Id.*

²² Daniel Kemper Donovan, *Recent Developments: Joint Cambodia-U.N. Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 552, 559 (2003).

²³ *Id.*

against his crippled opponent, which he thereafter reduced to political irrelevance.²⁴

The Group of Experts eventually produced its report in February 1999. It assessed the extent of the crimes of the Khmer Rouge and those responsible for them, the existing evidence, the feasibility of accountability and the need for justice. However, by then another major defection had occurred; in December 1998 both Nuon Chea and Khieu Samphan turned themselves in to the Government and to the literally and figuratively, welcoming arms of Hun Sen. This was followed by the Prime Minister's statements to the effect that the Khmer Rouge had now been defeated, that his policies had succeeded and that further talk of justice might reignite conflict. Hun Sen said as much in a March 1999 letter to the Secretary General in response to the Expert's report. The letter further stated that the Government of Cambodia was now looking into a Truth and Reconciliation Commission for Cambodia as a possible way forward.

However, the push for true accountability continued, in significant part due to the efforts of Cambodian civil society and the United States, fresh from the success of Rome and the creation of the International Criminal Court.²⁵ Obviously, the United States had its own interests and agenda in this process, but nonetheless its influence would prove determinant. The United States stated that it believed in the need for credible accountability, that such process was tied to future aid to the Government of Cambodia and that justice was not inherently a destabilizing factor.²⁶ The United Nations echoed this and stated that any such mechanism involving the United Nations must meet international standards and that the Experts Reports recommendations were useful guidance.²⁷ However, the Secretary General recognized that any such effort presupposed the cooperation of the Government of Cambodia, which was less than enthusiastic.²⁸ Following the arrest by the military of a high level Khmer Rouge who had not defected, Hun Sen reasserted that his trial, as well as that of any other responsible for the crimes of the Khmer Rouge, would have to be conducted by national courts and that Cambodian law did not allow for foreign judges or prosecutors.²⁹ Furthermore any "reckless prosecution" could threaten stability and

²⁴ Sue Downie, *Cambodia's 1998 Election: Understanding Why it Was Not a 'Miracle on the Mekong'*, 54 A.J.I.A. 43, 54 (2000).

²⁵ Ambassador Thomas Hammarberg, *How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian Government and the UN*, Documentation Center of Cambodia (2001), available at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

peace, though no problems arose after this arrest, a position that was publicly echoed by other officials of the Government.³⁰

Clearly, the Government of Cambodia, and particularly Hun Sen, had seen the threat of accountability as a means to defeat the Khmer Rouge. Once that was achieved by military and political means, the price of justice seemed far too high. To quote the Prime Minister, "better to dig a hole and bury the past."³¹

However, another notable arrest, that of Kaing Guek Eav, also known as "Duch," in 1999, as well as continued pressure by some states, kept up the momentum to end impunity for the Khmer Rouge.³²

There followed a long series of negotiations that are far too complicated to be detailed in fifteen minutes. For the purpose of this presentation, I will try to summarize the key points as follows. For Hun Sen and the Task Force he appointed to negotiate with the United Nations, the key issue was control of the proceedings.³³ These supposedly had to be kept narrow in prosecutorial scope so as to not threaten national stability. However, as analyses at the time and the facts since have demonstrated, this was a non-issue. This argument, of course, spoke directly to the personal jurisdiction of the ECCC and the independence of the prosecutors to indict those they deemed responsible.

Second, the role of Cambodians, both as juridical officials and administrators, had to be pre-eminent, even though by its own admission the national judiciary was beset by problems and widely perceived as inefficient and subservient to the executive.³⁴ Third, the applicable law had to be Cambodian law even though the applicable penal laws, due to the upheaval of the civil war, were a mishmash of very basic colonially inspired legislation dating back to the 1950s and a simplified legal code promulgated by U.N. authorities in the early 1990s.³⁵ Last, that any mechanism must be Cambodian in nature to respect national sovereignty.³⁶

As for the United Nations, it tasked its Legal Adviser, Hans Correll and his Office of Legal Affairs to negotiate the U.N.'s involvement on one single basis: that international standards of justice could be guaranteed.³⁷ To that end, the Secretary General eventually spelled out four issues on which this could be rested upon: (1) A guaranteed cooperation by the government

³⁰ *Id.*

³¹ *Id.*

³² Christine Malumphy and B.J. Pierce, *Cambodia's Search For Justice: Opportunities and Challenges for the Extraordinary Chambers in the Courts of Cambodia* (February 2009), available at <http://hrc.berkeley.edu/pdfs/IHRLC-Cambodia.pdf>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Supra* note 32.

³⁶ *Id.*

³⁷ *Id.*

to effect arrest and execute the Courts orders; (2) That no amnesty or pardon would be a bar to any prosecution; (3) The guaranteed independence of the prosecutors—and investigative magistrates—to prosecute anyone they deemed within the Courts jurisdiction; and (4) a majority of international judges to guarantee the fairness of the proceedings in image and substance.³⁸ Needless to say, those respective positions led to long, protracted, and at times acrimonious negotiations.

Indeed, at one point it appeared that all was lost. The Government of Cambodia, in a bit of pre-emptive legislating, tabled a law on the creation of the tribunal that in many ways appeared to go against an apparent earlier agreement with the United Nations.³⁹ It then continued to negotiate with Correll, but at the same time any further legislative progress was stymied by a variety of sometimes ridiculous obstacles, such as delays caused by termite damage to the National Assembly or the compensation of flood victims.⁴⁰ Faced with what appeared to be obvious procrastination by the Government of Cambodia, the United Nations declared that it faced an apparent impossibility to reach an agreement even though it had already significantly watered down its initial position on several key issues.⁴¹ With a possible failure in sight, the United States played a key role by, in essence, coming up with a compromise on key issues that prevented either party from being able to walk away cleanly.⁴²

In particular, U.S. Senator John Kerry was called upon to play the role of an intermediary between the United Nations and the Government of Cambodia, and at the same time represent the interests of the United States.⁴³ Eventually, what was created was roughly a model of what the Government of Cambodia thought it could live with.⁴⁴

Briefly, as you may garner from a reading of the Statute and the Internal Rules, the ECCC is a recognized National Court with international elements both in terms of personnel and laws.⁴⁵ Yet it is clearly the still the most national of any hybrid courts ever set up.⁴⁶ A majority of National

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Termites Blamed as Legislators Delay Genocide Tribunal Debate*, South China Morning Post, (Apr. 26, 2000), available at <http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1>; See also *Chronology Of The Khmer Rouge Tribunal*, Documentation Center of Cambodia, available at <http://www.cambodiatribunal.org/CTM/DC%20CAM%20Chronology.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou71pwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4> (last visited Dec. 2, 2010).

⁴¹ *Supra* note 32.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *supra* note 32.

⁴⁶ *Id.*

Judges with a minority of internationals sit on all three levels of the Court, the Pre-Trial Chamber (PTC), the Trial Chamber (TC), and the Supreme Chamber (SC).⁴⁷ All judicial officials are formally appointed by the Cambodian Council of the Magistracy, though the United Nations selects and draws up the list of Internationals from which the Council must pick appointees.⁴⁸ Those international appointees are U.N. Officials with diplomatic status.⁴⁹

The jurisdiction of the ECCC is over the “Senior Leaders of the Khmer Rouge and those most responsible” for the crimes committed between January 7, 1975 and April 20, 1979.⁵⁰ The crimes for which they can be prosecuted include internationally recognized offences such as genocide, but also national offences such as religious persecution.⁵¹

The procedural laws governing the ECCC are the applicable Cambodian laws.⁵² However, where national laws are deemed unclear, insufficient, or in contradiction to international precedents, guidance may be sought from those precedents.⁵³

In a unique departure from the norm, any positive decision of any of the Chambers must be taken in accordance with a “supra majority” principle, a majority plus one or two depending on the level.⁵⁴ In theory this is a safeguard necessitating the approval of some members of the international side of any Bench before any positive decision be taken. As I will explain later, the foresight in creating such a mechanism was well founded.

The cases are prosecuted by Co-Prosecutors, an International and a National, and investigated by Co-Investigative Judges again on the same dual nationality principle.⁵⁵ As there is no overt limit on the prosecution of suspects, a unique dispute mechanism was created to adjudicate differences

⁴⁷ Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea, ch. IV (Oct. 27, 2004).

⁴⁸ *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in INTERNATIONALIZED CRIMINAL COURTS; SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Romano, C., Nollkaemper, A., & Kleffner, J. eds., University Press: Oxford, 2004).

⁴⁹ *Id.*

⁵⁰ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, art. 1, Oct. 27, 2004, available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Statute].

⁵¹ *Id.* arts. 2–8.

⁵² *Id.* art. 23.

⁵³ *Id.*

⁵⁴ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, R. 17(4) (Rev. 6, 2010), available at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv6-EN.pdf> [hereinafter ECCC Internal Rules].

⁵⁵ ECCC Statute, *supra* note 50, art. 16.

in the event that either Co-Prosecutors or Co-Investigative Judges could not agree on cases.⁵⁶ In such an event, the disagreement would be brought before the PTC, and if the supra majority could not be reached, the law states that the prosecution or investigation must then “proceed.”⁵⁷ In other words, to block prosecution, at least one international Judge would have to side with all his or her national colleagues.

Of note, finally, is the central role of victims as a full-fledged party to the proceedings, with legal representation and right of audience, a first in terms of scope in internationalized proceedings.⁵⁸

As most of you know, after four years, the Court has proceeded against five individuals, completed on case in first instance, and will undertake within months its second one. Any assessment therefore is still early, yet can be instructive.

IV. LESSONS LEARNED?

In the end, the victims of the Khmer Rouge got the tribunal that Hun Sen and his allies, including other former Khmer Rouge throughout his regime, wanted. Whilst no doubt a flawed model, will it bring a measure of justice for the magnitude of the crimes committed? It may be too early to conclude but certain indicia does exist. During my tenure as International Co-Prosecutor, I forwarded for investigation to the Co-Investigative Judges three cases.

The first cases targeted five individuals well-known and indeed almost unavoidable: Kaing Guek Eav, also known as “Duch,” the warden of an infamous detention and death centre who was initially arrested by the Cambodian authority in 1999;⁵⁹ Ieng Sary and his wife Ieng Thirith who was a Minister in the Khmer Rouge the government;⁶⁰ Nuon Chea, Pol Pot’s second-in-command;⁶¹ and Khieu Samphan, the President of the Khmer

⁵⁶ *Id.* art. 20.

⁵⁷ *Id.*

⁵⁸ ECCC Internal Rules, *supra* note 54, R. 23.

⁵⁹ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007, Order of Provisional Detention (July 31, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/1/Order_of_Provisional_Detention-DUCH-EN.pdf.

⁶⁰ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/12/Provisional_detention_order_IENG_Sary_ENG.pdf; Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/11/Provisional_detention_order_IENG_Thirith_ENG.pdf.

⁶¹ Case of Nuon Chea, Case No. 002/19-09-2007, Provisional Detention Order (Sept. 17, 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/3/Provisional_Detention_Order_Nuon_Chea_19092007_ENG.pdf.

Rouge Presidium.⁶² That case was the product of a year of work by both the national and international side of the OCP and mutually agreed to between my national colleague and myself.

This case was eventually split in two by the Co-Investigative Judges and Duch proceeded separately to trial first.⁶³ This trial has recently ended with convictions on several counts of crimes against humanity and war crimes with a sentence of thirty-five years, minus time served, and taking into account the Accused admission of guilt and cooperation.⁶⁴ The other four remaining accused are on the brink of being referred for trial on counts that will possibly include genocide as well as crimes against humanity and war crimes and the trial is expected to get underway sometime next year.⁶⁵ By any indication, this will be an acrimonious trial where the defendants are expected to mount vigorous defenses, incredibly denying any responsibility for the massive crimes that happened under their leadership.

As to the other two cases, these were the subject of a disagreement between my national colleague and me. After about a year of investigations conducted jointly by our office, my national colleague refused to forward for investigations two cases of five individuals who, I believed fall well under the jurisdiction of the ECCC due to their responsibility in the deaths of hundreds of thousands of victims. My colleague did not so much dispute the evidence or the law as it applied to those individuals, but rather argued that their prosecution could threaten peace and stability of Cambodia and that the case of the initial five accused fulfilled the mandate of the Court, spurious arguments, as I have said. I therefore filed a formal disagreement with the PTC and eventually it ruled, splitting along national and international lines, the Cambodian judges agreeing with my colleague, the international judges recommending prosecutions.⁶⁶ Failure to reach a super majority meant that in accordance with the statute, the prosecution has proceeded

⁶² Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 19, 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/13/Provisional_detention_order_KHIEU_Samphan_ENG.pdf.

⁶³ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch (Aug. 8, 2008), http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf.

⁶⁴ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/TC, Judgment (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

⁶⁵ Sopheng Cheang, *UN Chief Appeals for More Khmer Rouge Trials*, ASSOCIATED PRESS, Oct. 28, 2010, available at http://hosted.ap.org/dynamic/stories/A/AS_ASIA_UN?SITE=VTBEN&SECTION=HOME&TEMPLATE=DEFAULT.

⁶⁶ Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC (Aug. 18, 2009), [http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_\(English\).pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_(English).pdf).

but it also meant that many viewed in the judgment the concretization of their fears of a politically controlled Court. That may be too early to assert although the future looks bleak. It has been reported that the investigation in these cases has been marred by the same type of dissension within the Office of the Co-Investigative judges and progress appears to be slow.⁶⁷

But, progress in these cases, in accordance with the rules of the ECCC, is indeed necessary to demonstrate that the institution is operating independently. Furthermore these additional cases are important for the Court in that they involve facts and crimes that fill an important gap in the understanding of how the Khmer Rouge operated so as to cause the death of nearly a quarter of the population of Cambodia.⁶⁸ The cases involve persons who were not senior political leaders of the central Khmer Rouge regime but yet who exercised power and authority in a way that resulted in the suffering and death of hundreds of thousands of people.⁶⁹ It was not only the “senior leaders” who made horrific decisions that violated international law. Trials of these cases are important to demonstrate that there is no impunity for persons responsible for gross abuses, even if they are not the top political and military leaders. In addition, if the Court were to conclude, after completing cases against only the five personalities initially accused, assuming none of those currently in custody die before their case is tried, it cannot be said that the Court has met its mandate to prosecute both senior leaders and those most responsible. As a result, it will have trouble justifying its cost in light of the prosecution of only five persons.

It has recently been reported that the ECCC is facing a major funding shortage that threatens even Case 002, and that there is discussion of the United Nations pulling out after completion of that case, handing over Case 003 and 004 to a purely national residual ECCC.⁷⁰ I firmly believe that completion of these additional cases represent a minimum by which the ECCC could be said to have delivered as much justice as it could. Should they not proceed in accordance with the evidence and the law, in whatever incarnation the Court may take, some may well conclude that in the end, politics won over justice.

⁶⁷ OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, MARCH 2010 UPDATE 6 (2010), available at <http://www.unhcr.org/refworld/pdfid/4cbd8e992.pdf>.

⁶⁸ *Acting International Co-Prosecutor Requests Investigation of Additional Subjects*, EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA (08 September 2009), http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310.

⁶⁹ *Id.*

⁷⁰ OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 67, at 11–12.