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What would be the legal and political ramifications if the UN decided to stop funding the ECCC prior to the current investigations and trials being finalized? Assess the ramifications in the Cambodian and International context.

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: What would be the legal and political ramifications if the UN decided to stop funding the ECCC prior to the current investigations and trials being finalized? Assess the ramifications in the Cambodian and International context.

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Fall Semester, 2017

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I. Introduction

A. Scope

This memorandum discusses the legal and political ramifications if the United Nations (hereinafter the “UN”) were to stop funding the Extraordinary Chambers in the Courts of Cambodia (hereinafter the “ECCC”) prior to the finalization of current trials and investigations.¹

By analyzing the legal ramifications specifically in Cambodia, and analyzing the political ramifications in both the Cambodian and International contexts, this memorandum will provide recommendations for the ECCC regarding the future of the Court. The legal ramifications of a loss of funding are split into two main categories: ongoing investigations and trials, and residual functions of the court for both complete and incomplete trials. The political ramifications of a loss of funding apply within Cambodia, to both the people and the Government. The political ramifications likewise extend internationally, and the effects of a closure due to a loss of funding are felt not only by other current tribunals, but also by the hope of future tribunals. Legally and politically, this closure will have a significant impact on Cambodia and the world.

B. Summary of Conclusions

i. Legal Ramifications for Ongoing Investigations and Trials

The closure of the ECCC would have legal ramifications impacting the current, ongoing criminal investigations and trials in the ECCC. The ECCC should

¹ What would be the legal and political ramifications if the UN decided to stop funding the ECCC prior to the current investigations and trials being finalized? Assess the ramifications in the Cambodian and International context.

enter agreements with other countries, with appropriate jurisdiction, to: continue investigations and trials; ensure the continued confinement of individuals; and provide protection for acquitted individuals.

ii. Legal Ramifications for Residual Functions

The closure of the ECCC would have significant legal ramifications leading to the need for residual functions. Most importantly, a Residual Court for Cambodia will need to be established. The functions of this Residual Court will be: maintaining detention and all issues relating to detention; ensuring witness protection; maintaining all archives; responding to requests for evidence; holding any remaining proceedings and providing counsel for said proceedings; ensuring that the accused's rights are not violated, such as double jeopardy; and prosecuting any remaining cases.

iii. Political Ramifications for Cambodia

The political ramifications of closing the ECCC are extremely prevalent within the borders of Cambodia. Citizens of Cambodia have relied on the ECCC for the prosecution of senior leaders responsible for crimes committed between April 17, 1975 to January 6, 1979. The ECCC has shown victims and witnesses alike that the criminals will be held accountable for their crimes against humanity and acts of genocide.

iv. Political Ramifications Internationally

The political ramifications of closing the ECCC extend far beyond Cambodia and into the international context. Closing the ECCC will create a lack of confidence in the international criminal justice system and will make it even more difficult for

future international courts to open in the future. This global impact reaches much farther than the doors of the ECCC, and tells other tribunals that their efforts are expendable if there is no more funding. A positive ramification would be that the closure could serve to teach and show other tribunals about the need to create completion strategies during the winding-up phase.

II. Factual Background

An agreement between the United Nations and the Government of Cambodia to establish the ECCC was signed on June 12, 2004, and went into effect on April 29, 2005.² The ECCC is supported with international assistance, but is primarily run through the Cambodian court structure.³ The ECCC is a unique court, because it is run as a domestic court but uses international assistance.⁴ Currently, both international contributors and the Cambodian Government fund the ECCC.⁵ Japan

² See United Nations General Assembly, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia, Eighth report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for the biennium 2018–2019*, (October 27, 2017) [hereinafter “Request for Subvention”], available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/351/48/pdf/N1735148.pdf?OpenElement>. [Electronic copy provided in the accompanying USB flash drive as Source 11]; see also Giorgia Tortora, *The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon*, 13 INT’L CRIM. L. REV. 93, 124 (2013) [hereinafter “Financing Special Tribunals”]. [Electronic copy provided in the accompanying USB flash drive as Source 3].

³ Request for Subvention, *supra* note 2. [Electronic copy provided in the accompanying USB flash drive as Source 11].

⁴ Financing Special Tribunals, *supra* note 2. [Electronic copy provided in the accompanying USB flash drive as Source 3].

⁵ Extraordinary Chambers in the Courts of Cambodia, *How is the Court Financed?*, (posted and last updated 6 years ago), available at: <https://www.eccc.gov.kh/en/faq/how-court-financed>. [Electronic copy provided in the accompanying USB flash drive as Source 16].

contributes 34% of the international contributions, and other major international contributors are: the United States of America, Australia, the European Union, and Germany.⁶ Japan and the European Union are contributors to the Cambodian portion of the budget, and UNTAC provides more than \$5 million in support.⁷ Finally, there are both monetary and in-kind contributions from the Cambodian government.⁸ The Cambodian Government provides approximately \$4.8 million and also in-kind contributions such as providing the premises and paying for the detention.⁹ However, the ECCC is currently having problems with its funding which is resulting in serious backlash. In 2012, there was fear that the ECCC, Khmer Rouge tribunal, was running out of funds.¹⁰ In 2013, the majority of the ECCC national staff was on strike because they were not paid for months.¹¹ In fact, this threat is so

⁶ Extraordinary Chambers in the Courts of Cambodia, *ECCC Financial Outlook as at 31 October 2017*, (Japan contributes 34%, the United States of America contributes 15%, and Australia contributes 13%), available at: <https://www.eccc.gov.kh/sites/default/files/ECCC%20Contribution%20Data%20as%20at%2031%20October%202017.pdf>. [Electronic copy provided in the accompanying USB flash drive as Source 17].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ David Scheffer, International Center for Transitional Justice, *Khmer Rouge War Crimes Tribunal Running Out of Funds* (August 16, 2012) [hereinafter “Khmer Rouge Tribunal Funds”], available at: <https://www.ictj.org/news/khmer-rouge-war-crimes-tribunal-running-out-funds>. [Electronic copy provided in the accompanying USB flash drive as Source 18].

¹¹ FIDH, Worldwide Movement for Human Rights, *The ECCC Funding Crisis must be swiftly resolved*, (September 20, 2013) [hereinafter “ECCC Funding Crisis”], available at: <https://www.fidh.org/en/region/asia/cambodia/eccc/the-eccc-funding-crisis-must-be-swiftly-resolved-13961>. [Electronic copy provided in the accompanying USB flash drive as Source 19].

imminent that in May 5, 2017, the co-investigating judges in the three current ECCC cases filed a sealed motion titled, “Confidential Request For Submission On *Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2.*”¹² The combination of all of these incidents makes the threat of a loss of funding seem imminent.¹³ The imminent threat of a loss of funding may have significant consequences on ongoing investigations and trials. If funding is lost, then the ECCC will need to establish residual functions and a residual court. There will also be political ramifications, both within Cambodia and Internationally.

III. Legal Argument

A. Legal Ramifications for Ongoing Investigations and Trials

If the UN cut funding tomorrow for the ECCC, there would be many concerns about current investigations and trials. Mainly, central issues revolve around determining how to solve problems with: future indictments; current charges and defendants; and current appeals.

¹² Open Society Foundations, Open Society Justice Initiative, Briefing Paper, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Threat to Permanently Stay Cases 003, 004 and 004/2A*, (June 2017) (emphasis added) [hereinafter “OSJI Briefing Paper”], <https://www.opensocietyfoundations.org/sites/default/files/recent-developments-eccc-june-2017-20160614.pdf>. [Electronic copy provided in the accompanying USB flash drive as Source 20].

¹³ See Khmer Rouge Tribunal Funds, *supra* note 10 [Electronic copy provided in the accompanying USB flash drive as Source 18]; ECCC Funding Crisis, *supra* note 11 [Electronic copy provided in the accompanying USB flash drive as Source 19]; OSJI Briefing Paper, *supra* note 12 [Electronic copy provided in the accompanying USB flash drive as Source 20].

The ECCC recently closed the investigations for Cases 003 and 004.¹⁴ If the UN had cut funding prior to the close of these investigations, the investigations would either have been dropped, or the indictments would have been filed in another court. The main issue here would be finding a court that has the proper jurisdiction to hear the cases, because the formation documents of the ECCC do not mention a transfer of jurisdiction to a residual court. If the issue were to arise at a later date, this would be a significant concern. Presumably, since the ECCC is a domestic court, then the Cambodian government would take control over the investigations and trials. However, a transfer of jurisdiction is not explicitly stated in the formation documents.

The ECCC currently has one ongoing trial in Case 002/2.¹⁵ In this case, the judgment is expected in the second quarter of 2018.¹⁶ If the UN were to cut funding tomorrow, the concern would be that the charges from case 002/02 would be dropped and that the accused would be free to leave. This is of exceptional significance because in case 002/02, not only is the investigation complete, but all of

¹⁴ Extraordinary Chambers in the Courts of Cambodia, *Case Load*, [hereinafter “ECCC Case Load”], available at: <https://www.eccc.gov.kh/en/caseloads>. [Electronic copy provided in the accompanying USB flash drive as Source 21].

¹⁵ Request for Subvention, *supra* note 2 [Electronic copy provided in the accompanying USB flash drive as Source 11]; *see also* OSJI Briefing Paper, *supra* note 12. [Electronic copy provided in the accompanying USB flash drive as Source 20].

¹⁶ Request for Subvention, *supra* note 2. [Electronic copy provided in the accompanying USB flash drive as Source 11]; *see also* Extraordinary Chambers in the Courts of Cambodia, *Trial chamber grants one more week for the filing of closing briefs and sets a new schedule for closing arguments in case 002/02*, Press Release (April 28, 2017), available at: <https://eccc.gov.kh/sites/default/files/media/Trial%20Chamber%20press%20release%20English%20final.pdf>. [Electronic copy provided in the accompanying USB flash drive as Source 22].

the trial arguments are also complete.¹⁷ To release the accused at this stage would be to waste many years worth of money and time spent throughout the investigation and trial.

Finally, the ECCC currently has one appeal in Case 004: to appeal the dismissal of the case against Im Chaem.¹⁸ Another appeal may be relevant if the ECCC were to close after judgment is issued on Case 002/02 but before an appeal is concluded. This would raise the issue of whether the accused's conviction – or lack of conviction – would stand without an appeal being completed. Likewise, if the ECCC were to close while an appeal is pending, the accused's rights may be different than if the appeal was concluded.

The Special Tribunal for Lebanon¹⁹ and the Special Court for Sierra Leone²⁰ have both also faced similar funding issues in the past. This memorandum analyzes

¹⁷ *Id.*; see also ECCC Case Load, *supra* note 14. [Electronic copy provided in the accompanying USB flash drive as Source 21].

¹⁸ Request for Subvention, *supra* note 2. [Electronic copy provided in the accompanying USB flash drive as Source 11].

¹⁹ SPECIAL TRIBUNAL FOR LEBANON COLLECTION: THE INDEPENDENT INVESTIGATION COMMISSION, 2 (Cecile Hoitink ed., 2014). [Electronic copy provided in the accompanying USB flash drive as Source 1]; see also United Nations Security Council, *Fourth Report of the Secretary-General submitted pursuant to Security Council Resolution 1757 (2007)*, (February 24, 2009) (formation document that explains funding of the tribunal.) [Electronic copy provided in the accompanying USB flash drive as Source 12]; see also Daniel T.P. Runge, *The Special Tribunal for Lebanon's Unique Beginnings, Its Political Opposition and Role as Model for Future Ad Hoc Criminal Tribunals for Terrorism Prosecution*, 19 SW. J. INT'L L. (2012) (provides an explanation on the foundation of the Special Tribunal for Lebanon and explains the impact of its criminal procedure). [Electronic copy provided in the accompanying USB flash drive as Source 4].

²⁰ Tom Perriello and Marieke Wierda, International Center for Transitional Justice, *The Special Court for Sierra Leone Under Scrutiny*, (March 2006), available at: <http://hrlibrary.umn.edu/instree/SCSL/Case-studies-ICTJ.pdf>. [Electronic copy provided in the accompanying USB flash drive as Source 23].

what happened in other tribunals and uses that information to further evaluate and determine the most effective solution for each of these problems to ensure that all parties are protected. When looking specifically at the legal ramifications of future indictments, current charges and defendants, and current appeals, the Special Tribunal for Lebanon provides beneficial insights.

The Special Tribunal for Lebanon enacted “completion strategies” at the start of the tribunal in order to account for these future problems.²¹ These “completion strategies” formed agreements that made arrangements regarding where inmates would serve the rest of their sentences if the court was to close, and also to where acquitted persons would be transferred.²² Specifically, the agreements are enacted with the purpose that “a state willing to sign an enforcement agreement would be agreeing either to take in a convicted person to serve his or her sentence, or to relocate someone who has been acquitted but cannot return to his or her country of origin because of security or other concerns.”²³ These enforcement agreements allow for the guaranteed continued confinement of convicted individuals, should the Residual Court not be able to maintain confinement.

²¹ Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion of Residual Mechanisms*, 104 AM. SOC'Y INT'L L. PROC. 45, 46 (2010) [hereinafter “Giorgia Tortora”]. [Electronic copy provided in the accompanying USB flash drive as Source 5]; *see also* Co-Operation Agreement Between The Special Tribunal for Lebanon and The International Criminal Police Organization – INTERPOL (2009). [Electronic copy provided in the accompanying USB flash drive as Source 24].

²² Giorgia Tortora, *supra* note 21, at 45. [Electronic copy provided in the accompanying USB flash drive as Source 5].

²³ *Id.*

Although there was no completion strategy enacted at the time of formation of the ECCC, the ECCC does now have a “completion plan” that is updated quarterly.²⁴ While the enactment of this completion plan is “rather late” compared to other tribunals,²⁵ the implementation is still beneficial. Not only does the plan outline what is left to be done, it also shows potential donors the exact stage of each case and in turn this can avoid the problem that Sierra Leone faced when the voluntary donations stopped. While the completion plan of the ECCC is a constructive starting point, the ECCC should create and enact similar enforcement agreements with other states in order to ensure that the convicted persons from Case 002/01 complete their sentence regardless of any future funding of a residual court.

The ECCC is well-past its starting stages, but creating these agreements now will still be effective in ensuring that all of the ECCC’s efforts are not lost if funding is lost. Moreover, an agreement of this nature can be effective when looking at the status of current investigations and trials. Since the ECCC is established as a domestic court within Cambodia²⁶, then the Cambodian government may be the

²⁴ Extraordinary Chambers in the Courts of Cambodia (ECCC), *Completion Plan*, Revision 14 (September 30, 2017), available at: <https://www.eccc.gov.kh/sites/default/files/ECCC%20Completion%20Plan%20-%20Revision%2014.pdf>. [Electronic copy provided in the accompanying USB flash drive as Source 25].

²⁵ Simon Meisenberg and Ignaz Stegmiller, *THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: ASSESSING THEIR CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW*, ASSER PRESS, International Criminal Justice Series, Volume 6, at 128. [Electronic copy provided in the accompanying USB flash drive as Source 2].

²⁶ Financing Special Tribunals, *supra* note 2. [Electronic copy provided in the accompanying USB flash drive as Source 3].

easiest to form an agreement with. However, it is not necessarily the only option. The ECCC should form an agreement with another court or state, which has proper jurisdiction, to continue the investigations and trial should the UN stop the ECCC's funding.

B. Legal Ramifications for Residual Functions

If the ECCC's funding stops and the court closes its doors, there will still be residual functions that need to be completed. In 2007, The Special Court for Sierra Leone faced extreme budget problems.²⁷ When determining the functions of the ECCC's residual court, this memorandum will draw parallels to the functions that the Residual Special Court for Sierra Leone held after the voluntary contributions were reduced and the court was closed.²⁸

In Sierra Leone, the Special Court was run by the implementation of voluntary donations.²⁹ When the Special Court of Sierra Leone returned a verdict on

²⁷ United Nations, *Special Court For Sierra Leone Faces Funding Crisis, As Charles Taylor Trial Gets Under Way, Security Council Told Today In Briefing By Court's Senior Officials*, (June 8, 2007), available at: <http://www.un.org/press/en/2007/sc9037.doc.htm> [Electronic copy provided in the accompanying USB flash drive as Source 13]; see also Cambridge University Press, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, available at: http://assets.cambridge.org/97811070/29149/frontmatter/9781107029149_frontmatter.pdf. [Electronic copy provided in the accompanying USB flash drive as Source 6].

²⁸ United Nations General Assembly, *Report on the use of the commitment authority and request for a subvention to the Residual Special Court for Sierra Leone, Report of the Secretary-General*, at ¶ 7, (September 12, 2017), [hereinafter "UN Report on the RSCSL"], available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/285/25/pdf/N1728525.pdf?OpenElement> [Electronic copy provided in the accompanying USB flash drive as Source 14].

²⁹ United Nations General Assembly, *Request for a subvention to the Special Court for Sierra Leone, Report of the Advisory Committee on Administrative and Budgetary Questions*, (December 14, 2012), available at: [https://documents-dds-](https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/450/01/pdf/N1245001.pdf?OpenElement)

a high-profile case, many donors assumed that it no longer needed financing, and in return the Court faced a serious decline in voluntary contributions.³⁰ This situation in Sierra Leone shows the ECCC potential solutions for handling a loss of funding, specifically when looking at residual functions.

The legal ramifications of a budget cut on the residual functions of the ECCC will likely be similar to those established in the Residual Special Court for Sierra Leone (hereinafter “RSCSL”).³¹

In Sierra Leone, there were significantly less employees in the residual court than there were in the original court.³² Specifically, the court went from approximately 400 employees to roughly 12.³³ The RSCSL was funded by voluntary contributions, and there were fewer constraints on alternate means of funding.³⁴ This should also be expected if there is a Residual Court for the Extraordinary Chambers in the Courts of Cambodia. The Residual Court will likely require a

ny.un.org/doc/UNDOC/GEN/N12/651/30/pdf/N1265130.pdf?OpenElement. [Electronic copy provided in the accompanying USB flash drive as Source 15].

³⁰ *Id.*, at ¶7.

³¹ See UN Report on the RSCSL, *supra* note 28, at ¶7 (thorough explanation of the residual functions established in the RSCSL). [Electronic copy provided in the accompanying USB flash drive as Source 14].

³² Special Court for Sierra Leone; Residual Special Court for Sierra Leone, [Hereinafter “Residual Special Court for Sierra Leone”], available at: <http://www.rscsl.org>. [Electronic copy provided in the accompanying USB flash drive as Source 26].

³³ *Id.*

³⁴ *Id.*

significant amount of voluntary donations, and it will also likely incur a significant decrease in the number of employees.³⁵

When looking specifically at the *functions* of the residual court, the functions of the RSCSL lay a foundation. As stated in a United Nations General Assembly Report:

These important and ongoing functions include: supervising the enforcement of sentences; reviewing convictions and acquittals; conducting contempt of court proceedings or referring them to national jurisdictions; providing witness and victim protection and support; maintaining, preserving and managing the archives of the Special Court and the archives of the Residual Special Court itself; responding to requests from national authorities for access to evidence and with respect to claims for compensation; providing defence counsel and legal aid for the conduct of proceedings before the Residual Special Court; and preventing double jeopardy by monitoring national proceedings. The Residual Special Court also has the power to prosecute the remaining fugitive, Johnny Paul Koroma, should he be alive and if his case is not referred to a competent national jurisdiction.³⁶

Other jurisdictions have also adopted comparable functions that would be essential for a residual court.³⁷

³⁵ See generally *id.*

³⁶ UN Report on the RSCSL, *supra* note 28, at ¶7. [Electronic copy provided in the accompanying USB flash drive as Source 14].

³⁷ See Giorgia Tortora, *supra* note 21, at 45-6 (“Areas of the STL's work that reflect such perspective include the organization of the archives, the consideration of possible legacy initiatives, the inclusion of acquittal provisions in enforcement-of-sentences agreements, and the incorporation of completion-strategy clauses in other agreements.”) [Electronic copy provided in the accompanying USB flash drive as Source 5]; see also Anne Joyce, *The Role of States in the Closure of the International and Hybrid Criminal Tribunals*, 104 AM. SOC'Y INT'L L. PROC. 43, 43-4 (2010) (“The United States-and many other countries-view the successful closure of these courts as a key part of the completion of their mandates. How do

Similar to the functions of the RSCSL, the major functions of the future Residual Court for Cambodia would be: maintaining detention and all issues relating to detention, maintaining control and protection of the archives, ensuring witness protection, responding to requests for evidence, holding any remaining proceedings and providing counsel for said proceedings, ensuring that the accused's rights are not violated, such as double jeopardy, and prosecuting any remaining cases.³⁸ While this is a lengthy list of functions for a group of roughly 12 individuals³⁹, the number of persons currently in confinement in Cambodia is small enough to make the functions manageable.

The first function of the Residual Court is to maintain detention of individuals who have already been found guilty and have no outstanding appeals. For the Residual Court of Cambodia, this would involve Case 002/01. The accused would not simply be free to leave at the closure of the ECCC, because the residual court would be in place to maintain the detention. However, if the Residual Court were to also be closed, the issue would arise of where the accused would then go. This is

supportive states define successful closure? Successful closure can be defined in many ways but, most importantly, it means the following: no impunity for those who have been indicted by the tribunals and are currently fugitives; ongoing protection of tribunal witnesses, including through the use of contempt proceedings; ongoing provision of security for and appropriate access to the tribunals' archives; the creation of residual mechanisms for the tribunals that are as efficient, streamlined, and downsized as possible; and-more broadly-continued peace and stability in the affected regions.") [Electronic copy provided in the accompanying USB flash drive as Source 7].

³⁸ Residual Special Court for Sierra Leone, *supra* note 32. [Electronic copy provided in the accompanying USB flash drive as Source 26].

³⁹ *Id.* (Explaining how the number of employees from the SCSL was reduced to about a dozen in the RSCSL after the SCSL lost funding and was closed: "Unlike the Special Court, which at its busiest employed more than 400 staff in Freetown and The Hague, the RSCSL is a small body with about a dozen staff.")

where a completion strategy would also be beneficial. In the RSCSL, the function of maintaining detention also included monitoring the conditions of imprisonment.⁴⁰ It is necessary to ensure that the building where inmates are confined has all necessities, including but not limited to: heat, air, water, and food. The RSCSL had seven persons total in custody, “one in the United Kingdom of Great Britain and Northern Ireland and six in Rwanda.”⁴¹

The obligation of ensuring witness protection is essential for the residual court. Witnesses from past and present trials, as well as all investigations, deserve to be protected. This is especially important if the individual the witness accused is free to go after the ECCC closes its doors. One manner of ensuring witness safety is by completing a threat assessment for each of the witnesses, as the RSCSL did.⁴² The Residual Court may also turn to both victims and witnesses for their perspectives on potential early release of certain inmates.⁴³ Finally, the Residual Court would also

⁴⁰ UN Report on the RSCSL, *supra* note 28, at ¶19. [Electronic copy provided in the accompanying USB flash drive as Source 14].

⁴¹ *Id.*, at ¶17.

⁴² *Id.*, at ¶12 (“Pursuant to article 18 of the statute of the Residual Special Court, the Witnesses and Victims Protection and Support Office continues to actively monitor and provide support to over 100 witnesses in Sierra Leone, as well as to those witnesses located outside Sierra Leone, and maintains updated information on the witnesses through regular contact. The Office also conducted a nationwide comprehensive threat assessment for all witnesses, including those located in Liberia, during the second half of 2016 and the first quarter of 2017.”)

⁴³ *See id.*

need to provide other services to witnesses, such as relocation and medical assistance for certain witnesses.⁴⁴

The Residual Court would also need to maintain all archives. The RSCSL maintains its archives of approximately 600 linear meters of paper archives and 13.4 terabytes of digital archives, while the original archives remain at The Hague.⁴⁵ Maintaining archives is an ongoing task that must continuously be completed.⁴⁶ Similarly, the Residual Court for Cambodia will need to maintain its archives to ensure that all final documents from the ECCC are accounted for an indexed, and that all data is properly stored.

Another function of the Residual Court would be to respond to requests for evidence and assistance. The RSCSL typically responds to requests from other states when a former individual from the Court is requesting a certain status in the foreign

⁴⁴ *Id.* (“Meanwhile, the Office continues to implement protective measures, such as relocation, and provides welfare and medical assistance to vulnerable witnesses, including, where appropriate, surgical operations.”)

⁴⁵ *Id.*, at ¶24-5 (“[¶24] The physical archives of the Residual Special Court occupy approximately 600 linear metres of paper records, and the digital archives occupy approximately 13.4 terabytes. [¶25.] The original archives continue to be maintained at the Dutch National Archives in The Hague.”)

⁴⁶ *Id.*, at ¶24 (“The maintenance of the archives of the Special Court and the Residual Special Court is ongoing. Archivists continue to work to complete the archiving of all final Special Court documents and data.”); *see also* Giorgia Tortora, *supra* note 21, at 46 (“The STL has employed an archivist to work on policies to: (1) keep track of the sources of STL documents, [] and (2) ensure consistency in the way information is classified and processed both within the different organs and within each organ. In addition, an internal administrative instruction is in the process of being finalized to outline a STL-wide information management policy.”) [Electronic copy provided in the accompanying USB flash drive as Source 5].

state, such as asylum.⁴⁷ The RSCSL also assists researchers with their projects by providing information.⁴⁸ Similarly, the Residual Court for Cambodia should be able to respond to any requests for information or assistance from other agencies or states. This information may be related to: former suspects, accused persons, victims, or witnesses.

If the Residual Court is able to, assisting researchers with academic or other projects is also encouraged. Assisting with academic research projects is beneficial to look at trends and patterns within international criminal law and crimes against humanity and crimes of genocide. This information and research may be key for academics to learn why these crimes happened and how to prevent these crimes from happening again in the future. International criminal tribunals essentially create a record of history for the time period during which the crimes were committed, and that is invaluable information. The Residual Court should also be prepared to translate any documents to ensure historical accuracy.⁴⁹

⁴⁷ *Id.*, at ¶23 (“In keeping with the aspect of its mandate relating to the provision of assistance to national prosecuting authorities, the Residual Special Court has continued to receive and respond to requests for assistance from national authorities. To date, at least 22 such requests have received full responses through the Registry and the Office of the Prosecutor, while work continues on follow-up issues regarding further requests.”)

⁴⁸ *Id.* (“In addition, the Registry and the Office of the Prosecutor received and responded to requests for information or assistance from researchers engaged in academic and media projects.”)

⁴⁹ Giorgia Tortora, *supra* note 21, at 46 (“In this context, the STL is seeking funding to ensure translation of STL public-trial transcripts into Arabic, in order to enhance current access to its work and the future value of its archives. The STL has also established a National Visiting Professional Project for Lebanese residents and citizens, with the aim of benefiting from a mutual learning process, both now and in the concluding phases of work of the tribunal.”) [Electronic copy provided in the accompanying USB flash drive as Source 5].

The Residual Court would also hold any remaining proceedings and would provide counsel for said proceedings. These proceedings may include: applications for early conditional release; appointing of counsel; violations of conditional release; motions for acquittal; new evidence; and other residual functions relating to indicted persons who are still at-large.⁵⁰ Assuming no other cases complete trial and appeal before the funding is cut, then the only case that this would apply to is Case 002/01. However, if a judgment has been reached in Case 002/02 before funding is lost, then many of these proceedings may be relevant for all appeals and a variety of other motions and hearings – regardless of whether the verdict is guilty or not guilty.

The Residual Court would ensure that the accused’s rights are not violated, such as double jeopardy. This function is also related to providing information to other agencies about any other indictments, and also holding other proceedings within the ECCC. Regardless of the context of double jeopardy, the main purpose is to ensure that the accused’s rights are upheld and that the accused is not tried twice for the same crime.

Finally, The Residual Court can prosecute any remaining fugitives. While this function was relevant to the fugitive in the RSCSL⁵¹, it may not be necessary in the

⁵⁰ UN Report on the RSCSL, *supra* note 28, at ¶14-6 (explaining judicial and administrative proceedings and providing examples: Allieu Musa Kondewa for conditional early release; Charles Ghankay Taylor for appointment of new counsel; and Johnny Paul Koroma who is still at-large with an unknown status.) [Electronic copy provided in the accompanying USB flash drive as Source 14].

⁵¹ *Id.*, at ¶ 7 (“The Residual Special Court also has the power to prosecute the remaining fugitive, Johnny Paul Koroma, should he be alive and if his case is not referred to a competent national jurisdiction.”)

Residual Court for Cambodia. This will be dependent on what stage the investigations and trials are at when the funding is cut. It will also depend on the status and location of all accused persons. While it currently remains unlikely that the Residual Court itself would prosecute an accused person, this function is important to consider if the ECCC begins to draft completion strategies and agreements.

The aforementioned functions are the critical functions that the Residual Court for Cambodia will need to complete, if the funding is cut, in order to ensure that the convicted persons' rights are upheld and that the witnesses and victims remain healthy and safe.

Importantly, the Residual Court must also ensure “watertight continuity of jurisdiction from the existing tribunals to the residual mechanism and its respective branches.”⁵² By ensuring continuous jurisdiction, this will enable the Residual Court to continue its essential functions. As stated earlier, the ECCC’s formation documents, specifically the Agreement, do not contain language on transfer of jurisdiction. This issue will be especially relevant when ensuring that not only the Residual Court has jurisdiction, but also that any future court to try the accused also has “watertight continuity of jurisdiction.”⁵³

⁵² Huw Llewellyn, *The Security Council's Consideration of the Establishment of Residual Mechanisms for the International Criminal Tribunals*, 104 AM. SOC'Y INT'L L. PROC. 41, 43 (2010). [Electronic copy provided in the accompanying USB flash drive as Source 8].

⁵³ *Id.*

C. Political Ramifications for Cambodia

When discussing international criminal law, it is also necessary to discuss the political impact. “For some commentators the entire project of international criminal justice is *fundamentally* a political one.”⁵⁴ The ECCC was enacted with the purpose of prosecuting and “bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”⁵⁵ Since the ECCC has successfully completed the trial and appeal for Case 002/01,⁵⁶ the citizens of Cambodia can be assured that the ECCC is taking these crimes seriously and prosecuting accordingly. If the ECCC closes its doors and stops prosecuting these crimes simply because the funds were stopped, this would send a very bad message to the people of Cambodia, implying that a lack of money means a lack of justice.

The political ramifications of closing the ECCC are appropriately prevalent within the borders of Cambodia. The primary purpose of enacting this Court was to prosecute and hold responsible the leaders of Democratic Kampuchea for their

⁵⁴ Tomas Hamilton and Michael Ramsden, *The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia*, 14 INT'L CRIM. L. REV. 115, 147, at 119 (2014) (emphasis added) [hereinafter “*Politicisation of Hybrid Courts*”]. [Electronic copy provided in the accompanying USB flash drive as Source 9].

⁵⁵ Request for Subvention, *supra* note 2, at ¶2. [Electronic copy provided in the accompanying USB flash drive as Source 11].

⁵⁶ *Id.*, at ¶10.

significant violations of international laws, customs, and conventions.⁵⁷ By prosecuting these individuals, the ECCC gives all citizens of Cambodia notice that their lives are accounted for and that the perpetrators of their victimization will be held accountable for their actions.

Successful prosecution also gives any potential criminals notice that if they do commit these heinous acts against the citizens of Cambodia, then they will also be prosecuted by the ECCC and that conviction will hold, notwithstanding any appeals. Closing the ECCC for no reason besides losing funding would send the message to the criminals that if there is not enough money, they can continue to commit crimes without the risk of being prosecuted by an international court. This also sends the message to children and future generations that crimes against them may not be accounted for simply because a court ran out of money. Overall, the political ramifications within Cambodia are significant and extreme.

An unfortunate reality is that in some instances, there cannot be justice without enough money to keep the courts open. For this reason, it is essential to renew funding for the ECCC and ensure that justice is given for each and every victim. To cut funding and close the ECCC would reinforce a dangerous precedent that was also set in the Special Court for Sierra Leone, not only for Cambodia but also internationally.

D. Political Ramifications Internationally

Internationally, the ECCC is viewed as another international court that was enacted to hold guilty persons accountable for their crimes against humanity,

⁵⁷ *Id.*, at ¶2.

genocide, and other crimes.⁵⁸ To close down the tribunal because of a lack of money would send a discouraging message to other international tribunals, and would cause a serious ripple in both the confidence in the ECCC and the confidence in any other current or future tribunals.

The overall international criminal justice system may be impacted politically by closing the doors of the ECCC due to budgetary restrictions and a lack of monetary contributions. Furthermore, if the UN alone was to drastically reduce funding, this could open the door to other voluntary donors that may cause undue influence on a tribunal. All international tribunals that are run by voluntary donations shall insure that donors and funders of the tribunal do not at all influence the tribunal and its decisions. Notwithstanding possible influence by monetary donors, some already view international tribunals as purely political.⁵⁹ This is why it is essential to maintain neutrality with the funding of the ECCC and that the UN continues funding.⁶⁰ The impacts of these potentially pitfalls would reach worldwide and would impact the potential formation of future tribunals.

⁵⁸ Request for Subvention, *supra* note 2, at ¶2. [Electronic copy provided in the accompanying USB flash drive as Source 11].

⁵⁹ See Politicisation of Hybrid Courts, *supra* note 54, at 119 (“This view is therefore less concerned with the internal aspects of a court's work, for example the degree of procedural fairness which it achieves during a trial; rather it offers a perspective focused on whether prosecutions are brought by purely objective prosecutors, or ultimately, whether political actors are in control. This reflects the widely held view that international justice is foremost a political project, rather than an unselective attempt to apply universal principles of justice.”) [Electronic copy provided in the accompanying USB flash drive as Source 9].

⁶⁰ See *id.*, at 120 (generally explains what the ECCC documents consider to be political interference: “the disclosure of confidential information; a failure to attend court or produce evidence; destruction or tampering with evidence; interference with witnesses; assisting a defendant to evade the ECCC's jurisdiction; and an incitement or attempt of any of these acts.”) [Electronic copy provided in the accompanying USB flash drive as Source 9].

The impact of the ECCC reaches far beyond the borders of Cambodia. On October 9, 2014, Julia O'Brien, First Secretary (Legal), Australian Permanent Mission to the United Nations, made the following statement to the Sixth Committee of the General Assembly:

The international criminal justice system plays an important role in preventing impunity, limiting historical revisionism and upholding the rule of law. By bringing justice to victims of mass atrocity crimes, accountability mechanisms can help establish an inclusive and lasting peace. Australia is therefore committed to supporting the mandates of the relevant ad hoc courts and tribunals. *The Extraordinary Chambers in the Courts of Cambodia achieved a significant milestone on 7 August when the trial chamber delivered guilty verdicts against two former Khmer Rouge leaders for crimes against humanity, which we note are now on appeal.*⁶¹

As shown by the Ms. O'Brien's statement on behalf of Australia, the reach of the ECCC extends to people all around the world. By cutting funding to this International Court, the message is being sent that individuals may not be held accountable for committing heinous crimes against humanity and genocide simply because the court ran out of money and could not continue to function. This message is sent not only to Cambodia, but also to other countries that look to the ECCC as a successful example showing that the international criminal justice system is bringing justice to these victims.

⁶¹ Christina Hey-Nguyen, *Australian Practice in International Law 2014*, 33 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 297, 452-53 (2015) (quote by Julia O'Brien) (emphasis added). [Electronic copy provided in the accompanying USB flash drive as Source 10].

As stated by Giorgia Tortora, “[t]he international and hybrid criminal tribunals are constantly trying to learn from each other, and the [Special Tribunal for Lebanon] has already benefited from the experiences of other tribunals in a number of ways.”⁶² International and hybrid criminal tribunals work most efficiently when they are improved upon by learning from other tribunals’ experiences and actions.

Experiences within the ECCC will impact other current and future international tribunals many ways. Other tribunals that may be in the formation stages will learn the importance of the formation documents and enumerating residual jurisdiction and residual functions within the documents. They will also learn the importance of enacting “completion strategies”.⁶³ If the ECCC loses funding and current investigations and trials are dropped, and because there was not a “completion strategy” in place at the formation of the ECCC, other future tribunals will learn the importance of enacting “completion strategies” at the outset while creating the tribunal.⁶⁴ By implementing these agreements, international courts are able to engage in investigations and trials with less fear that all of their work could

⁶² Giorgia Tortora, *supra* note 21, at 45. [Electronic copy provided in the accompanying USB flash drive as Source 5].

⁶³ *Id.*, at 45. (Showing that even the Special Tribunal for Lebanon began the completion strategy because of other tribunals’ experiences: “Thus, it is unsurprising that the STL has also sought to benefit from the experiences of other tribunals in relation to their completion strategies.”)

⁶⁴ *Id.* (“Discussions on the completion strategy of the ad hoc Tribunals and the Special Court for Sierra Leone (SCSL) have indicated how important it is for the efficiency-and costeffectiveness-of the STL to plan for its own completion ahead of time, as much as feasible, and consider the long-term effects of its decisions.”)

simply be dropped if funding is lost.⁶⁵ Restricting funding and closing the ECCC will cause other nations to lose confidence in the international criminal justice system and therefore harming future chances at other international courts forming to bring justice. The political international effect of reducing or eliminating funding to the ECCC would be severe enough to damage global confidence in the entire international criminal justice system. Lastly, cutting funding to the ECCC will send a message that international criminal tribunals are expendable courts.

IV. Conclusion

In summation, the legal and political effects of cutting funding will expand far beyond simply closing the ECCC and may cause rippling effects to be felt in future years, trials, and investigations. Looking forward, the experiences of the ECCC will be beneficial to showing other future tribunals the “importance of carefully considering the administrative and oversight structure of tribunals funded through voluntary contributions *before* the commencement of their work.”⁶⁶ This will ensure that all future tribunals learn from actions of prior tribunals and continue to move forward.

A. Legal Ramifications for Ongoing Investigations and Trials

The legal ramifications of closing the ECCC will have an impact on current trials and investigations within the Court. It is essential for the ECCC to form and

⁶⁵ See Giorgia Tortora, *supra* note 21, at 45. (“Consequently, even though the STL is currently concentrating most of its efforts and resources on the investigations, the tribunal is already considering issues that could affect the completion of its operations.”) [Electronic copy provided in the accompanying USB flash drive as Source 5].

⁶⁶ Financing Special Tribunals, *supra* note 2, at 116. [Electronic copy provided in the accompanying USB flash drive as Source 3].

enter into agreements with other qualified countries to continue investigations and trials after the closure of the ECCC.

B. Legal Ramifications for Residual Functions

There legal ramifications leading to the creation of a Residual Court for Cambodia to perform all of the residual functions of the Court. This Residual Court will perform various functions to ensure the continued detainment of convicted individuals and protection of witnesses and victims. The Residual Court will also maintain all archives, respond to evidence requests, hold hearings, provide counsel, protect the accused's rights, and prosecute any remaining fugitives. While there are many functions of the Residual Court, each of the functions is essential in ensuring the continued integrity of the ECCC and other international courts.

C. Political Ramifications for Cambodia

The political ramification of cutting funding to the ECCC will send a message within Cambodia that their criminals are not being held accountable for the heinous acts they committed because of budget cuts. Cambodians will lose confidence in the ECCC, and this will hinder any possible future re-opening of the court.

D. Political Ramifications Internationally

The political ramification of cutting funding to the ECCC will also send a message internationally that these international criminal courts are expendable. The severe lack of confidence this instills in the international criminal justice system is felt far beyond the walls of the ECCC. Not only does this hurt the current trials and investigations, but it also hurts the potential for future prosecution of crimes against humanity and crimes of genocide.