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Does political pressure necessarily amount to political interference. Specifically addressing what can be done to alleviate worries that political pressure amounts to political interference within the international courts

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CASE WESTERN RESERVE
UNIVERSITY

SCHOOL OF LAW

MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA

ISSUE: DOES POLITICAL PRESSURE NECESSARILY AMOUNT TO POLITICAL INTERFERENCE

SPECIFICALLY ADDRESSING WHAT CAN BE DONE TO ALLEVIATE WORRIES THAT POLITICAL
PRESSURE AMOUNTS TO POLITICAL INTERFERENCE WITHIN THE INTERNATIONAL COURTS

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J.D. Candidate, May 2016
Fall Semester, 2014**

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I. Introduction and Summary of Conclusions

A. Issue and Question

The Extraordinary Chambers of the Courts of Cambodia (ECCC) asked the War Crimes Prosecution Lab at Case Western Reserve School of Law, to examine the question: does political pressure on judges, prosecutors, and defense lawyers necessarily amount to political interference in a fair trial process?¹ I have been asked to identify various cases and situations that have examined the effects or lack thereof of political pressure on the processes of international law.

The ECCC has been the object of much criticism when it comes to the involvement of the Cambodian government. Public statements from Prime Minister Hun Sen about the quantity of prosecutions that should be undertaken, circumstances surrounding Cases 003 and 004, and the formation of the tribunal itself have all been highly publicized and criticized by the international community.

This memorandum states that even in cases where the government holds sway in the processes of the judicial system, the trials themselves can be fair. A fair trial is a guarantee under international human rights law; additionally a fair trial increases the legitimacy of a court. Legal systems around the world generally acknowledge that the accused in a criminal case have a right to a fair trial, which in part consists of an impartial judiciary.²

a. Summary of Conclusions

There is scarce authority on the definitions of political pressure and political interference, especially in the international sphere. Courts all mention the importance of an impartial judiciary

¹ Does political pressure on judges, prosecutors and / or defense lawyers necessarily amount to political interference in a fair trial process? Please provide as many examples as possible where judicial authorities have held that political pressure does not necessarily amount to breach of an accused's fair trial rights to an independent and impartial trier of fact.

² For the purposes of this memo the judiciary is defined as: prosecutors, defense, and judges.

and concur that political interference is bad; however no documents define what those things mean. Therefore part of this memorandum will propose working definitions for “political pressure” and “political interference³.”

The Extraordinary Chambers of the Courts of Cambodia (ECCC) office of the Prosecutor has asked that this paper examine cases in which political pressure was extant but did not amount to political interference. International law has long been battling the looming presence of political pressure and interference. High profile international cases ranging from that of Charles Taylor to that of Rios Montt, in which there have been allegations of political interference both in the proceedings and the structures of the various tribunals, have been upheld as fair. Furthermore, other cases have pointed out that an appeals mechanism or a reevaluation of a case can mitigate possible unfairness that might be caused by political interference. Mechanisms meant to prevent political pressure from amounting to political interference, could also be useful for the ECCC’s situation.

Since the ECCC posed this question, an analysis of the Chambers will be helpful in discussing whether or not political entities hold sway in the Chambers. The United Nations (UN) and Cambodia have been trying to balance their interests, making the formation of the ECCC contentious. The formation of the ECCC incorporated various internal mechanisms to alleviate the possibility of unfair proceedings, due to ideologies of the appointed judges, prosecutors, and defense lawyers. Political pressure on the judiciary system does not mean that the pressure interferes with the outcomes of the trials⁴. The internal rules of the court call for the utilization of international standards in the processes of the court; furthermore the Internal Rules

³ For definitions and discussion see, Section III(A)

⁴ For definitions and discussion see, Section III(A)

of the ECCC state that the judiciary may not accept or seek any instructions from any source, including the government, other than the rules of the ECCC. The ECCC has mechanisms that were negotiated into the system by the United Nations and Cambodia to combat the possibility that political pressure could become political interference.

Finally this memorandum will explore possible policy considerations that speak both for and against the importance of political pressure. The final section will explore political pressure in international law and the possibility that the system might not function at all without political pressure. This analysis will be useful to the ECCC, in cases where some members of the international community suggest that all political pressure must be eradicated.

This memo concludes that just because there is political pressure, such pressure need not always lead to political interference. This paper will use cases to outline that idea, and will also point to mechanisms built into the ECCC which function to prevent political pressure from becoming political interference.

II. Factual Background

A. History of the Khmer Rouge:

From 1975 until 1979 the Communist Party of Kampuchea, colloquially known as the Khmer Rouge, held power in Cambodia. The Cambodian people endured an incredible amount of suffering during this time period because of the policies of the Khmer Rouge. These policies included the use of forced labor camps and the eradication of small villages thought to be harboring enemies of the Khmer Rouge. In January 1979 a Vietnamese army freed Cambodia from the Khmer Rouge; the Vietnamese then occupied Cambodia until 1989. The numbers are unclear but loss of life during the Khmer Rouge period is estimated between 7.3 to 7.9 million

people.⁵

B. Formation of the ECCC

The ECCC was formed by a series of negotiations spanning from 1997 to 2003 between the UN and Cambodia, since “neither the Cambodian Government nor the UN Secretariat trusted the other side to run the process. Both sides had ample historical reasons to be suspicious of one another.”⁶ Because Cambodia did not have the resources or experience to create a new court, they had to rely upon the UN. Furthermore, because of the mutual distrust between the UN and Cambodia, many sources have published an analysis of that tension. In the book *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, John Corciari and Ann Heindel explain:

UN participation was intended to ensure that the ECCC would meet international standards, but where the United Nations is unable or unwilling to fight for those standards, a hybrid court is left to the mercy of national interests.⁷

While the ECCC’s situation is not as dire as this quotation makes it out to be, nevertheless this comment effectively indicates the nature of the tension between the government of Cambodia and the UN. The negotiation process was complicated, with the basic structure of the court central to the question; the final product was a hybrid tribunal.

C. Structure of the ECCC

The ECCC is comprised of three judicial chambers, the office of the co-investigating judges, the office of the co-prosecutors, and an administrative office which oversees the defense

⁵ Susanna Linton, at 95-6. [Electronic copy provided in accompanying USB flash drive at Source 13] Citing: Report of the Group of Experts for Cambodia Established Pursuant to UNGA Res. 52/135, transmitted by the Secretary-General along with his own report, UN Doc. A/53/850, S/199/231. [Electronic copy provided in accompanying USB flash drive at Source 6]

⁶ John D. Ciorciari & Ann Heindel, at 15. [Electronic copy provided in accompanying USB flash drive at Source 21]

⁷ Id. at 201.

and victim support.⁸ In this memorandum, the three judicial chambers and the offices of the co-prosecutors and co-investigating judges, are of particular interest.

D. Allegations of Political Pressure Upon the Judiciary of the ECCC

The ECCC's efforts to find justice for victims and survivors of the Cambodian genocide have also been tainted by coverage by the media and legal scholars. Scholars have pointed out that: "Accountability efforts for the Cambodian genocide have fallen victim to a process in which peace was prioritized over justice, and national interest (on the part of Cambodia and an array of international actors) was prioritized over both."⁹ In recognition of the danger that this would happen, the ECCC was created with various internal mechanisms to combat the political pressure and possible corruption of the judiciary within the ECCC itself.

III. Substantive Legal Discussion

A. Definitions

1. Political Pressure

For the purposes of this memo, "political pressure" is the power exerted by political actors; in the international sphere this includes but is not limited to States, collections of States, and non-governmental organizations. Political pressure is difficult to define, however the simplest and most encompassing way to describe it would be the exertion of persuasive efforts by those in power. If the government of one state wants a particular outcome and makes that known, this would constitute political pressure for purposes of this memo. Political pressure can vary from light to intense. Intense political pressure, of course, has the highest likelihood of

⁸ The three chambers are: Pre-trial Chamber, Trial Chamber, and Supreme Court. *See* 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 (Jun. 6, 2003), I-41723 UNT.S. 2329 [Electronic copy provided in accompanying USB flash drive at Source 2]

⁹ Kristen Ainley, at 26. [Electronic copy provided in accompanying USB flash drive at Source 22]

resulting in political interference.

Political pressure can be seen as necessary for the application and formation of international law, because without it international courts would have no authority. Without the authority provided by the backing of political entities, the international courts would lack the ability to enforce their judgments, because unlike States, international courts do not have autonomy, or an enforcement body.

2. Political Interference

For the purposes of this memo, “political interference” results when political pressure brings about a change in the outcome of a particular situation. It is very difficult to find a bright-line distinction where “pressure” morphs into “interference.”

3. Judiciary

For the means of this memorandum, the judiciary is a term used to refer to the people that make up the court; with particular emphasis upon the judges, prosecutors, and defense lawyers.

B. Discussion of Particular Cases and Historical Development of International Courts

The establishment of the International Criminal Court and various cases demonstrate that political pressure upon the processes of the court does not necessarily lead to “interference” in the sense of directly affecting the outcomes of trials. And where it has done so, there are various mechanisms intended to counteract such interference.

1. States Are Allowed to Decide What Laws and Procedures are Applicable in Their Tribunals

In his article “Assessing the Impact of the United Nations War Crimes Commission on the Principle of Complementarity and Fair Trial Standards” Prof. Mark S. Ellis discusses the formation of the United Nations War Crimes Commission (UNWCC) and its role in creating fair

trial standards during the establishment of the International Criminal Court (ICC) and the subsequent policy decisions that led to the establishment of various tribunals:

It is interesting to note that the responsibilities of the Commission extended only to war criminals and not to those individuals who *committed atrocities against nationals of their own country*. This exception aimed to ensure that the Commission did not interfere with a nation and its own citizens and sought to protect a State's right to punish its own nationals....[T]he Commission went even further and noted that the *national courts should decide what laws and what procedure were applicable*.¹⁰

The UNWCC, in its establishment of the ICC, sought to assist the States parties in establishing a fair trial process, not to dictate to them what was allowable. Based upon the principles of the UNWCC the applicable laws and procedures of the ECCC should be determined by the ECCC and the Cambodian government. Furthermore political pressure upon which processes and procedures are applicable in the court, can be mitigated through various mechanisms, as outlined in the following cases.

2. Intense Political Pressure Alone Cannot Stop a Trial

Rios Montt was the President of Guatemala during the Guatemalan Civil War, from 1982 until 1983. Global spectators and Spain accused his regime of genocide and crimes against humanity, due to the targeting of the indigenous Maya population during the purge of the guerrilla movement in Guatemala¹¹.

President Otto Perez Molina maintained throughout the Rios Montt trial that genocide never happened in Guatemala, in part because Molina was a regional commander¹² during the Montt regime. Molina's public statements arguably amounted to political pressure upon the

¹⁰ Mark S. Ellis, at 200. Emphasis added. [Electronic copy provided in accompanying USB flash drive at Source 8]

¹¹ "Justice on Trial in Guatemala: The Rios Montt Case - International Crisis Group", at 2. [Electronic copy provided in accompanying USB flash drive at Source 16]

¹² Guatemala City & Bogota & Brussels, *Justice on Trial in Guatemala: The Rios Montt Case*, Latin America Report 5023 (2013). [Electronic copy provided in accompanying USB flash drive at Source 12]

proceedings themselves, because they were statements made by the President of a nation about the very situation that necessitated the trial in question. However, Molina allowed the judiciary to act as a separate power during his presidency. Molina did not appoint judges or meddle with the court's internal affairs. Even with the statements made by the Sitting President of Guatemala, Molina, Montt was originally convicted on May 10, 2013. While his conviction has been overturned on other grounds by the Constitutional Court of Guatemala, the trial will resume in January 2015.¹³ Molina's statements could be construed as political pressure, however with the conviction Montt's trial demonstrates that political pressure does not necessarily equate to political interference.¹⁴ Even though the trial was overturned, the Constitutional Court did not cite political reasons, including the statements of Molina as the reason for overturning the guilty verdict. Rather, the Court noted that when Montt's lawyers walked out Montt was left without representation, which was illegal according to Guatemalan Law.¹⁵ Thus in this case the trial was still allowed to go forward even under intense political pressure, and was overturned only because of a problem with the proceedings themselves.

3. Political Pressure Fails to Stop Otherwise Meritorious Claims

¹³ "Justice on Trial in Guatemala: The Ríos Montt Case - International Crisis Group", at 2. [Electronic copy provided in accompanying USB flash drive at Source 16]

¹⁴ Will Grant BBC, and Guatemala City, at 1. *See also* Guatemala City & Bogota & Brussels, *Justice on Trial in Guatemala: The Ríos Montt Case*, Latin America Report 5023 (2013). [Electronic copy provided in accompanying USB flash drive at Source 15]

¹⁵ Defense lawyers were upset about a legal technicality, as a last ditch effort to suspend the trial they walked out, leaving Montt without representation. The lawyers were upset that the judge who had ordered the trial presided over pre-trial hearings. However the court decided that as long as the closing statements are redone then the trial is still valid. *Ríos Montt's Lawyers Walk Out of Guatemala Genocide Trial*. VOA. (Retrieved 17 Nov 2014). <http://www.voanews.com/content/rios-montts-lawyers-walk-out-of-guatemala-genocide-trial/1644482.html>. [Electronic copy provided in accompanying USB flash drive at Source 20] *See also* Guatemala City & Bogota & Brussels, *Justice on Trial in Guatemala: The Ríos Montt Case*, Latin America Report 5023 (2013). [Electronic copy provided in accompanying USB flash drive at Source 12]

As a result of his involvement in the Sierra Leone Civil War,¹⁶ Charles Taylor the President of Liberia, was accused of crimes against humanity and war crimes. Charles Taylor allegedly created and supported the rebel groups which during the Sierra Leone Civil War committed various crimes against humanity including the use of child soldiers. He was indicted in 2003.

Charles Taylor has alleged that his trial was a conspiracy of foreign nations to convict him and was thus unfair.¹⁷ The Appeals Chamber at the Special Court for Sierra Leone, however, upheld his conviction and his sentence.

The judges agreed that Taylor's assessment of his trial as a conspiracy, was wrong.¹⁸ The judges used their skills of deduction and reasoning to determine that Taylor's interpretation, that his trial was simply a conspiracy by foreign powers, was unfounded. While there may have been political pressure to prosecute Taylor and funding from the UN to run the trial, according to the Appeals Chamber Taylor was convicted based upon the evidence of war crimes presented, not the assertion of the countries. The judges of the Charles Taylor trial examined the evidence and found him guilty because of the evidence, not because foreign countries told the court that he was guilty. No documents from the trial mention political interference however they do mention the presence of the evidence, on which Taylor was found guilty. Thus the court asserts that Taylor was found guilty on the merits of his case and not because of some western conspiracy.

4. Impartiality must be Measured both Subjectively and Objectively and May be Remedied with Appeals Mechanisms

¹⁶ 1991-2002. See Sierra Leone profile. BBC News. Available at: <http://www.bbc.com/news/world-africa-14094419> (Accessed November 17, 2014). [Electronic copy provided in accompanying USB flash drive at Source 23]

¹⁷ "Charles Taylor's Conviction and Sentence Upheld: What next for Him?" at 1. [Electronic copy provided in accompanying USB flash drive at Source 18]

¹⁸ "At Prosecution and Defense Oral Arguments on Sentencing, Charles Taylor Makes Public Statement" at 1. [Electronic copy provided in accompanying USB flash drive at Source 17]

This case rested on a procedural question. It decided whether or not a judge who objected to a decision, may decide on that objection. The original case was about Klazien Wilhelmina de Haan, a woman who was ill due to the chemicals she used in her job at a dry cleaners. Under the Netherlands' Health Insurance Act she was entitled to sick-pay; however after a year of sick-pay the government cut her off. During her trial, a judge who objected to evidence presented, ruled upon the objection thus calling his impartiality into question.

In *de Haan* the European Court of Human Rights found that there had been a violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to a fair trial), when a judge presided over an appeals tribunal called upon to decide on an objection against a ruling for which he was responsible. Furthermore the Central Appeals Tribunal refused to quash the proceedings based upon the composition of the original appeals tribunal, and therefore guarantee impartiality. Thus the Central Appeals Tribunal did not cure the possible impartiality based upon the composition of the court consequently violating Article 6.¹⁹ The *De Haan* case points out that impartiality may be measured both subjectively and objectively and must be measured both ways. Subjectively impartiality must be evaluated on a case by case basis; possible connections of the parties to the court, the situation being tried, etc.. In war crimes tribunals this could involve the connections of the accused to the judiciary. Objectively impartiality must be measured using extant mechanisms created to prevent impartiality, such as rules and procedures. Furthermore the court suggests that the scope of review in an appeals mechanism may make reparation possible for a violation of Article 6 even if

¹⁹ *De Haan v. The Netherlands*, Judgement of 26 of August 1997, 26 EHRR 417. [Electronic copy provided in accompanying USB flash drive at Source 1]

that was not the case for de Haan.²⁰

The idea that biased trial could be remedied by court mechanisms is the main point in *de Haan*. Therefore if there were measurable political interference in the ECCC, objective or subjective, which would be a violation of the accused's right to a fair trial, then an appeals mechanism could be used to combat that partiality, such as a separate chamber for appeals or a system for evaluating complaints of impartiality.

C. Extant Mechanisms That Alleviate Political Pressure Upon the Judiciary of the ECCC

In 1997 the UN was asked in a letter from the Prime Minister of Cambodia, to assist in the prosecution of the leaders of the Khmer Rouge, because Cambodia did not have the experience to handle trying crimes of this magnitude. However because of the aforementioned²¹ tension between Cambodia and the UN, both parties have attempted to implement mechanisms to alleviate any possible appearance of political pressure or interference.

1. The International Standards Adopted into the ECCC

The court, formed as a royal decree by the King of Cambodia and “taking into account the request of the Prime Minister” state in Article 10:

The judges of the Extraordinary Chambers shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law including international humanitarian law and human rights law. Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or other source.²²

Both the Prime Minister and the King of Cambodia have accepted these[?] written rules

²⁰ *Id.* at para. 53.

²¹ See *supra* note 4.

²² Extraordinary Chambers in the Courts of Cambodia (ECCC). 2011. Internal Rules. 3 August. [Electronic copy provided in accompanying USB flash drive at Source 3]

indicating that judges ought to be impartial. Furthermore Article 12 (2) states:

The Extraordinary Chambers 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.²³

These rules were adopted at the behest of both the Prime Minister and the King. Furthermore, the UN implemented additional mechanisms to prevent and remedy the possibility of political interference.

2. Mechanisms to Prevent Political Interference

a. Super-majority Rule

A super-majority requirement for Court action was put into place in order to address the potential impact of government interference because of the inherent structure of the court with its Cambodian majority. This rule was a prerequisite for UN participation in a court which has more Cambodian judges than international judges.²⁴ In the ECCC, any time a decision is made by judges there must be a super majority. Articles 4 and 7 of the Agreement between the UN and Cambodia declare that a decision by either the Trial Chamber or Pre-Trial Chamber require the vote of at least four judges; the composition of those chambers is three Cambodian judges and two international judges. The Pre-Trial Chamber hears motions and appeals against decisions by the investigating judges when a case is still under investigation before trial. In the Supreme Court Chamber, where four of seven judges are Cambodian, a super-majority five out of seven votes is required for a decision²⁵ In both of these situations, in case the Cambodian judges vote together

²³ *Id.* at 8.

²⁴ John D. Ciorciari & Ann Heindel, at 192. [Electronic copy provided in accompanying USB flash drive at Source 21]

²⁵ 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 (Jun. 6, 2003), I-41723

because of intense political pressure, an international judge is required for a decision to become effective. This requirement should at least in theory prevent the intense political pressure from morphing into “interference” by the terms of this memo.

The super-majority rule as a mechanism to prevent political interference is effective; however the potential for a stalemate (where a super-majority cannot be formed, so no action can be taken) means that the efficacy of the court is compromised in order to combat possible injustice. Furthermore even if there are no political reasons for the way votes are cast, there could be an impasse. Thus the super-majority rule could potentially cause the ECCC problems in enacting justice.

The “Duch” trial was Case 001, in the ECCC in which Kiang Kek Lev²⁶ was tried for crimes against humanity, torture, and murder. He was found guilty and sentenced in July 2010. The decisions²⁷ which were not unanimous during the trial did not fall along international lines or result in deadlock.²⁸ The analysis of these voting patterns shows the possibility that there was no political interference during this trial because partisan voting blocs did not arise. This case is an excellent demonstration of how the super-majority rule may be used to police the possibility of political interference.²⁹ Analyzing voting patterns is a good tool for tracking whether political

UNT.S. 2329. [Electronic copy provided in accompanying USB flash drive at Source 2]

²⁶ Known as “Duch.”

²⁷ Such as objections to evidence and the charges Duch was guilty of.

²⁸ *Trial Chamber Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character*, (October 9, 2009). [Electronic copy provided in accompanying USB flash drive at Source 5]

²⁹ See Kristen Ainley, *Transitional Justice in Cambodia: The Coincidence of Power and Principle*, Cambridge University Press, (2014), at 24. [Electronic copy provided in accompanying USB flash drive at Source 22] “There have been small successes at the ECCC – the most significant of which is the completion of the trial of Case 001 and

pressure is becoming political interference, Case 001 shows that the judges of the ECCC resisted political attempts to influence their work.

b. The Judicial Nomination System

Transparency in general processes and procedures is regarded as a means to maintain a legitimate and impartial court. A transparent process for the selection of the judiciary is commonly held as a means for combatting corruption, including political interference. A transparent selection process is defined by the University College of London as:

[O]ne that clearly identifies the potential candidate pool, is accessible to potential applications through advertising, publishes criteria and a procedure for its decision-making, accepts applications in a set format, assesses candidates consistently against its criteria, consults with a set range of outside institutions (if appropriate), makes a decision based on an objective assessment of whether the criteria have been met, and, where appropriate, provides reasons for the decision.³⁰

The UN has attempted to enact a novel procedure, specifically formulated for the ECCC, for the selection and nomination of ECCC judges and prosecutors in order to eliminate any possibility that the judiciary itself was biased:

As part of the UN's efforts to improve the transparency and quality of selection, the ECCC was the first court for which it accepted nominations not only from the States,³¹ but also from anyone else (including self-nominations), which were entered into the database by OSJI. Also for the first time the judges were interviewed by a panel of experts, including two ICTY judges and UN Office of Legal Affairs staff. This new procedure 'is said to provide a better guarantee than previous mechanisms of the selection of impartial and professional officials.'³²

the progress made in Case 002. It remains a possibility that the existence of the ECCC will inspire reform in the Cambodian judiciary – currently heavily dependent upon the government for patronage and protection, widely seen as untrustworthy and corrupt and often poorly qualified.”

³⁰ Centre for International Courts and Tribunals, University College London, *Selecting International Judges: Principles, Process and Politics*, (2008), at 15 (11.1). [Electronic copy provided in accompanying USB flash drive at Source 24]

³¹ States other than Cambodia and UN members.

³² John D. Ciorciari & Ann Heindel, at 192. [Electronic copy provided in accompanying USB flash drive at Source

This procedure follows the definition provided by the University College of London. The nominees are interviewed by an outside panel. This panel is composed of people who are experts in international law. The panel consists in part of ICTY judges; those judges ought to be impartial. Therefore those panelists should be able to identify potential problems with the nominees' partiality.

The ECCC could potentially make the judicial selection process more transparent by requiring the selection panels to publish criteria for nominees and findings after the interview process on whether or not the candidates meet the criteria, in keeping with the above University College London suggestions.

c. The Weighted Dispute Resolution Procedure

Within the Pre-Trial Chamber of the ECCC the chamber must settle disagreements between the co-prosecutors and the co-investigating judges. The teams of co-prosecutors and co-investigating judges, as per the internal rules of the court, must include one international member and one Cambodian member. If the co-investigating judges or co-prosecutors cannot come to an agreement, then either may file a notice which the Pre-Trial Chamber must resolve utilizing the super-majority rule discussed above.³³ Furthermore the rules of the ECCC state that if the Pre-Trial Chamber does not reach a super-majority vote to the contrary, then the investigation will go forward.³⁴ Therefore unless the Pre-Trial Chamber says the case may not go forward the case will go forward, to prevent inaction from thwarting justice.

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³³ See Section II(C)(2)(A)

³⁴ Extraordinary Chambers in the Courts of Cambodia (ECCC). 2011. Internal Rules. 3 August. See also Extraordinary Chambers in the Courts of Cambodia (ECCC). 2014. [Electronic copy provided in accompanying USB flash drive at Source 3]

This rule against inaction is to combat the issues that arise in deciding whether or not to move forward in an investigation. However while this eradicates certain situations³⁵ that could arise because of political interference it does not clarify what happens if other issues were to arise.³⁶ Additionally the internal rules do not discuss any standards that should be applied in resolving disputes. A suggestion to the ECCC would be to draft such standards for resolving a dispute between Chambers, such as voting procedures.

d. Provision Allowing the UN to Withdraw

The final mechanism utilized by the UN to prevent political interference in the ECCC by the Cambodian Government is arguably an attempt by the UN to exert political pressure upon the Cambodian Government. Article 28 of the Agreement between the UN and Cambodia states:

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.³⁷

This provision amounts to political pressure, in the form of financial pressure, from the UN upon the government of Cambodia to maintain international standards within the court. This provision gives the UN a lot of leverage to maintain international legal standards, because the loss of funding would mean the end of the ECCC.³⁸

³⁵ If there were a rule making a Pre-Trial vote necessary to move a case forward, then there could be the potential for a stalemate and possibly gridlock in the pre-trial phases.

³⁶ Such as gridlock once a trial moves forward; If the Pre-Trial Chamber couldn't meet the supermajority rule in moving the case forward, how could we assume that the Trial Chamber would meet the supermajority rule in deciding guilt?

³⁷ 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 (Jun. 6, 2003), I-41723 UNT.S. 2329. Article 28. [Electronic copy provided in accompanying USB flash drive at Source 2]

³⁸ See UN General Assembly, *Report of the Secretary-General on Khmer Rouge trials*, 12 October 2004, A/59/432, para. 45. [Electronic copy provided in accompanying USB flash drive at Source 6]

The withdrawal provision is good for preventing the possibility of Cambodian interference, but it feels as though the UN is utilizing political pressure of its own. Thus the UN is using political pressure to prevent political interference from the Cambodian government.

D. Political Pressure is not Always Political Interference

The ECCC has a lot of political pressure upon it because of the nature of its formation and day to day operation. The ECCC has a variety of mechanisms to combat political interference. These mechanisms are intended to prevent the trials from becoming unfair, and they go a long way toward accomplishing that feat. With the withdrawal option that the UN maintains,³⁹ sometimes political pressure is necessary to prevent political interference. As illustrated by the various examples provided by recent cases⁴⁰ political pressure upon participants does not necessarily equate to political interference in outcomes of the trials. Therefore the trials are not inherently unfair.

The Agreement establishing the ECCC contains measures to prevent interference by the Cambodian government. If the Cambodian Government decides to interfere with the proceedings, the court would become independent if the UN decides to withdraw support or be disbanded due to lack of funding. However this would be counterproductive because it could damage the legitimacy of the court in prosecuting crimes perpetrated by the Khmer Rouge. The legitimacy would be damaged because the UN, in its withdrawal, is confirming that the court has been interfered with by the Cambodian government. The lack of UN participation would also mean that the court would be run only by Cambodian officials, meaning that political

³⁹ *supra* at note 31.

⁴⁰ See Section III(B).

interference would be a sure thing.

Legitimacy is a serious concern for international tribunals. Legitimacy is not only dependent upon the international community but the states' opinions in the rulings⁴¹ are also important in upholding the rulings. The backing of the state is important because it provides legitimacy to the ruling. John C. Yoo in his article "Judicial Independence in International Tribunals" argues that international tribunals, in order to be legitimate in their rulings must "act consistently with the interests of the states that create them."⁴² Therefore, so long as the government of Cambodia is not interfering in the trials themselves the government should be allowed to have a say in the court because the crimes in question were perpetrated by their nationals upon their people.

IV. Policy Considerations

With the rising need for international legal proceedings, involving various governments, political pressure and political interference are a constant presence in the world today. Therefore an analysis of the benefits and pitfalls of political pressure in an international setting is consequently beneficial to this document.

A. Potential Problems with Political Pressure

Critics have attacked the ECCC for prioritizing peace over justice.⁴³ However these critics, the international media, legal experts, states, etc., fail to take into account the current

⁴¹ Lodged against crimes perpetrated by their own nationals upon their current citizens.

⁴² John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1 (2005), at 72. [Electronic copy provided in accompanying USB flash drive at Source 9]

"We have found no evidence that independent tribunals are more effective than dependent tribunals, and some evidence that the reverse is true, that independent tribunals are less effective than dependent tribunals. ... We argue that political unification makes independent tribunals possible. In the international realm, where there is no political unification, international tribunals cannot be both independent and effective. This is not to claim, as some have, that international tribunals serve no useful purpose. As we have explained, international tribunals can help states resolve disputes by providing information on the facts or rules of conduct. But they must act consistently with the interests of the states that create them."

⁴³ Kristen Ainley, at 26. [Electronic copy provided in accompanying USB flash drive at Source 22]

political and social-economic situations in countries that have been subjected to the atrocities prosecuted in international tribunals. The point of the international war crimes tribunals is to seek justice. However, states exert political pressure upon their people and the various arms of governance in order to maintain peace within their countries. There must be a balance, between state and victim interests, in order for international courts to be sustainable in the future. The state provides the forum in which victims may seek justice.

Cases 003/004 of the ECCC are what most media outlets point to as an example of the interference by the Cambodian government on the proceedings of the ECCC. Cases 003/004 focuses upon crimes in specific locations and the suspects remain confidential.⁴⁴ The international attention on these crimes and the inability of the Chambers to come to a conclusion, make the Chambers seem ineffectual and illegitimate. These cases were brought to a standstill due to disagreements between the judges. Judge Kasper-Ansermet, resigned and claimed that the co-investigating judges were dysfunctional.⁴⁵ Because of the actions of the Cambodian government (such as public statements and judicial appointments) and the circumstances that surround these investigations, the international media have painted the ECCC as illegitimate and corrupt.⁴⁶ Such media attention a frequent effect of political pressure and it has the potential to damage the reputation of international courts.

⁴⁴ *Khmer Rouge Crimes in Legal Limbo*. The National.” <http://www.thenational.ae/featured-content/latest/khmer-rouge-crimes-in-legal-limbo> (October 26, 2014). [Electronic copy provided in accompanying USB flash drive at Source 14]

⁴⁵ Office of the Co-Investigating Judges, *Note of the International Reserve Co-Investigating Judge to the parties on the egregious dysfunctions within the ECCC impeding the proper conduct of investigations in cases 003 and 004*. Extraordinary Chambers in the Courts of Cambodia. Document No. D114, March 21, 2012. [Electronic copy provided in accompanying USB flash drive at Source 7]

⁴⁶ *see* John D. Ciociari & Ann Heindel at 167. *see also* Ainley at 26. [Electronic copy provided in accompanying USB flash drive at Source 21]

There is an argument that seems prevalent in the current media with regards to political pressure; that all political pressure is unlawful. If all trials and tribunals were heavily influenced by the political entities that control them then all judgments would be the will of the government and not the conclusion of an impartial trier of fact. The legitimacy of the ruling could be called into question. the last thing that international law needs is its legitimacy further questioned.

B. Potential problems without Political Pressure

Without political pressure international tribunals could not function as they have. Gwyneth McClendo, writing for Human Rights Review, points out that without government cooperation international tribunals would not be functional because fewer than ten people have turned themselves in for prosecution. Furthermore, without government backing most of these tribunals would not be able to make determinations at all.⁴⁷

We live in an imperfect world, there will always be political pressure and political interference; if political pressure is a reason to throw out otherwise legitimate rulings or procedures, then most of the current court systems across the globe are presenting illegitimate rulings. There is a colloquialism that states: “Whenever you have three people in a room you have politics.” The field of international law is no exception. Thus courts must make better procedures for identifying political pressure and differentiating it from political interference. Courts must also create better systems for handling the possibility of political interference, such as appeals systems and internal mechanisms for combatting interference, such as those present in the ECCC.

⁴⁷ Gwyneth C. McClendon, Building the Rule of International Criminal Law: *The Role of Judges and Prosecutors in the Apprehension of War Criminals*, 10 Hum. Rights Rev. 349 (2009), at 369. [Electronic copy provided in accompanying USB flash drive at Source 11]

V. Conclusions

In conclusion political pressure does not become political interference unless it is allowed to dictate the outcomes of a trial. This suggests that not all political pressure results in an inherently unfair outcome.

Political pressure may be kept in check by various mechanisms, which may or may not change the efficacy of the judiciary. The effects of political pressure may be mitigated by judicial decisions, and political interference can be prevented by institutional protocols. Thus political pressure would be prevented from becoming political interference.

The ECCC has many mechanisms which help to offset the potential for abuse by the government. These mechanisms were written into the foundations of the Chambers. In practice they seem to have been effective, although these mechanisms need more time before their efficacy can be fully evaluated. The ECCC has struggled with allegations that the Cambodian Government has been improperly meddling with the affairs of the court. Both parties in this hybrid court have exerted political pressure upon the proceedings and structure of the court, but political interference has not been proven. Therefore instead of declaring all proceedings to be unfair, the proceedings should be evaluated for political interference. If there is political interference the case ought to be retried.

