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## The End of the Khmer Rouge Tribunal: Its Success and Legacy

Choongman Lee\*

### Abstract

This note critically examines the effectiveness of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), in achieving justice against members of the Democratic Kampuchea, also known as the Khmer Rouge, and explores areas where the ECCC could influence international criminal law in the future. The analysis explores the structural flaws, political interference, and challenges faced by the ECCC, particularly in Cases 003 and 004. Despite these challenges, the court successfully convicted three individuals in Cases 001 and 002, providing a degree of justice for victims. Also, the ECCC’s unique features, such as the super-majority rule, victim-centered approach, and residual functions, offer insights into how future international tribunals could be better organized and structured. Ultimately, this note highlights the ECCC’s journey amidst several limitations and emphasizes the lessons international communities could learn from the ECCC.

### Introduction

I regret very much what I did. I joined the movement because I thought something good would come out of it. But finally, it turned bad and now my name is connected to a bad thing.

— Mey Mann, a Khmer Rouge intellectual who sailed to Paris with Pol Pot in 1949, shortly before he died<sup>1</sup>

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1. Pin Sisovann, *KR Intellectual, Friend of Pol Pot, Passes Away*, CAMBODIA DAILY (Aug. 18, 2001), <https://english.cambodiadaily.com/news/kr-intellectual-friend-of-pol-pot-passes-away-25253/>.

In 1997, the Cambodian government (“Government”) requested assistance from the United Nations (“UN”) to establish a tribunal to prosecute senior leaders of the Khmer Rouge (“KR”).<sup>2</sup> In 2001, the Cambodian National Assembly created a court to adjudicate serious crimes committed during the KR period (1975–79).<sup>3</sup> The Government stipulated that the trials be held on Cambodian soil employing Cambodian staff in concert with international staff.<sup>4</sup> The Government invited international participation in the court due to a lack of resources and expertise in international law available at the national level.<sup>5</sup> Ultimately, the UN and Cambodia reached an agreement in June 2003, detailing how the international community would participate in the court.<sup>6</sup> Consequently, the cooperating bodies created the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).

For over 15 years, the ECCC endeavored to effect consequences for members of the KR who, in the late 1970s, killed over 1.5 million Cambodians.<sup>7</sup> In pursuit of these aims, the ECCC spent over \$330 million, ultimately only prosecuting just five people and convicting only three.<sup>8</sup> Two of those convicted have since died due to old age whilst serving life imprisonment.<sup>9</sup> On September 22, 2022, the ECCC

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2. Identical letters from Kofi Annan, U.N. Secretary-General, to the President of the General Assembly and to the President of the Security Council (Jun. 23 1997), (annexed to U.N. Doc. A/51/930, S/1997/488 (Jun. 24, 1997)); Letter from Prince Norodom Ranariddh and Hun Sen, respectively the First and Second Prime Ministers of Cambodia, to Kofi Annan, U.N. Secretary-General (Jun. 21, 1997), (annexed to U.N. Doc. A/51/930, S/1997/488 (Jun. 24, 1997)) [hereinafter Identical letters].

3. Law on the Establishment of Extra-Ordinary Chambers Within the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Aug. 10, 2001, NS/RKM/0801/12, <https://www.eccc.gov.kh/sites/default/files/legal-documents/C300-2001-Law%20on%20the%20establishment%20of%20the%20EC%20and%20Decree-En.pdf> (official English translation).

4. *Id.* art. 9.

5. Identical letters, *supra* note 2.

6. 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, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 117.

7. Seth Mydans, *16 Years, 3 Convictions: The Khmer Rouge Trials Come to an End*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/world/asia/cambodia-khmer-rouge-tribunal.html>.

8. *Id.*

9. See *Cambodia Genocide: Khmer Rouge Prison Chief Comrade Duch Dies*, BRIT. BROAD. CORP. (Sept. 2, 2020), <https://www.bbc.com/news/world-asia-53994189>; see also Scott Neuman, *Nuon Chea, Top Khmer Rouge Leader, Dies At 93 While Serving Life Sentence*, NAT'L PUB. RADIO (Aug. 5, 2019, 3:36 AM), <https://www.npr.org/2019/08/05/748158149/nuon-chea-top-khmer-rouge->

“rendered the summary of its last substantive judgment in Case 002/02, confirming the conviction against Khieu Samphan, the former head of state of Democratic Kampuchea,” also known as the KR.<sup>10</sup> This decision signaled the end of the ECCC.<sup>11</sup> The overall results of the ECCC may appear disproportionate to the time and resources mobilized to support these trials. If international criminal tribunals, such as the ECCC, are not effective in the punishment of egregious criminals, then victims will lose their only judiciary mechanism, especially in states like Cambodia where the leaders, such as Prime Minister Hun Sen who was a member of the KR, have little will to effect justice.<sup>12</sup> Therefore, it remains imperative to assess the overall effectiveness of the ECCC and determine the repercussions it has or will have on the development of international criminal law more broadly.

This note seeks to assess the effectiveness of the ECCC, in its pursuance of justice, and given the court’s dissolution, evaluate the ECCC’s repercussions on international criminal law. As the note will later explain, one should evaluate the tribunal’s effectiveness by examining how successful the ECCC was in realizing its goals. This note unfolds in the following sequence: Part I briefly outlines the history of the KR, the creation of the ECCC, and the cases the Court has reviewed over the years. Part II explores how one may determine the success of international courts and investigate the efficacy of the ECCC in its adjudication. Additionally, Part II further analyzes the ECCC’s impact on international criminal law.

This note resolves that the ECCC was challenged by its structural framework and political influence within the Court. However, it was partly successful in bringing justice to members of the KR. Despite the limitations the Court faced, the ECCC has the potential to catalyze reform of how international criminal law may be employed in the future through victim-centered approaches.

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leader-dies-at-93-while-serving-life-sentence.

10. Marija Đorđeska, *The Khmer Rouge Tribunal is Closing its Doors: Here’s What to Know About its Final Case*, JUST SECURITY (Dec. 6, 2022), <https://www.justsecurity.org/84350/the-khmer-rouge-tribunal-is-closing-its-doors-heres-what-to-know-about-its-final-case/>; see *Prosecutor v. Khieu*, Case No. 002/19-09-2007-ECCC/SC, F76, Summary of the Appeal Judgment (Extraordinary Chambers in the Ct. of Cambodia Sept. 22, 2022).

11. See Đorđeska, *supra* note 10.

12. Katheryn M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. J. INT’L HUM. RTS. 549, 554 (2006).

## I. I. BACKGROUND

## A. THE KHMER ROUGE

In 1930, the Cambodian section of the Indochina Communist Party (“ICP”) was subject to the controlling ideological and organizational influence of Vietnamese communists.<sup>13</sup> During Cambodia’s struggle for independence from France, the Cambodian section’s strength grew due to the recruitment of radical participants for the anti-colonial endeavor.<sup>14</sup> The “KR emerged from the Cambodian communist party, which was formed in 1951 with the support of the Vietnamese communists.”<sup>15</sup> However, the early years of the KR were chaotic. The ruling government persecuted the KR for its communist dogma, and members of the KR frequently betrayed each other.<sup>16</sup> The prevailing chaos within the KR and the “absence of significant control from” Vietnam presented Pol Pot, the future leader of the KR, with the opportunity to rise within the ranks.<sup>17</sup> In 1963, Pol Pot became general secretary of the KR.<sup>18</sup> The party slowly reinforced its military capabilities with the support of other communist States in the region, growing stronger under the leadership of Pol Pot.<sup>19</sup> In 1975, the KR overthrew the pro-American Lon Nol regime and established Democratic Kampuchea.<sup>20</sup> The KR regime ruled from 1975 to 1979, and during this period, the KR initiated radical socialist projects that would kill millions of innocent Cambodians.<sup>21</sup> These projects included the “promotion of a collective cooperative system, depopulation of cities, prohibition of markets, prevention of all religious activities, expulsion of Vietnamese minorities, and assimilation of all ethnic groups into Khmer.”<sup>22</sup> Cambodians endured

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13. Dmitry Mosyakov, *The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives 2* (Yale Univ. Genocide Stud. Program, Working Paper No. 15, 2004),

[https://gsp.yale.edu/sites/default/files/g15\\_-\\_the\\_khmer\\_rouge\\_and\\_the\\_vietnamese\\_communist\\_a\\_history\\_of\\_their\\_relations\\_as\\_told\\_in\\_the\\_soviet\\_archives.pdf](https://gsp.yale.edu/sites/default/files/g15_-_the_khmer_rouge_and_the_vietnamese_communist_a_history_of_their_relations_as_told_in_the_soviet_archives.pdf).

14. *Id.* at 2.  
 15. SUNGYONG LEE, *EVERYDAY RECONCILIATION IN POST-KHMER ROUGE CAMBODIA* 22 (Roger Mac Ginty ed., 2022).

16. Mosyakov, *supra* note 13, at 5.

17. *Id.*

18. *Id.* at 6.

19. LEE, *supra* note 15.

20. *Id.*

21. *Id.*

22. *Id.*

extreme hardships and challenges.<sup>23</sup> People were forced to work from early morning to dusk in collective labor areas under brutal conditions.<sup>24</sup> Many died of hunger and malnutrition, while survivors sustained their energy by eating anything such as plants and insects.<sup>25</sup> Although the figure varies depending on the source, approximately 1.5 million people died during the KR rule.<sup>26</sup>

The KR ruled the Cambodian people by creating fear and terror, demanding complete obedience.<sup>27</sup> To maintain complete obedience, the KR hired large numbers of intelligence agents who would detect signs of ‘anti-revolutionary actions’ among local residents.<sup>28</sup> Once the agents reported their findings, those accused were sent to detention centers where they would be interrogated, tortured, and executed.<sup>29</sup> S-21, most notably known as Tuol Sleng, is the most notorious detention center, where approximately 17,000 prisoners were detained, and only 12 are believed to have survived.<sup>30</sup> Furthermore, the KR regime saw religious and cultural practices as hindrances to the social transformation they envisaged.<sup>31</sup> Thus, religious institutions and everyday cultural practices were eliminated by the regime, leaving the people with nothing to rely on or celebrate.

On January 7, 1979, the KR regime was overthrown by an anti-KR military group supported by 150,000 Vietnamese troops.<sup>32</sup> By early 1979, this military group had seized the capital, Phnom Penh, and the majority of Cambodia’s territory.<sup>33</sup> The anti-KR military group set up

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23. See RONNIE YIMSUT, *FACING THE KHMER ROUGE: A CAMBODIAN JOURNEY* (2011); see also AZRA RASHID, *GENDER AND GENOCIDE IN CAMBODIA* (2024).

24. LEE, *supra* note 15, at 23.

25. *Id.*

26. See *Cambodian Genocide*, UNIV. S. CAL., <https://sfi.usc.edu/collections/cambodian-genocide> (last visited Feb. 16, 2024); R.J. Rummel, *Statistics of Democide*, UNIV. HAW., <https://www.hawaii.edu/powerkills/SOD.CHAP4.HTM> (last visited Feb. 16, 2024); *Genocide in Cambodia*, HOLOCAUST MUSEUM HOUSTON, <https://hmh.org/library/research/genocide-in-cambodia-guide/> (last visited Feb. 16, 2024); *Cambodian Genocide Program*, YALE UNIV., <https://macmillan.yale.edu/gsp/research-collection/cambodian-genocide-program> (last visited Feb. 16, 2024).

27. LEE, *supra* note 15, at 23.

28. *Id.*

29. *Id.* at 24.

30. *S-21, Tuol Sleng*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/genocide-prevention/countries/cambodia/s-21> (last visited Feb. 16, 2024).

31. LEE, *supra* note 15, at 24.

32. *Id.* at 25–26.

33. *Id.* at 26.

a new political leadership which would govern the country under the name of the People's Republic of Kampuchea ("PRK").<sup>34</sup> However, the perception of the newly established regime was divided; some saw it as a savior from the KR rule while others saw it as a proxy for Vietnamese imperialism.<sup>35</sup> Thus, to solidify its political legitimacy, the new PRK regime tried to emphasize the KR's war crimes and human rights violations through judicial processes, truth-finding mechanisms, and memorial programs.<sup>36</sup> This approach to dealing with history shifted in the early 1990s when the battle between the new regime and the remaining KR regime was "officially" terminated by signing the Paris Peace Agreements.<sup>37</sup> Through the Paris Peace Agreements, the PRK maintained its political leadership in Cambodia in the name of the Cambodian People's Party ("CPP").<sup>38</sup> Now that the conflict between the two regimes was formally completed, the Government tried to avoid issues regarding the KR.<sup>39</sup> The Government feared that the resurfacing of KR issues would threaten the security of the country.<sup>40</sup> To avoid such concerns, Prime Minister Hun Sen negotiated amnesty deals and defections for many KR members.<sup>41</sup> Supporting this process, senior KR leader Khieu Samphan called for Cambodians to "let bygones be bygones" while Hun Sen declared that Cambodians should "dig a hole and bury the past."<sup>42</sup> The Government decided to not only absolve the crimes of KR members but also adopted many of them into the CPP, the national army, or society in general.<sup>43</sup> At the same time, the Government interfered with

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 27; *See Framework for a Comprehensive Political Settlement of the Cambodia Conflict*, U.N. Doc. A/46/608-S/23177 (Oct. 23, 1991) (agreeing on a ceasefire and cessation of military conflicts within Cambodia).

38. LEE, *supra* note 15, at 27.

39. *Id.*

40. *Id.*

41. *Id.*; *see Cambodia: Khmer Rouge Convictions 'Too Little, Too Late'*, HUM. RTS. WATCH (Aug. 8, 2014), <https://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late>.

42. Kay Kimsong, *'Let Bygones Be Bygones,' Say Former DK Leaders*, CAMBODIA DAILY (Dec. 30, 1998), <https://english.cambodiadaily.com/news/let-bygones-be-bygones-say-former-dk-leaders-12654/>; Brad Adams, *No Pass For the Khmer Rouge*, WASH. POST (Apr. 17, 2000),

<https://www.washingtonpost.com/archive/opinions/2000/04/18/no-pass-for-the-khmer-rouge/2d2bb5bd-2435-4ef7-9a9b-b158f51e3cc4/>.

43. *See Cambodia: Chea Sim Death Shows Failings of Khmer Rouge Court*, HUM. RTS. WATCH (June 8, 2015), <https://www.hrw.org/news/2015/06/08/cambodia-chea-sim-death-shows-failings-khmer-rouge-court>; *see also* Anya Palm, *The Khmer Rouge's Last Stronghold in Cambodia*, THE DIPLOMAT (May 5, 2016),

mainstream media coverage of the KR and removed the KR's history from the education curriculum.<sup>44</sup> However, one of the most important initiatives was developed during this period to deal with the KR history: the ECCC.

#### B. CREATION OF THE ECCC

The process for the establishment of the ECCC started in 1997, when the Government sent an official letter to the UN seeking assistance in setting up a tribunal as a response to international pressure.<sup>45</sup> The UN attempted to form an international tribunal with foreign staff to ensure that the tribunal was insulated from Cambodian domestic influence, and focused on indicting 20 key leaders of the KR for investigation.<sup>46</sup> However, the Government strongly resisted this UN proposal and instead wanted to put the tribunal under Cambodian jurisdiction with a minimal number of suspects to be investigated.<sup>47</sup> After multiple negotiations, the UN and the Government agreed to create a hybrid tribunal that would be under the authority of both the UN and Cambodia, and to minimize the number of suspects that would be investigated. This hybrid tribunal officially began its operations in 2007 with the adoption of the Internal Rules.<sup>48</sup>

The structure of the ECCC can be divided into two sectors: the judicial sector and the administrative sector. On the judicial side, there are three judicial chambers (Pre-Trial, Trial, and Supreme Court), the Office of the Co-Investigating Judges, and the Office of the Co-Prosecutors.<sup>49</sup> On the administrative side, there is the Defense Support Section, Victims Support Section, and Civil Party Lead Co-Lawyers Section.<sup>50</sup> Although the Court is comprised mostly of

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<https://thediplomat.com/2016/05/pailin-the-khmer-rouges-last-stronghold/>.

44. See Kate Hodal, *Journalist seeking truth about Khmer Rouge 'fears for his life'*, THE GUARDIAN (Mar. 25, 2012),

<https://www.theguardian.com/world/2012/mar/25/journalist-khmer-rouge-fears-life>; see also *In Cambodia's Schools Breaking a Silence Over the 'Killing Fields'*, U.S. INST. OF PEACE (Apr. 8, 2015), <https://www.usip.org/publications/2015/04/cambodias-schools-breaking-silence-over-killing-fields>.

45. LEE, *supra* note 15, at 28; see *Situation of Human Rights in Cambodia*, U.N. Doc. E/CN.4/1997/49 (1997) (calling upon the government of Cambodia to prosecute all those who have perpetrated human rights violations).

46. LEE, *supra* note 15, at 28.

47. *Id.*

48. See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) (Jan. 16, 2015) [hereinafter Internal Rules].

49. LEE, *supra* note 15, at 28.

50. The Civil Party Lead Co-Lawyers Section was a new introduction to the

Cambodian personnel, the Court included both international and Cambodian staff in all areas of the Court including judges, prosecutors, and lawyers, pursuant to the compromise made between the UN and the Government.<sup>51</sup> The first hearing process began in 2007, and, since then, three (Kang Kew Iew, Nuon Chea, and Khieu Samphan) have been found guilty and given life sentences, but two of them died during the proceedings.<sup>52</sup> Two others (Ieng Thirith and Ieng Sary) did not receive verdicts due to their death or lack of mental fitness.<sup>53</sup>

### C. CASES OF THE ECCC

The ECCC was set up to bring to justice “senior leaders” of the KR 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 April 17, 1975 to January 6, 1979.”<sup>54</sup> While the terms “senior leader” or “those most responsible” were not defined, the Supreme Court of the ECCC acknowledged that senior leader refers to a person’s role within the Khmer Rouge hierarchy.<sup>55</sup> On the other hand, most responsible refers to those responsible for the most serious crimes, even if they were not high ranking officials.<sup>56</sup> With this criteria in mind, nine people were indicted but only three were convicted.<sup>57</sup> The first case (Case 001) brought to the ECCC was that of Kang Kew Iew, who was the former head of the Tuol Sleng detention center.<sup>58</sup> Kang Kew Iew was indicted

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international tribunal scene. It ensured the effective organization of Civil Party representation and had the responsibility for the overall presentation of the interests of the consolidated group of Civil Parties. *Id.*, see *infra* note 156 and accompanying text.

51. *Id.* at 28–29.

52. *Id.* at 29; see *supra* note 9 and accompanying text.

53. Thomas Fuller, *Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83*, THE N.Y. TIMES (Aug. 22, 2015),

<https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html>; Seth Mydans, *Ieng Sary, Former Official of Khmer Rouge, Dies at 87*, THE N.Y. TIMES (Mar. 14, 2013),

<https://www.nytimes.com/2013/03/15/world/asia/ieng-sary-khmer-rouge-leader-tied-to-genocide-dies-at-87.html>.

54. Internal Rules, *supra* note 48.

55. Kaing Uek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, F28, Appeal Judgment, ¶ 57 (Extraordinary Chambers in the Cts. of Cambodia, Feb. 2, 2012).

56. *Id.*

57. Mydans, *supra* note 7.

58. *Kaing Gueak Eav (Duch)*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/kaing-gueak-eav> (last visited Apr. 2, 2025).

and tried for “crimes against humanity and grave breaches of the Geneva Conventions” of 1949.<sup>59</sup> Kang Kew Iew was sentenced to life in prison and died while serving his sentence.<sup>60</sup>

Case 002 tried Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith.<sup>61</sup> Ieng Sary was a senior leader of the Khmer Rouge, being the Deputy Prime Minister for Foreign Affairs during the KR regime.<sup>62</sup> Sary was indicted for crimes against humanity, and grave breaches of the Geneva Convention of 1949.<sup>63</sup> However, proceedings were terminated on March 14, 2013, because of Sary’s death.<sup>64</sup> Ieng Thirith, wife of Ieng Sary and sister-in-law of Pol Pot, was the Minister of Social Affairs for the KR.<sup>65</sup> She was indicted for similar allegations as her husband; however, she was found to be mentally unfit to stand trial and ultimately died in August 2015.<sup>66</sup> Nuon Chea was appointed Deputy Secretary of the Communist Party of Kampuchea in 1960 and retained this position during the KR regime.<sup>67</sup> On August 7, 2014, in Case 002/1, the Trial Chamber found Nuon Chea guilty of crimes against humanity and grave breaches of the Geneva Conventions, and sentenced him to life imprisonment.<sup>68</sup> On November 16, 2018, in Case 002/02, the Trial Chamber also found Nuon Chea guilty of genocide against the Vietnamese and Cham people.<sup>69</sup> However, Nuon Chea died

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59. *Id.*

60. Kaing Uek Eav alias Duch, Case No. 001/18-07-2007/ECCC/SC, F26/3, Summary of Appeal Judgment, 15 (Extraordinary Chambers in the Cts. of Cambodia, Feb. 3, 2012); *See Cambodia genocide, supra* note 9.

61. *Case 002*, EXTRAORDINARY CHAMBERS IN THE CT. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/case-002> (last visited Apr. 2, 2025).

62. *Ieng Sary*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/ieng-sary> (last visited Apr. 2, 2025).

63. *Id.*

64. Termination of the Proceedings against the Accused Ieng Sary, Case No. 002/19-09-2007/ECCC/TC, D56/4/2.1.1, 3 (Extraordinary Chambers in the Cts. of Cambodia, Mar. 14, 2013).

65. *Ieng Thirith*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/ieng-thirith> (last visited Apr. 2, 2025).

66. Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, Case No. 002/19-09-2007/ECCC/TC, E138/1/10, ¶ 39 (Extraordinary Chambers in the Cts. of Cambodia, Sep. 13, 2013); *see Fuller, supra* note 53.

67. *Nuon Chea*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/nuon-chea> (last visited Apr. 2, 2025).

68. Case 002/01, Case No. 002/19-09-2007/ECCC/TC, E313, Judgment, ¶ 1061 (Extraordinary Chambers in the Cts. of Cambodia, Aug. 7, 2014); *Id.* at 622.

69. Case 002/02, Case No. 002/19-09-2007/ECCC/TC, Summary of Judgment, ¶ 26, 30, 34 (Extraordinary Chambers in the Cts. of Cambodia, Nov. 16, 2018).

on August 4, 2019, while appealing his conviction for the crime of genocide.<sup>70</sup> Thus, the Supreme Court terminated the remaining proceedings against him on August 13, 2019.<sup>71</sup> Finally, Khieu Samphan was appointed the Head of State for the KR.<sup>72</sup> He succeeded Pol Pot after Pol Pot retired as the official head of the KR in 1987.<sup>73</sup> On August 7, 2014, Khieu Samphan was found guilty of crimes against humanity and grave breaches of the Geneva Convention, and was sentenced to life imprisonment in Case 002/01.<sup>74</sup> In Case 002/02, the Trial Chamber found him guilty of the crime of genocide against the Vietnamese and Cham people on November 16, 2018.<sup>75</sup> His appeal against this conviction for genocide was rejected on September 22, 2022, with the guilty verdicts of genocide, crimes against humanity, and grave breaches of the Geneva Convention confirmed.<sup>76</sup>

The most controversial cases were Cases 003 and 004. Case 003 focused on the crimes allegedly committed by Meas Muth, who was the Commander of Division 164 in the navy during the KR regime.<sup>77</sup> While Meas Muth was charged with genocide, crimes against humanity, breaches of the Geneva Conventions, and violations of the 1956 Penal Code of Cambodia, there were two separate closing orders by the Co-Investigating Judges due to a disagreement about whether Meas Muth was subject to the ECCC's personal jurisdiction as a senior leader or one of the persons most responsible for crimes committed during the period of the KR.<sup>78</sup> The International Co-Prosecutor filed an appeal against the National Co-Investigating Judge's Closing Order

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70. Neuman, *supra* note 9.

71. Decision to Terminate Proceedings against Nuon Chea, Case No. 002/19-09-2007-ECCC/SC, F46/3, ¶ 8 (Extraordinary Chambers in the Cts. of Cambodia Aug. 13, 2019).

72. *Khieu Samphan*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/khieu-samphan> (last visited Feb. 16, 2024).

73. Perpetrators, THE CENTER FOR JUSTICE AND ACCOUNTABILITY (last visited Apr. 6, 2025), <https://cja.org/what-we-do/litigation/khmer-rouge-trials/perpetrators/>

74. Case 002/01 Judgment, Case No. 002/19-09-2007/ECCC/TC, E313 (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014).

75. Summary of Judgment, Case No. 002/02, 002/19-09-2007/ECCC/TC, ¶ 26 (Extraordinary Chambers in the Cts. of Cambodia Nov. 16, 2018).

76. Summary of the Appeal Judgment in Case 002/02, Case No. 002/19-09-2007-ECCC/SC, F76.1 (Extraordinary Chambers in the Cts. of Cambodia Sept. 22, 2022).

77. *Meas Muth*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/meas-muth> (last visited Feb. 16, 2024).

78. *Case 003*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/case-003> (last visited Feb. 16, 2024); see Closing Order, Case No. 003/07-07-2009-ECCC-OCIJ, D267 (Extraordinary Chambers in the Cts. of Cambodia Nov. 28, 2018).

but the Supreme Court of the ECCC dismissed the appeal and the case was terminated.<sup>79</sup>

Case 004 investigated Yim Tith who was appointed as the party secretary for the Kirivong district.<sup>80</sup> He was indicted for the alleged crimes of genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the 1956 Penal Code of Cambodia.<sup>81</sup> Similar to Case 003, the National Co-Investigating Judge issued an order dismissing all the charges against Yim Tith, claiming that Yim Tith was not one of the most responsible for the crimes committed during the KR regime.<sup>82</sup> Conversely, the International Co-Investigating Judge found Yim Tith to be one of the most responsible, notably for the crime of genocide, crimes against humanity, war crimes as well as other domestic offenses under Cambodian law.<sup>83</sup> However, the Supreme Court terminated the case and dismissed the International Co-Prosecutor's appeal.<sup>84</sup> The Supreme Court stated that Case 004 was terminated "in the absence of a definitive and enforceable indictment" that would move the case further.<sup>85</sup> It was the Supreme Court's reasoning that termination would prevent the case from languishing since if it were to proceed there would be constant disagreement between the Co-Investigating Judges.

Case 004/1 investigated Im Chaem, who was the alleged Secretary of the Preah Net Preah District and the Deputy Secretary of the Northwest Zone Sector 5.<sup>86</sup> The charges were crimes against

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79. Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, Case No. 003/08-10-2021-ECCC/SC(05), 3/1/1/1 (Extraordinary Chambers in the Cts. of Cambodia Dec. 17, 2021).

80. *Yim Tith*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/yim-tith> (last visited Feb. 16, 2024).

81. International or Hybrid Tribunal: Case 004 and Case 004/2, THE CENTER FOR JUSTICE AND ACCOUNTABILITY (last visited Apr. 6, 2025), <https://cja.org/what-we-do/litigation/khmer-rouge-trials/international-hybrid-tribunal-case-004/>

82. Order Dismissing the Case Against Yim Tith, Case No. 004/07-09-2009/ECCC/OCIJ, D381, ¶ 684 (Extraordinary Chambers in the Cts. of Cambodia June 28, 2019).

83. Closing Order, Case No. 004/07-09-2009-ECCC-OCIJ, D382, ¶ 1016(iii) (Extraordinary Chambers in the Cts. of Cambodia June 28, 2019).

84. Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, Case No. 004/23-09-2021-ECCC/SC(6), 2/1/1/1, ¶ 31 (Extraordinary Chambers in the Cts. of Cambodia Dec. 28, 2021).

85. *Id.*

86. *Im Chaem*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/im-chaem> (last visited Mar. 30, 2025).

humanity and breaches of the Geneva Convention.<sup>87</sup> This time both Co-Investigating Judges dismissed the case against Im Chaem, finding that Im Chaem was not subject to the personal jurisdiction of the ECCC which meant she was neither a senior leader nor one of the most responsible officials of the KR regime.<sup>88</sup> The International Co-Prosecutor appealed but it was dismissed by the Pre-Trial Chamber.<sup>89</sup> Four out of five votes were required to overturn a dismissal order by the Co-Investigating Judges, but three out of the five judges concluded that the ECCC lacked personal jurisdiction.<sup>90</sup>

Finally, Case 004/2 investigated Ao An who was the Secretary of Sector 41 and later the Deputy Secretary of the Central Zone.<sup>91</sup> Ao An was indicted for the alleged crimes of genocide, crimes against humanity, and violations of the 1956 Penal Code of Cambodia.<sup>92</sup> Again, the Co-Investigating Judges issued two separate closing orders in the case against Ao An due to a disagreement about whether Ao An was subject to the ECCC's personal jurisdiction as a senior leader or one of the persons most responsible for crimes committed during the KR period.<sup>93</sup> Noting that no agreement had been reached on whether Ao An was subject to the ECCC's jurisdiction after thirteen years of investigation, the Supreme Court found that there was no definitive and enforceable indictment against Ao An.<sup>94</sup> Thus, the Supreme Court terminated the case against Ao An.<sup>95</sup>

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87. *Id.*

88. Closing Order (Disposition), Case No. 004/1/07-09-2009-ECCC-OCIJ, No. D308, ¶ 10 (Extraordinary Chambers in the Cts. of Cambodia, Feb. 22, 2017).

89. Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), ¶ 86, 92 93 (Extraordinary Chambers in the Cts. of Cambodia, June 28, 2018) (showing that only the two International Pre-Trial Judges disagreed with the Co-Investigating Judges' assessment), their opinion beginning on ¶ 93

90. *Id.* ¶ 81, 92 (stating that four out of five votes are needed to reach a common decision).

91. *Ao An*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/cases/charged-profile/ao-an> (last visited Mar. 31, 2025).

92. *Id.*

93. Order Dismissing the Case Against Ao An., Case No. 004/2/07-09-2009-ECCC/OCIJ, D359, ¶ 541, 554–55 (Extraordinary Chambers in the Ct. of Cambodia, Aug. 16, 2018); Considerations on Appeal Against Closing Orders, Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), ¶ 11 (Extraordinary Chambers in the Cts. of Cambodia, Dec. 19, 2019) (Cambodia).

94. Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, Case No. 004/2/07-09-2009-ECCC/TC/SC, E004/2/1/1/2, ¶ 69 (Extraordinary Chambers in the Ct. of Cambodia, Aug. 10, 2020) (Cambodia)

95. *Id.*

## II. ANALYSIS

## A. WHAT DETERMINES SUCCESS?

Many scholars share the view that measuring the effectiveness of an international court or tribunal means identifying the court's goals and ascertaining if the goals have been met.<sup>96</sup> In other words, to measure the effectiveness of an international court, identifying the court's aims or goals is a useful guide. For many years, courts, States, and scholars have determined numerous potential goals for international tribunals.<sup>97</sup> Examples of some common goals are: "preventing violations of international criminal law; ending impunity for past violations; maintaining or restoring international peace and security; establishing a reliable historical record; providing closure or redress for victims; expressing condemnation of crimes that are abhorrent; fostering post-conflict reconciliation; developing international criminal law; and assigning responsibility for wrongs and punishing the guilty (i.e., retribution)."<sup>98</sup> While these can be the most common goals throughout international courts, they are not exhaustive and might be different. This difference can be reflected by the specific needs and historical backgrounds of cases and countries. In this case, the goals would need to be tailored according to the relevant historical narrative and necessities of Cambodia. The specific purpose of the ECCC was to bring to trial senior leaders of the KR or those who were most responsible for the crimes and serious violations of Cambodian penal law, international law, and international conventions recognized by Cambodia, that were committed during the reign of the KR.<sup>99</sup> With this specific goal in mind, the succeeding section will analyze whether senior leaders or those

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96. See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 230 (2012); David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 45, 62-63 (1999); Stuart Ford, *Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention*, 43 LOY. L.A. INT'L & COMPAR. L. REV. 101, 104 (2020); Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers on the Courts of Cambodia*, 13 ASIAN-PACIFIC L. & POL'Y J. 300, 302-03 (2011).

97. See Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI. KENT L. REV. 329, 331 (2008) ("The list of goals proclaimed by international criminal courts and their affiliates is very long.").

98. Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT'L L. 179, 189-90 (2018).

99. See Rep. of the Third Comm. on Human Rights Questions Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms on Its Fifty-Seventh Session, U.N. Doc. A/57/806 (2003) (mentioning the creation and motive of creating the extraordinary chamber).

most responsible were indeed successfully brought to justice.

#### B. WAS THE ECCC SUCCESSFUL?

It is important to note that the structure of the ECCC and its form of operation had flaws. As mentioned above, a major point of debate between the UN and the Government was whether the Court would be fundamentally international or domestic. A group of experts appointed by the UN Secretary-General cautioned that high levels of corruption in the court system “would make it nearly impossible for prosecutors, investigators and judges to be immune from such [political] pressure” in a court organized under Cambodian law.<sup>100</sup> Thus, the group of experts strongly recommended the establishment of an ad hoc international tribunal.<sup>101</sup> However, Hun Sen rejected this recommendation stating that “there would be no international tribunal, outside or within Cambodia.”<sup>102</sup> Then the only way to protect the court against political pressure would be for the UN to appoint a majority of the judges and the chief prosecutor. But this was also rejected during negotiations with Hun Sen expressing that the international community can “[P]articipate, but [cannot] try to be masters of the issue.”<sup>103</sup> This led to an agreement where the UN consented to the creation of a hybrid tribunal, with a majority of the personnel being Cambodian. Decisions were to be reached by a “super-majority” of votes which meant a majority of the judges plus one.<sup>104</sup> Since a majority of the judges were Cambodian, the super-majority rule ensured that the vote of at least one international judge was required. To further reinforce this super-majority rule, when a disagreement arose between the Co-Prosecutors or Co-Investigating Judges on whether to start an investigation or indict a suspect, the investigation or indictment would proceed unless a super-majority of

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100. Rep. of the Grp. of Experts for Cambodia Established Pursuant to Gen. Assembly Resol. 52/135, U.N. Doc. A/53/850-S/1999/231, ¶133 (1999).

101. *Id.* ¶139.

102. U.N. Secretary General, Situation of Hum. Rts. in Cambodia, ¶ 55, U.N. Doc. A/54/353 (1999).

103. *Id.*; see Thomas Hammarberg, *How the Khmer Rouge Tribunal Was Agreed: Discussions between the Cambodian Government and the UN, Part I*, DOCUMENTATION CTR. OF CAMBODIA, [https://d.dccam.org/Tribunal/Analysis/How\\_Khmer\\_Rouge\\_Tribunal.htm](https://d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm) (last visited Apr 6, 2025).

104. Natasha Naidu & Sarah Williams, *The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia*, 18 J. INT'L CRIM. 665, 668 (2020); see Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 (Aug. 26, 2007).

the Pre-Trial Chamber judges voted to prevent it.<sup>105</sup>

Another point of contention was the scope of personal jurisdiction. Hun Sen wanted a trial of eight candidates who were “Pol Potist ringleaders responsible for crimes of genocide” while the UN wanted a trial of the KR leaders “responsible for the most serious of crimes.”<sup>106</sup> While this dispute was not resolved, it was declared that it was up to the tribunal’s independent judiciary to decide who fell within the tribunal’s personal jurisdiction.<sup>107</sup> These initial disagreements would later paralyze the ECCC’s pursuance of justice.

Cases 003 and 004 tried members of the KR who were considered to be senior leaders or the most responsible by the International Co-Prosecutor, but were of lower ranking than those in Cases 001 and 002. As observed in the ‘Cases’ section, there were multiple disagreements between the Co-Investigating Judges regarding personal jurisdiction in Cases 003 and 004. The National Co-Investigating Judge would file a closing order dismissing the investigation of the accused while the International Co-Investigating Judge would file a closing order determining that the accused should be sent to trial. Each time, the International Co-Prosecutor filed an appeal to the Supreme Court, but it had been dismissed because the Supreme Court found that no agreement had been reached after years of investigation; thus, there was no enforceable indictment against accused individuals.

Coupled with the structure of the ECCC, the ECCC was also vulnerable to political influence. The ECCC’s Co-Prosecutors submitted five suspects to the Co-Investigating Judges who then would decide who to bring charges against.<sup>108</sup> The International Co-Prosecutor attempted to include one suspect that was not approved by the Government but the National Co-Prosecutor repudiated the International Co-Prosecutor’s effort.<sup>109</sup> The International Co-Prosecutor wanted this Introductory Submission done immediately,

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105. Diane Orentlicher, *‘Worth the Effort’? Assessing the Khmer Rouge Tribunal*, 18 J. INT’L CRIM. JUST. 615, 624 (2020).

106. Steve Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, CAMBODIA TRIBUNAL MONITOR (Aug. 1, 2011), [https://cambodiatribunal.org/wp-content/uploads/2019/07/ctm\\_blog\\_08-01-2011\\_A-Review-of-the-Negotiations-Leading-to-the-Establishment-of-the-Personal-Jurisdiction-of-the-ECCC.pdf](https://cambodiatribunal.org/wp-content/uploads/2019/07/ctm_blog_08-01-2011_A-Review-of-the-Negotiations-Leading-to-the-Establishment-of-the-Personal-Jurisdiction-of-the-ECCC.pdf).

107. Naidu & Williams, *supra* note 104, at 667.

108. International Co-Prosecutor Robert Petit shares his experience working with the National Co-Prosecutor, and recounts a moment when his partner used superstition to justify his decision to remove suspects from being charged. CRAIG ETCHESON, *EXTRAORDINARY JUSTICE: LAW, POLITICS, AND THE KHMER ROUGE TRIBUNALS* 222 (2020).

109. *Id.* at 222–23.

so the prosecutor agreed to remove one of the suspects.<sup>110</sup> The next year, the International Co-Prosecutor again sought investigations against six suspects alleged to be “among the most brutal implementers” during the KR regime but whose prosecution was limited by Hun Sen.<sup>111</sup> The National Co-Prosecutor declined to approve the investigation which for the International Co-Prosecutor seemed to reflect “reasons that appear[ed] to reflect the government’s position.”<sup>112</sup> Hun Sen expressed his resistance to adding more suspects on trial, claiming that putting more KR members on trial for crimes committed during the KR period could revive armed conflict.<sup>113</sup> Hun Sen stated that he “would prefer to see this tribunal fail instead of seeing war return to [his] country.”<sup>114</sup>

Pursuant to the super-majority rule, investigations were launched in Cases 003 and 004 despite Cambodian opposition. However, Cambodian personnel employed a number of methods to impede proceedings. For example, the National Co-Investigating Judge, You Bunleng, delayed the authorization of crime base investigations in Cases 003 and 004.<sup>115</sup> All the cases in the ECCC were time sensitive since most of the KR suspects were then elderly, and this was vividly portrayed by the death of four suspects. In April 2011, a new International Co-Investigating Judge, Siegfried Blunk, was appointed, and he joined Judge You to close Case 003.<sup>116</sup> However, the Judges’ decision was brought into doubt. There had hardly been any investigation done on Case 003 and lawyers were not asked to prepare the documents required to formally close an investigation.<sup>117</sup> Consequently, Judge Blunk resigned because his “ability to withstand [political] pressure by Government officials and to perform his duties independently” might be called into question.<sup>118</sup> Judge Blunk’s

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110. *Id.* at 223.

111. Orentlicher, *supra* note 105, at 626.

112. Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, <https://www.nytimes.com/2009/02/01/world/asia/01cambodia.html> (Jan. 31, 2009).

113. Ek Madra, *Cambodia PM rejects wider Khmer Rouge trials*, REUTERS (Mar. 31, 2009), <https://www.reuters.com/article/us-cambodia-rouge-idUSTRE52U1IZ20090331/>.

114. *Id.*

115. Orentlicher, *supra* note 105, at 627.

116. *Id.*

117. ETCHESON, *supra* note 108, at 299; see Press Release, Pre-Trial Chamber, Statement from the Co-Investigating Judges (Apr. 29, 2011) (“The Co-Investigating Judges today in a public decision concluded the investigations in Case 003 . . . and have notified the parties according to Rule 66.1.”).

118. *Statement by the International Co-Investigating Judge*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/articles/statement->

successor was Judge Laurent Kasper-Ansermet, who was resolute in conducting a thorough investigation in Cases 003 and 004.<sup>119</sup> However, Judge You refused to cooperate and the Supreme Council of the Magistracy refused to formally approve Judge Kasper-Ansermet.<sup>120</sup> Judge Kasper-Ansermet resigned given that he was unable to properly perform his duty.<sup>121</sup> Judge Kasper-Ansermet's successor, Judge Mark Harmon, conducted investigations in Cases 003 and 004, despite opposition by Judge You, and was able to bring charges against Meas Muth, Im Chaem and Ao An.<sup>122</sup> However, although multiple judicial orders were given by Judge Harmon requesting the arrests of suspects in Cases 003 and 004, government officials refused to follow the orders and none of the suspects were taken into custody.<sup>123</sup>

Simply looking at the proceedings of Cases 003 and 004 shows that the national judges and other national staff in the court have consistently hindered the proceedings from moving forward. The national police had also not issued arrest warrants for several suspects which further led to an impasse in the work of the International Co-Investigating Judges and International Co-Prosecutors. It is also notable that the former Khmer Rouge leaders and combatants were prevalent in the Cambodian political arena which implies that corruption was widespread in the ECCC.<sup>124</sup> Additionally, the hybrid character of the court resulted in a conflict of interests among decision-makers which further delayed proceedings. As shown in Cases 003 and 004, the super-majority formula also increased the likelihood that cases were dismissed because conflicts were unable to be resolved. Moreover, the ECCC's personal jurisdiction was limited to senior leaders or those most responsible for the crimes of the KR. This is a definition that can be freely interpreted by the decision-makers. This free interpretation led the Government and the Cambodian personnel in the ECCC to conclude that some members of the KR were not senior leaders nor the most responsible for the KR crimes. Nevertheless, these KR members were

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international-co-investigating-judge (last visited Feb. 16, 2024).

119. Orentlicher, *supra* note 105, at 627–28.

120. *Id.* at 628.

121. UN News, *UN Voices Concern as Second Judge Resigns from Cambodia Genocide Court*, UN, (Mar. 19, 2012), <https://news.un.org/en/story/2012/03/406712>.

122. Orentlicher, *supra* note 105, at 628.

123. ETCHESON, *supra* note 108, at 325–26.

124. Tomas Hamilton & Michael Ramsden, *The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia*, 14 INT'L CRIM. L. R. 115, 129 (2014).

responsible for approximately 40,000 deaths.<sup>125</sup> These obstacles were indicative of the limitations the ECCC faced in seeking to achieve its goal of holding criminals responsible for their actions.

Despite these interferences and structural deficiencies, the ECCC was still able to convict three members of the KR in Cases 001 and 002. Kang Kew Iew was not a “senior leader” of the KR; however, he was clearly one of the most responsible members for the death of thousands of innocent Cambodians. The court estimated that more than 12,272 detainees died and were executed in Toul Sleng, the detention center run by Kang Kew Iew.<sup>126</sup> On July 26, 2010, he was found guilty of crimes against humanity and war crimes.<sup>127</sup> The Trial Chamber imposed a sentence of 35 years but was later changed to life in prison.<sup>128</sup> Apart from the sentencing, Kang Kew Iew was willing and eager to respond to the victims’ questions. He expressed a deep sense of remorse and provided partial answers to questions that tormented many of the victims such as “why did this happen?”<sup>129</sup> This dialogue was critical for the victims since many of them had lost loved ones and suffered traumas during the rule of the KR.<sup>130</sup> While none of the civil parties who participated in the ECCC offered forgiveness, Kang Kew Iew’s remorse dissipated some of the victims’ more extreme emotional responses.<sup>131</sup>

Case 002 was a partial success. Proceedings against Ieng Sary ended 16 months after his trial began when he died before judgment.<sup>132</sup> Proceedings against Ieng Thirith were terminated just before opening statements because she suffered from dementia and died months after.<sup>133</sup> The other two defendants, Nuon Chea and Khieu

125. Mikkel J. Christensen & Astrid Kjeldgaard-Pedersen, *Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Courts of Cambodia*, 18 INT’L CRIM. L. R. 127, 151 (2018).

126. Kaing Uek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, E188, Judgment ¶ 340 (Extraordinary Chambers in the Cts. of Cambodia, July 26, 2010).

127. *Id.* ¶ 677.

128. *Id.* ¶ 679; Kaing Uek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment (Extraordinary Chambers in the Cts. of Cambodia, Feb. 3, 2012).

129. Orentlicher, *supra* note 105, at 631.

130. *The Khmer Rouge Tribunal: Justice Through Accountability*, THE PHNOM PENH POST (July 20, 2022), <https://www.phnompenhpost.com/opinion/khmer-rouge-tribunal-justice-through-accountability>.

131. Renée Jeffery, *The Forgiveness Dilemma: Emotions and Justice at the Khmer Rouge Tribunal*, AUSTL. INST. INT’L AFF. (Apr. 7, 2016), <https://www.internationalaffairs.org.au/australianoutlook/the-forgiveness-dilemma-emotions-and-justice-at-the-khmer-rouge-tribunal/>.

132. Termination of the Proceedings Against the Accused Ieng Sary, Case No. 002/19-09-2007/ECCC/TC, D56/4/2.1.1 (Extraordinary Chambers in the Cts. of Cambodia, Mar. 14, 2013).

133. Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial

Samphan, who were ultimately sentenced to life in prison, were also elderly at the time of the proceedings. Nuon Chea died on August 4, 2019, while serving his sentence of life in prison which means he only spent approximately 5 years in prison.<sup>134</sup> The sentences were incommensurate with the suffering experienced by the Cambodian people. Life imprisonment might not be an adequate redress to justice because those sentenced only had or have to spend a small amount in prison until they die from old age. But many Cambodians “expressed a feeling of relief and satisfaction, as well as a sense of closure.”<sup>135</sup> After the verdict against Nuon Chea and Khieu Samphan was announced, a group of victims praised the court’s conviction stating that “[w]e will finally be able to mourn our relatives. It was important for us to see those who planned and ordered these crimes be held to account.”<sup>136</sup> Also, on November 16, 2018, the Court found Nuon Chea and Khieu Samphan guilty of crimes against humanity, war crimes, and genocide in relation to the Vietnamese and Cham populations.<sup>137</sup> The two appealed the conviction of Case 002/02; however, Nuon Chea died during the proceedings and the Court rejected Khieu Samphan’s appeal on September 22, 2022 which signaled the end of all proceedings in the ECCC. The ECCC has not been completely successful in its pursuit for justice. Yet it is undoubtedly true that it has answered some of the victims’ demand for justice.

### C. C. THE COURSE OF INTERNATIONAL CRIMINAL LAW

Although the ECCC was imperfect, it was a paramount experiment in international criminal justice that has the potential to change the course of international criminal law. With its imperfections, the ECCC clarified areas of improvement in international tribunals. On the other hand, with its successes, the ECCC highlighted areas that can be worthwhile to simulate in future international courts, especially the victim centered approach followed

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Following Supreme Court Chamber Decision of 13 December 2011, Case No. 002/19-09-2007/ECCC/TC, E138/1/10 (Extraordinary Chambers in the Cts. of Cambodia, Sep. 13, 2013)

134. Neuman, *supra* note 9.

135. HEATHER RYAN & LAURA MCGREW, PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 24 (2016).

136. Tom Fawthrop, *Despite the Controversy, the Khmer Rouge Tribunal is a Success*, THE INTERPRETER (Jan. 19, 2018), <https://www.lowyinstitute.org/the-interpreter/despite-controversy-khmer-rouge-tribunal-success>.

137. Prosecutor v. Chea, Case No. 002/19-09-2007/ECCC/TC, Summary of Judgment, ¶¶ 30, 34 (Extraordinary Chambers in the Cts. of Cambodia, Nov. 16, 2018).

throughout the ECCC's operation.

### 1. Learning From the Imperfections

The super-majority rule was an inescapable product of negotiations between the UN and the Government. The Government had a clear objective: peace. Although the KR had been defeated in 1979, the KR continued its fight against the newly established government. Thus, it was understandable that the Government wanted a hybrid tribunal with Cambodian Judges and Prosecutors. To maintain peace with the remaining KR members, the Government needed to be as lenient as possible, but it was clear that International Judges and Prosecutors would not share this same view. Hence, negotiations between an impenetrable shield and an all-piercing spear led to the basic features of the ECCC model, including the super-majority rule. The super-majority rule was far from perfect but it fulfilled the essential tasks for which it was designed, which was “preventing unjust convictions in government-favored cases while allowing investigations to advance in government-opposed cases.”<sup>138</sup> Furthermore, it created an incentive for both national and international personnel to seek consensus and adopt joint decisions.<sup>139</sup> The super-majority rule was not flawed per se. Problems arose when this rule was integrated with political pressure. Therefore, in the future, it is imperative that the basic foundations of international tribunals are organized impartially through better negotiations. For example, negotiations could include more discussion or instructions on the super-majority rule. Directions on the super-majority mechanism were scarce in the agreement between the UN and the Government.<sup>140</sup> The agreement was not explicit about whether the super-majority rule would apply to minor decisions, such as requests for public hearings, and did not provide any guidance on deadlocked situations where judges disagreed with each other.

During negotiations to establish the ECCC, the UN insisted that it would “only participate in a court that met international fair trial standards, including international standards for judicial independence.”<sup>141</sup> However, the UN remained silent when Hun Sen publicly restricted the court from starting proceedings against five

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138. Paolo Lobba & Niccolò Pons, *Rethinking the Legacy of the ECCC: Selectivity, Accountability, Ownership*, 18 J. INT'L CRIM. JUST. 599, 610 (2020).

139. *Id.*

140. *Supra* note 6, art. 4.

141. OPEN SOCIETY JUSTICE INITIATIVE, *POLITICAL INTERFERENCE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 23 (2010).

suspects pursuant to the decision of the International Co-Prosecutor and the ruling by the Pre-Trial Chamber.<sup>142</sup> There was no sign that UN officials engaged with Hun Sen to insist on full cooperation with the proceedings of Cases 003 and 004.<sup>143</sup> It is apparent that the UN Secretary General should have been more assertive in the UN's negotiations with the Government and should have audibly expressed his concerns to the Government. It was the Secretary General's duty to do so since he facilitated the negotiations for organizing the ECCC. The UN's silence in response to Hun Sen restricting the court is an essential failure that the UN and other intergovernmental organizations should take into account when creating international tribunals in the future.

Furthermore, transparency is required to alleviate the detriments of political interference because "[a]ttempts to interfere with judicial independence are easily hidden."<sup>144</sup> The right to information is a fundamental right reflected on Resolution 59/201 of the UN General Assembly.<sup>145</sup> Transparency is also reflected on Article 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>146</sup> Article 14 of the International Covenant on Civil and Political Rights also highlights the importance of publicity in trials.<sup>147</sup> However, the ECCC lacked transparency during its initial proceedings. For example, in 2010, there were "news reports that significant Pre-Trial Chamber filings or decisions relating to claims of political interference have been ruled by the court as 'confidential.'"<sup>148</sup> Making filings of parties and decisions of judges confidential to protect the court from embarrassment or other trivial reason is a misuse of confidentiality and can easily be utilized to cover up symptoms of political interference. Many documents are now available online through the ECCC website and the Supreme Court has declassified many confidential documents; however, it is most likely that there are filings or decisions not published to the public that might manifest signs of political interference.<sup>149</sup> In the future, there should be more

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142. *Id.*

143. *Id.*

144. *Id.* at 27.

145. G.A. Res. 59/201, at 3 (Dec. 20, 2004).

146. G.A. Res. 60/147, art. 8 (Mar. 21, 2006).

147. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1996, 999 U.N.T.S. 171.

148. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 141, at 28.

149. Press Release, Supreme Court Chamber, Supreme Court Chamber Orders to Declassify Over 1,700 Confidential Documents (Sept. 6, 2012).

transparency requirements to detect political interference within courts. Specifically, making the decisions of judges available to the public will ensure that the basis for their decision is clear and will enhance accountability.

Finally, the ECCC was based on Cambodian law, which was an uncertain body of law influenced by French law. Cambodian law was not meaningfully applied before the ECCC and the law had not been significantly developed.<sup>150</sup> The law had not been re-drafted in any considerable way and this paved the way for gaps and loopholes that did not meet international human rights standards. Also, many Cambodian intellectuals, including those in the legal profession, were eliminated by the KR. Thus, there were few individuals who understood Cambodian law. Due to such shortcomings, the ECCC suffered from problems such as access to evidence and counsel, independence of judges and prosecutors, and adequate protection of witnesses.<sup>151</sup> Despite these shortcomings, the ECCC did provide a pathway for young talented lawyers and led to an increase in legal professionals.<sup>152</sup> The ECCC emphasized the importance of legal education. Supporting and funding the legal field is imperative in the creation of a robust legal framework and in the effectiveness of future international tribunals. Such legal framework will serve to counter ambiguities in the law and furnish a better guidance in determining questions such as personal jurisdiction.

## 2. Learning From the Successes

The ECCC had a distinct method of victim participation. All trials were open to the public at all times, except in special circumstances when the Judges determined that the public must be excluded.<sup>153</sup> As a result, over 240,000 people attended public ECCC hearings.<sup>154</sup> The ECCC provided free bus transportation for groups of Cambodians who wanted to visit the court which allowed thousands of Cambodians to

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150. Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 *ASIAN-PAC. L. & POL'Y J.* 300, 323 (2011).

151. *Id.*

152. See Kim Sarom, *Lawyers, BAKC 'Cornerstones' of Kingdom's Judiciary System*, PHNOM PENH POST (Dec. 6, 2023), <https://www.phnompenhpost.com/national/lawyers-bakc-cornerstones-of-kingdom-s-judiciary-system>.

153. PUBLIC AFFAIRS SECTION OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, AN INTRODUCTION TO THE KHMER ROUGE TRIALS 14 (6th ed. 2015).

154. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, Quarterly Progress Report: 1 October–31 December 2022, at 4.

experience the trials.<sup>155</sup> The ECCC further promoted victim participation through its structure which allowed victims to set up consolidated groups as direct parties to ECCC litigation to seek reparations.<sup>156</sup> The ECCC is the only tribunal with such a procedure, with over 3,800 civil parties.<sup>157</sup> This victim-centered approach was furthered by the ECCC's residual function.

In January 2023, the ECCC commenced its residual functions under the Addendum to the UN-RGC Agreement on the Extraordinary Chambers.<sup>158</sup> The Addendum conferred the ECCC with a residual mandate including “supervising the enforcement of sentences;” witness and victim protection; maintenance, preservation and management of the ECCC archives; and dissemination of information to the public as well as monitoring of “the enforcement of reparations awarded to Civil Parties” as required, among other functions.<sup>159</sup> This residual function differs significantly from the narrower residual mandates of international tribunals such as those of the Former Yugoslavia and Rwanda which are focused mainly on archival management and case monitoring.<sup>160</sup> Instead of ending its operation after the final appeal judgment, the ECCC launched a reconciliation process alongside civil society and victim communities.

The residual functions aim to promote self-help groups, co-design workshops, consultative meetings, and dialogues. The ECCC's residual functions will engage with ethnic and religious minorities,

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155. PUBLIC AFFAIRS SECTION, *supra* note 153, at 14.

156. Andre Kwok, *Justice Beyond the Courtroom? Residual Functions at the Extraordinary Chambers of the Courts of Cambodia*, CAMBRIDGE CORE BLOG (Apr. 19, 2023), <https://www.cambridge.org/core/blog/2023/04/19/justice-beyond-the-courtroom-residual-functions-at-the-extraordinary-chambers-of-the-courts-of-cambodia/>.

157. Defence Objection to Trial Chamber's Announcement to Put the Medical Report by Dr Campbell on the 'Confidential' Part of the Case File, Case No. 002/19-09-2007-ECCC/TC, E62/3/7, ¶ 11 (Extraordinary Chambers in the Cts. of Cambodia, June 29, 2011).

158. Kwok, *supra* note 156; *see* Addendum to the Agreement between the Royal Government of Cambodia and the United Nations Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers, art. 2 (Aug. 26, 2021).

159. Addendum to the Agreement between the Royal Government of Cambodia and the United Nations concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers (Aug. 26, 2021).

160. *See Mechanism for Closed Rwanda, Former Yugoslavia Criminal Tribunals Readying Transition from Operational Court to Residual Institution, President Tells General Assembly*, UNITED NATIONS (Oct. 19, 2022), <https://press.un.org/en/2022/ga12459.doc.htm>.

aging victims, youth, and survivors of sexual violence. Furthermore, the Supreme Court is declassifying numerous court documents and other materials of the KR period and ECCC trials.<sup>161</sup> The declassification and outreach projects serve to reduce the barriers to information and provide a full picture of the Cambodian reconciliation narrative. The residual functions also provide a strong connection between victims and generations born after the KR period by transmitting memories of the KR regime to future generations. Another important role of the ECCC's residual functions is the hosting of the Outreach Study Tour Program which informs students about the mass atrocities of the KR.<sup>162</sup> Such promotion of education serves to maintain the memories of the KR and reduce stigma regarding conversations about the KR. Despite the ECCC's imperfections, the ECCC's residual functions provide important lessons. The pursuit of justice should not end solely with the end of judicial proceedings but rather courts should aspire to reconcile societies with mass atrocities and grave human rights violations.

Another distinct feature of the ECCC was the Trial Chamber's issuance of testimonial therapy as reparations.<sup>163</sup> In the ECCC, testimonial therapy often consisted of symbolic purification rituals and forms of spiritual release, allowing victims to regain their dignity.<sup>164</sup> Victims found sessions of testimonial therapy helpful in managing post-traumatic stress disorder and profoundly empowered the victims by "giving back" the narrative to victims.<sup>165</sup> Concurrently, the court facilitated a form of monk-led walking meditation, wherein survivors walked together to sacred sites and found solace in shared trauma while chanting in sacred languages alongside Khmer.<sup>166</sup> "The ECCC is likely the first international court to direct such practices as legitimate remedies under international law, representing an attempt to not only hold individuals criminally responsible but also to restore the dignity of the victims."<sup>167</sup> Only a few civil parties were awarded

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161. Kwok, *supra* note 156.

162. A simple look at the News Articles page of the ECCC shows the reporting of countless Outreach Study Tour Programs. See *News Articles*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/news?page=0> (last visited Feb. 16, 2024).

163. Andre Kwok, *Testimonial Therapy: Buddhism's Influence in the Aftermath of the Khmer Rouge Tribunal*, INTERPRETER (Sep. 18, 2023), <https://www.lowyinstitute.org/the-interpreter/testimonial-therapy-buddhism-s-influence-aftermath-khmer-rouge-tribunal>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

testimonial therapy but victims were satisfied.<sup>168</sup> This highlighted the value of testimonial therapy in reconciliation or healing processes within victim communities. The ECCC's approach showed how faith-based interventions and criminal prosecutions can innovatively meet, fostering healing in the aftermath of mass atrocities.

### III. CONCLUSION

I have visited both the Toul Sleng detention center and the "Killing Fields," where more than a million people were killed and buried by the KR. Once one sets foot in these places, a sense of dread and terror instantly sets in. Looking at the countless skulls, bones, photos of torture and execution, and pictures of prisoners makes one deliberate on the cruelty of the world. Such suffering makes one ponder about what justice means and what can be done to prevent such atrocities. The effectiveness of the ECCC in achieving justice can be a subject of debate. Amongst structural flaws and political interference, the ECCC still managed to convict three individuals in Cases 001 and 002, providing a sense of justice for the victims. However, Cases 003 and 004 faced significant challenges which led to the dismissal of many proceedings. While imperfect, the ECCC served as a crucial experiment in international criminal justice, highlighting both areas of improvement and innovative practices. Lessons from the ECCC's shortcomings, such as the need for impartial tribunal foundations, increased transparency, and assertive international engagement during negotiations, can guide the establishment of future international courts. On the other hand, the victim-centered approach, residual functions, and testimonial therapy demonstrated the potential for a more comprehensive and holistic approach to justice in the aftermath of mass atrocities. In essence, the ECCC's journey underscores the challenges inherent in balancing legal accountability with political realities and the complex nature of achieving justice in post-conflict societies. While the court did not fully realize its goals, it undoubtedly contributed to addressing the demands for justice from the victims and provided valuable insights for the future development of international criminal law.

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168. *Id.*