

# NOT WORTH THE WAIT: HUN SEN, THE UN, AND THE KHMER ROUGE TRIBUNAL

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## I. INTRODUCTION

Between 1975 and 1979, the Khmer Rouge killed between one and three million Cambodians.<sup>1</sup> Twenty-four years later, on March 17, 2003, the United Nations and the Cambodian government reached an agreement to establish a criminal tribunal designed to try those most responsible for the massive human rights violations which took place during the Khmer Rouge reign of terror.<sup>2</sup> Another three years later, on July 4, 2006, international and Cambodian judges and prosecutors were sworn in to begin work at the Extraordinary Chamber in the Courts of Cambodia (“ECCC”).<sup>3</sup> To quickly grasp the Cambodia court’s prospects for success, one only need know a few basic facts.

First, the jurisdiction of the court will be limited to crimes that took place between April 17, 1975 and January 6, 1979.<sup>4</sup>

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1. Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 181-82 (Cesare P.R. Romano, Andre Nollkaemper, & Jann K. Kleffner eds., 2004) [hereinafter INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA].

2. UN News Service, *UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes*, UN News Centre, Mar. 17, 2003, at <http://www.un.org/apps/news/storyAr.asp?NewsID=6487&Cr=cambodia&Cr1=>.

3. *KR Tribunal Judges, Prosecutors are Sworn in*, THE CAMBODIA DAILY, Jul. 4, 2006, at 1.

4. 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, G.A. Res. 57/228(B), U.N. GAOR, 57th Sess., U.N. Doc. A/Res/57/228(B) (May 22, 2003) (ratified by the National Assembly of the Royal Government of Cambodia on October 5, 2004), art. 1-2 [hereinafter Agreement]; and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of

Thus, the only crimes the court can consider occurred more than twenty-seven years ago, which means that many of the responsible parties and witnesses are dead and that the memories of surviving witnesses have faded. Second, the Khmer Rouge mastermind, Pol Pot, and many of his top henchmen are in fact dead and beyond the reach of human justice.<sup>5</sup> Third, according to the agreement concluded between the UN and the Cambodian government, Cambodian judges will be in the majority on the judicial panels.<sup>6</sup> Fourth, while in theory the Cambodian judiciary is an independent organ within the Cambodian government structure,<sup>7</sup> in practice, Cambodia's judges are heavily influenced if not controlled by Cambodia's ruling party and its leader, Prime Minister Hun Sen.<sup>8</sup> Fifth, Hun Sen is a former Khmer Rouge member, and his Cambodian Peoples Party ("CPP") and his government include many former Khmer Rouge leaders, some of whom are possible targets of investigation and indictment.<sup>9</sup> Sixth, the ECCC has been given a shoestring budget and a three-year time period within which to accomplish its task.<sup>10</sup> This all adds up to a depressing forecast that the Cambodian hybrid will ultimately do a very poor job of delivering justice to the Cambodian people.

## II. HISTORICAL BACKGROUND

In ancient times Cambodia possessed one of the world's most advanced civilizations, and its people ruled an Asian empire. Its modern history, however, has been one of colonization

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Democratic Kampuchea, with inclusion of amendments, NS/RKM/1004/06 (adopted by the National Assembly of the Royal Government of Cambodia on October 5, 2004 and promulgated on October 27, 2004), art. 1-8 [hereinafter Law], available at <http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf>.

5. Pol Pot died in 1998. He murdered his former Defense and Security Chief, Son Sen, in 1997. DAVID CHANDLER, A HISTORY OF CAMBODIA 243 (3d ed. 2000) [hereinafter CHANDLER, HISTORY]. Former Army Chief Ke Pauk died in 2002. JUSTIN CORFIELD & LAURA SUMMERS HISTORICAL DICTIONARY OF CAMBODIA 193 (2003). Southwest Zone Commander Ta Mok died of "old age and tuberculosis" in a Phnom Penh military hospital on Jul. 21, 2006. *KR Chief Ta Mok Dies in Military Hospital*, THE CAMBODIA DAILY, Jul. 22-23, 2006, at 3.

6. Agreement, *supra* note 4, ¶ 13.

7. Chapter IX, article 109 of the Cambodian Constitution states, "The Judicial power shall be an independent power." Article 111 states, "Judicial power shall not be granted to the legislative or executive branches." KINGDOM OF CAMBODIA CONST., art. 109.

8. See Reality Check *infra*.

9. The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 53rd Sess., Agenda Item 110(B), U.N. Doc. A/53/850, S/1999/231, ¶ 96 (1999) [hereinafter Group of Experts Report].

10. See A Court Built for Delay and Confusion, Financing *infra*.

and subjugation by foreign powers.<sup>11</sup> The most recent colonizers were the French, who dominated Cambodia from 1863 until the early 1950s.<sup>12</sup> When the French withdrew from Indochina following their defeat at Dien Bien Phu in 1954, Cambodia was left to follow its own way as an independent nation under the leadership of then-youthful King Norodom Sihanouk.<sup>13</sup> Sihanouk and his new nation found themselves in a dangerous neighborhood. Some of the dangers were familiar. For centuries Cambodia maintained rivalries with the bordering countries of Vietnam, Thailand, and Laos, and these rivalries were never far from the surface. But the new and more pressing danger was the escalating conflict in Vietnam and its potential for expanding into Cambodia.

In order to keep his country from being sucked into the conflict, Sihanouk adopted a foreign policy of neutrality,<sup>14</sup> a policy that worked for nearly a decade. When the war in Vietnam escalated, however, the presence of Vietnamese communist sanctuaries within Cambodia's borders, economic crisis, and a domestic communist insurgency led by a former school teacher named Sath Sar (who later became known as "Pol Pot") soon overwhelmed Sihanouk and his government.<sup>15</sup> In the face of these growing problems, Sihanouk's grip on power began to slip. When he left the country on holiday in March 1970, a group of disenchanted civil servants and military officers led by General Lon Nol staged a successful *coup d'état*.<sup>16</sup> When Sihanouk heard of Lon Nol's betrayal, he made what would turn out to be the most disastrous about-face of his political career: he lent his name and support to the Cambodian communist organization known as the Khmer Rouge.<sup>17</sup>

Prior to Lon Nol's coup, Sihanouk had brutally repressed the communists and driven them from the cities into the countryside.<sup>18</sup> Although they were receiving financial and military aid from North Vietnam, the communists were a factionalized group without widespread support from the population.<sup>19</sup> This situa-

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11. See generally CHANDLER, HISTORY, *supra* note 5.

12. *Id.* at 117-208.

13. Ben Kiernan, *Introduction: Conflict in Cambodia, 1945-2002*, 34(4) CRITICAL ASIAN STUD. 483, 484 (2002).

14. *Id.* at 484.

15. *Id.*

16. CHANDLER, HISTORY, *supra* note 5, at 204-06.

17. *Id.* at 205.

18. See DAVID P. CHANDLER, BROTHER NUMBER ONE: A BIOGRAPHY OF POL POT 65-85 (rev. ed. 1999) [hereinafter CHANDLER, BROTHER].

19. BEN KIERNAN, THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE 1975-1979 13-25 (1996) [hereinafter KIERNAN, POL POT].

tion changed when Sihanouk joined forces with them and the Khmer Rouge skillfully played upon Sihanouk's continued popularity with the Cambodian peasantry to expand their support base.<sup>20</sup> The Khmer Rouge recruiting efforts were further assisted when the United States began bombing Cambodian territory in 1973, leading many angry Cambodians to join the cause they equated with, opposition to the U.S.<sup>21</sup> With moral and material assistance flowing in and its ranks growing by the day, the Khmer Rouge movement became an unstoppable force. On April 17, 1975, the inevitable occurred — Lon Nol's government collapsed and the Khmer Rouge marched into Phnom Penh — as the new rulers of Cambodia.<sup>22</sup>

While Cambodia's population had grown accustomed to conflict, few were likely to have foreseen the fate that awaited their country under the Khmer Rouge. As soon as they had seized control of Cambodia's few cities, the Khmer Rouge drove the urban population into the countryside, forcing them to march for days, sometimes weeks, to villages where they were put to work in the fields.<sup>23</sup> The precise motivation for these forced expulsions remains unclear, but it certainly involved a determination to turn the country into a nation of peasants as part of the Khmer Rouge's purifying revolution. Moreover, Pol Pot and his associates recognized that these forced expulsions provided a means of gaining control of the urban population and rivals within their own party.<sup>24</sup> During the time of the expulsions and in the years that followed, the Khmer Rouge executed hundreds of thousands of civilians for a variety of reasons - for having been officials of the former government, members of the former government's army, or family members of such people; for coming from an educated background; for not working hard enough; for expressing religious sentiments; or simply for being sick.<sup>25</sup> Many more died from hunger, disease, and exposure. Estimates of the number of people who perished under the Khmer Rouge vary, but respected sources estimate that approximately 2.2 million people died between 1975 and 1979.<sup>26</sup>

The Khmer Rouge leadership's destructive revolutionary philosophy and its extreme paranoia soon led it to devour its own. When Lon Nol's forces were defeated and Cambodia's educated elite had been eliminated, Pol Pot and his ruling clique

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20. CHANDLER, BROTHER, *supra* note 18, at 85-99.

21. KIERNAN, POL POT, *supra* note 19, at 16-25.

22. CHANDLER, HISTORY, *supra* note 5, at 208.

23. *Id.* at 209-11.

24. *Id.* at 210-11.

25. See Group of Experts Report, *supra* note 9, ¶¶ 5-35.

26. *Supra* note 1, at 181-82.

orchestrated a series of bloody purges in which tens of thousands of Khmer Rouge members, including many of its most important leaders, were tortured and killed.<sup>27</sup> Pol Pot and the Khmer Rouge then turned on their Vietnamese benefactors by killing or driving out large numbers of ethnic Vietnamese living in Cambodia before engaging in a series of border conflicts with Vietnamese troops.<sup>28</sup> Eventually, the Vietnamese ran out of patience and invaded Cambodia on December 25, 1978. The much superior Vietnamese army quickly routed Pol Pot's fighters and captured Phnom Penh on January 7, 1979.<sup>29</sup> Pol Pot managed to escape and went into hiding in the forests near the Thai-Cambodian border.<sup>30</sup> With the majority of the country under their control, the Vietnamese set up a new communist government using as front men former Khmer Rouge members — those who had escaped to Vietnam years earlier to avoid being purged by Pol Pot.<sup>31</sup>

While the initial response of the Cambodian population to the Vietnamese victory over the Khmer Rouge seems to have been one of gratitude and relief, it was not long before the mood of many turned to resentment and resistance.<sup>32</sup> As the Vietnamese presence in Cambodia dragged on through the 1980s, a variety of Cambodian resistance groups organized to end the Vietnamese occupation.<sup>33</sup> These groups included communists and non-communists, but the dominant group was the Khmer Rouge, still led by Pol Pot, who operated in relative safety from his border stronghold.<sup>34</sup> In fact, even though news of Khmer Rouge atrocities filtered out of the country and soon became widely known, the U.S., China, and other world powers recognized Pol Pot's government as the legitimate government of Cambodia and provided the Khmer Rouge with various forms of assistance.<sup>35</sup>

Eventually, Vietnam grew weary of propping up a dysfunctional Cambodian government and fighting an endless guerilla war. In 1989, Vietnam announced its intention to withdraw its forces from Cambodia.<sup>36</sup> This announcement led to a comprehensive settlement between the Cambodian government and the

27. CHANDLER, HISTORY, *supra* note 5, at 216-19.

28. *Id.* at 134.

29. *Id.* at 223-25.

30. CHANDLER, BROTHER, *supra* note 18, at 157-59.

31. CHANDLER, HISTORY, *supra* note 5, at 225.

32. See generally EVAN GOTTESMAN CAMBODIA AFTER THE KHMER ROUGE: INSIDE THE POLITICS OF NATION BUILDING (2003).

33. CHANDLER, HISTORY, *supra* note 5, at 227, 231-39.

34. *Id.*

35. *Id.* at 231-35.

36. Group of Experts Report, *supra* note 9, ¶ 40.

major resistance groups, signed in Paris on October 23, 1991.<sup>37</sup> The agreement called for resistance forces to demobilize and for a United Nations Transitional Authority in Cambodia ("UNTAC") to conduct fair elections.<sup>38</sup> Despite the fact that the Khmer Rouge refused to participate in the elections and continued to commit human rights violations in the countryside,<sup>39</sup> UNTAC was able to orchestrate elections in 1993. These elections resulted in the formation of a coalition government made up of royalists, headed by Sihanouk's son, Norodom Ranariddh, and former communists, now led by a young, former Khmer Rouge leader named Hun Sen.<sup>40</sup>

Even with the election of a new, ostensibly democratic, government, the Khmer Rouge was still a force to be reckoned with. Pol Pot still loosely commanded thousands of battle-hardened fighters, still held the loyalty of significant segments of Cambodia's rural population, and still controlled significant pieces of Cambodian territory.<sup>41</sup> Since the new government was weak and since UNTAC adopted a passive interpretation of peacekeeping, i.e., refusing to engage the Khmer Rouge militarily,<sup>42</sup> the guerilla war seemed likely to drag on for a very long time. When the UN began withdrawing its peacekeepers, Co-Prime Minister Hun Sen set out to accomplish what the Vietnamese and the UN could not – destroy the Khmer Rouge as a military threat. He did this by convincing key leaders of the Khmer Rouge to cease their struggle and join his government. Tired of decades of conflict and, certainly in many cases, eager to partake in whatever largesse Hun Sen could provide, a number of Khmer Rouge leaders defected and brought with them hundreds of Khmer Rouge fighters.<sup>43</sup> In return, Hun Sen foreswore retribution and gave some of these men high positions in his government and security forces.<sup>44</sup>

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37. *Id.*

38. U.S. Institute of Peace, Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, available at [http://www.usip.org/library/pa/cambodia/agree\\_comppol\\_10231991.html](http://www.usip.org/library/pa/cambodia/agree_comppol_10231991.html).

39. Group of Experts Report, *supra* note 9, ¶ 41.

40. CHANDLER, HISTORY, *supra* note 5, at 239-41.

41. *Id.*

42. *Id.*

43. CHANDLER, HISTORY, *supra* note 5, at 243. One of the early defectors was Ieng Sary, Pol Pot's former Prime Minister, who defected in return for a promise of amnesty for his 1979 genocide conviction in absentia and for crimes he may have committed under Cambodia's 1994 law outlawing the Khmer Rouge and a promise that he would be able to stay living in the border region of Pailin. Group of Experts Report, *supra* note 9, ¶ 44.

44. For example, former Khmer Rouge army chief, Ke Pauk, was made a Brigadier General in the Royal Cambodian Armed Forces after his defection in 1999. CORFIELD, *supra* note 5, at 194. Chouk Rin, the Khmer Rouge commander who orchestrated a 1994 train attack and kidnapping of three western backpackers was

In the case of some Khmer Rouge military units, it was as simple as changing uniforms - one day they were Khmer Rouge guerillas in black pajamas; the next day they were loyal government soldiers in green uniforms.<sup>45</sup> Due to these defections, the Khmer Rouge ceased to exist as a fighting force by the mid 1990s.<sup>46</sup> In July 1997, Hun Sen and Ranariddh made a joint appeal to the UN asking that an international tribunal be established to judge the Khmer Rouge.<sup>47</sup>

### III. NEGOTIATING THE EXTRAORDINARY CHAMBERS

#### A. *The Group of Experts*

From the time that the extent of the Khmer Rouge mass murders became widely known, elements of the international community pushed for the establishment of some type of criminal tribunal to try those responsible. For many years, however, the political situation within the country was so unstable that serious planning for such an endeavor was not possible. When Co-Prime Ministers Hun Sen and Norodom Ranariddh requested assistance in 1997, it seemed that a decisive moment had been reached, and the UN began to engage the Royal Government of Cambodia ("RGC") in negotiations over creating some sort of justice operation.<sup>48</sup>

To begin the process of negotiation, the UN sent a three-member group, the Group of Experts, to Cambodia in 1999 on a fact finding mission.<sup>49</sup> The Group conducted research, met with government and nongovernmental officials, and then wrote a report presenting their findings and recommendations.<sup>50</sup> In the report, the Group identified what they saw to be the two main options available for bringing former Khmer Rouge leaders to justice. The first option was to conduct trials in a domestic Cambodian court using Cambodian law.<sup>51</sup> This option included the possibility of setting up a hybrid court comprised of

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made a colonel in the Cambodian army. PETER MAGUIRE, *FACING DEATH IN CAMBODIA* 102 (2005).

45. MAGUIRE, *supra* note 44, at 102.

46. See CHANDLER, *HISTORY*, *supra* note 5, at 241-43.

47. Group of Experts Report, *supra* note 9, ¶¶ 4-5.

48. See U.N. Office of Legal Affairs, *History of Negotiations of Khmer Rouge Tribunal Between the United Nations and Cambodia: A Chronology*, Feb. 8, 2002 [hereinafter *History of Negotiations*], available at [http://www.dccam.org/history\\_of\\_the\\_negotiations\\_on\\_the\\_khmer\\_rouge\\_tribunal.htm](http://www.dccam.org/history_of_the_negotiations_on_the_khmer_rouge_tribunal.htm).

49. Group of Experts Report, *supra* note 9, ¶ 6. (The Groups members were Sir Ninian Stephen, an Australian judge, Rajsoomer Lallah, a judge from Mauritius, and Steven R. Ratner, an academic from the United States).

50. *Id.* ¶ 7.

51. *Id.* ¶ 122.

Cambodian and international personnel serving as judges, prosecutors, investigators and defense attorneys, who would apply a mixture of domestic and international law.<sup>52</sup> The second option was for the United Nations to use Chapter VI, Chapter VII, or some other part of the United Nations Charter to establish an ad hoc international tribunal similar to those created for the former Yugoslavia (the International Tribunal for the Former Yugoslavia (ICTY)) and Rwanda (the International Criminal Tribunal for Rwanda (ICTR)).<sup>53</sup> Such a tribunal would apply international law, operate according to internationally accepted rules and procedures, and would be controlled by international, rather than domestic, judges and prosecutors. Considering these two alternatives, the Group recommended that the UN establish an ad hoc international tribunal<sup>54</sup> and specifically recommended *against* UN involvement in any sort of Cambodian domestic tribunal, even one receiving international financial support and employing international personnel.<sup>55</sup>

The Group gave numerous reasons for their recommendation. They expressed their opinion that the Cambodian legal system lacked the three key ingredients necessary for a fair judicial process, namely, a trained group of judges, lawyers and investigators, an adequate infrastructure, and a "culture of respect for due process."<sup>56</sup> The Group expressed equally strong doubt that Cambodia's domestic political reality would allow a locally based tribunal to proceed at full speed and in good faith. They noted that both of the principal political parties in Cambodia had strong connections with the Khmer Rouge and that both parties included many former Khmer Rouge members, some of whom were likely to be targets of investigation.<sup>57</sup> They expressed concern that even if a mixed tribunal were created, the tribunal would not be able to avoid being manipulated or thwarted by the Cambodian government or other "political forces in Cambodia."<sup>58</sup> The Group summed up its opposition to the domestic court option by stating:

Our decision to recommend against United Nations involvement in the establishment of a Cambodian tribunal is not an easy one and comes only after careful consideration of the situation in Cambodia based on our research and interviews. It doubtless will be difficult for some to accept our opinion that even substantial international funding and insertion of inter-

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52. *Id.* ¶ 137.

53. *Id.* ¶¶ 139-48.

54. *Id.* ¶ 47.

55. *Id.* ¶¶ 131-38.

56. *Id.* ¶¶ 126.

57. *Id.* ¶ 96.

58. *Id.* ¶ 137.

national personnel will not be worth the effort in that it will still encounter the many impediments likely to be placed in its way as a result of Cambodian politics. But we believe it is our responsibility to reject options that are not likely to be feasible and not to encourage the United Nations to fund any tribunal that is unlikely to meet the minimal standards of justice.<sup>59</sup>

The Cambodian government's response to the Group's recommendations was swift and negative. In a letter to Secretary-General Annan, the RGC suggested that an effort by the UN to create an ad hoc tribunal might cause panic among the former Khmer Rouge and result in a new guerilla war.<sup>60</sup> In a follow-up meeting, RGC representatives argued that, since both the perpetrators and victims were Cambodian, the matter should be handled by a Cambodian court.<sup>61</sup> They also expressed their opinion that Cambodian courts and Cambodian judicial personnel were fully capable of conducting the investigations and court trials.<sup>62</sup>

Secretary-General Annan passed along the Group's report to the General Assembly and Security Council but failed to endorse its recommendations completely. The Secretary-General did not agree with the Group's conclusion that the only acceptable option was to create an ad hoc international tribunal. Instead, he recommended that the UN explore "other options" that would be "international in character."<sup>63</sup> The UN's Office of Legal Affairs ("OLA") was then given the task of working with the Cambodian government to build a court that both sides could live with. This began four years of tortuous negotiations aimed at creating a new model of international justice - a model which would use a mixture of international and domestic law and personnel. Meanwhile, out in the Cambodian countryside, Pol Pot and other high level members of the Khmer Rouge were dying, disappearing, negotiating actual or *de facto* amnesty deals with the government, or otherwise living out the remains of their lives in relative peace and obscurity.

### B. *The Negotiations*

Beginning in August 1999, a UN OLA team began a negotiating odyssey, flying back and forth to Cambodia with the aim of creating a tribunal that would meet the Cambodian government's requirements but would also operate within internationally ac-

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59. *Id.* ¶ 138.

60. *Id.* Letter from the Secretary General to the President of the General Assembly and the President of the Security Council, ¶ 2.

61. *Id.*

62. *Id.*

63. *Id.*

cepted norms.<sup>64</sup> There were numerous issues to negotiate, and some issues changed as negotiations moved along. Ultimately, five main points of negotiation emerged for the OLA. First, the OLA wanted recognition that any agreement forged between the UN and the Cambodian government establishing the tribunal would trump any domestic law regarding the tribunal passed by the Cambodian legislature.<sup>65</sup> This was to ensure that the UN would not be endorsing legal procedures that did not meet international due process standards.<sup>66</sup> Second, the OLA wanted the tribunal to employ international rules of procedure rather than domestic rules<sup>67</sup> to make certain that the trials, paid for and supported mostly by the international community, would follow internationally accepted standards and provide internationally accepted protections for the rights of the accused. Third, the OLA wanted a guarantee that no major human rights abusers would be shielded from prosecution by amnesty or pardon.<sup>68</sup> The UN had taken the position in previous years that international customary law strictly forbids granting either amnesty or pardon to serious violators of international humanitarian law.<sup>69</sup> A court rejecting this central tenant of progressive international law could never stake a claim to international legitimacy. The OLA position on this point was also consistent with the recognition that allowing the Cambodian government to give some former Khmer Rouge leaders immunity and not others would jeopardize the integrity and credibility of the whole process. Fourth, the OLA wanted the court and the office of the prosecutor to be controlled by international judges and international prosecutors<sup>70</sup> as a safeguard of the justice process tribunal's impartiality. This measure would also ensure that the judicial panels and prosecutor's office would have an adequate number

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64. See History of Negotiations, *supra* note 48; see also Chronology of Cambodian Events Since 1950, Yale University Cambodian Genocide Program, [www.yale.edu/cgp/chron.html](http://www.yale.edu/cgp/chron.html).

65. Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders, Feb. 8, 2002 [hereinafter Statement], available at [www.un.org/News/dh/infocus/cambodia/corell-brief.htm](http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm).

66. *Id.*

67. Ben Kiernan, *Cambodia and the United Nations-Legal Documents*, 34(4) CRITICAL ASIAN STUD. 611, 611 (2002).

68. Craig Etcheson, A "Fair and Public Trial": A Political History of the Extraordinary Chambers, in Justice Initiatives (newsletter of the Open Society Justice Initiative), Spring 2006, 7-24, at 15; Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 1, at 214.

69. See ANTONIO CASSESE, INT'L CRIM. L. 312-16 (2003).

70. Report of the Secretary-General on Khmer Rouge Trials, U.N. Doc. A/57/769, ¶16(c) (Mar. 31, 2003) [hereinafter Report on Khmer Rouge Trials].

of personnel knowledgeable about international criminal law and experienced in applying international rules of criminal procedure. Fifth, the Secretary-General and the OLA wanted to see a financing scheme put in place guaranteeing that the justice effort receives adequate funding. To this end, the Secretary-General fought a battle within the UN to establish a financing mechanism based upon assessed contribution rather than relying upon voluntary contribution. Under a scheme of assessed contribution, UN Member States are billed their portion of tribunal costs at rates consistent with their regular UN budget assessment.<sup>71</sup> Under a voluntary contribution scheme, each individual State may decide for itself how much to contribute, when to contribute, and even whether it should be making any contribution at all.<sup>72</sup> Based upon his experience in such matters, the Secretary-General believed that funding by voluntary contribution was too uncertain and would start the enterprise out on very shaky ground.<sup>73</sup>

Negotiations quickly revealed that the Cambodian government was pursuing a very different set of priorities than the UN. To begin with, it was unclear if Hun Sen and the RGC wanted a tribunal to be created at all. Throughout the years Hun Sen had made a variety of statements expressing his ambivalence toward the prospect.<sup>74</sup> He and his negotiators also made it known from the beginning that if a tribunal were created, they wanted it to be an institution that was more national than international in character and structure.<sup>75</sup> They insisted that Cambodian judges be in control of the court and that Cambodian law govern its operation.<sup>76</sup> Ultimately, Hun Sen would outmaneuver the OLA with an assist from a number of powerful nations, including the United States.

The backsliding began in May 1999, after the RGC rejected the recommendation of the Group of Experts to establish an international ad hoc tribunal. At that point, the UN Special Representative for Human Rights in Cambodia, Thomas

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71. For a detailed explanation of how other international criminal tribunals are financed, see Thordis Ingadottir, *The Financing of Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 1, at 271-89.

72. *Id.*

73. See Report on Khmer Rouge Trials, *supra* note 70, ¶¶ 72-78.

74. *E.g.*, in 1998, Hun Sen received Nuon Chea, formerly Pol Pot's number two, and Khieu Samphan, former Head of State for the Khmer Rouge, at his home and announced to the press that Cambodians should "dig a hole and bury the past and look to the future." *UN Dismay at Khmer Rouge Immunity*, BBC News, Dec. 29, 1998, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/243634.stm>.

75. See Group of Experts Report, *supra* note 9, Letter from the Secretary-General to the President of the General Assembly and the President of the Security Council, ¶ 2.

76. *Id.*

Hammerberg, proposed that a “mixed tribunal,” composed of a majority of international judges and a minority of Cambodian judges, be established instead.<sup>77</sup> Hun Sen and his government refused this proposal since it placed the international majority in control of the court.<sup>78</sup> To break the stalemate in negotiations, the U.S. stepped in and proposed a mixed tribunal with a majority of Cambodian judges and “co-prosecutors” - one international and one Cambodian with equal power.<sup>79</sup> The U.S. also proposed a “supermajority” voting formula which required a majority plus one of judges for any decision to stand.<sup>80</sup> The presumed rationale for this system was that because it required the assent of at least one international judge, it would work to reduce the influence of Hun Sen and his government.<sup>81</sup> The OLA did not agree with the U.S. proposal and continued to push for a tribunal where the international personnel would be in control of both the court and the prosecutor’s office.<sup>82</sup>

In January 2001, the Royal Government of Cambodia blindsided the OLA by arranging for the Cambodian parliament to pass legislation that created, at least on paper, a hybrid court within the Cambodian court system containing many of the elements the UN negotiators had refused to accept.<sup>83</sup> The passage of the law had the dual effect of making the RGC appear sincere in its efforts to bring the Khmer Rouge to justice while at the same time locking down the RGC’s negotiating position by creating a specialized national court that would pre-date any agreement the RGC might reach with the UN.<sup>84</sup>

In the eyes of the OLA, the Cambodian government had finally gone too far. On February 8, 2002, UN Legal Counsel Hans Correll, speaking for the Secretary-General, announced that the UN was pulling out of negotiations. Correll stated, “The United Nations has come to the conclusion that the Extraordi-

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77. *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, HUM. RTS. WATCH, Apr. 2003, at 9, available at <http://hrw.org/backgrounder/asia/cambodia040303-bck.htm>.

78. *Id.* at 10.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See Law, *supra* note 4. The original version of the Law, NS/RKM/0801/12, was adopted by the Cambodian National Assembly on January 2, 2001. Available at <http://www.genocidewatch.org/CambodianTribunalLaw.htm>.

84. The Secretary-General acknowledged the effect the passage of the Law had upon the UN negotiating position by stating in his March 31, 2003 report to the General Assembly, “It was clear to me, then, that the only agreement it would be possible to negotiate with the Government was one that accepted the structure and organization of the Extraordinary Chambers foreseen in Cambodia’s Law of 10 August 2001.” See Report on Khmer Rouge Trials, *supra* note 70, ¶ 23.

nary Chambers, as currently envisaged, would not guarantee the independence, impartiality, and objectivity that a court established with the support of the United Nations must have.”<sup>85</sup> The UN, it seemed, had drawn a line in the sand. This was a major event since it represented a moment where the UN leadership took the long view, showed courage of conviction, and refused to accept a debilitating compromise that would ruin any chances for real justice to be achieved. Significantly, the UN’s position was supported by a wide coalition of Cambodian human rights groups.<sup>86</sup> But the UN leadership’s resolve did not last long. Powerful countries like the U.S., Japan, France, India, and Australia, had spent years pushing for the creation of a tribunal, and did not want to see their efforts result in failure, so they pressured the UN leadership to accept what it did not wish to accept - a tribunal controlled by Cambodians.<sup>87</sup> In the end, Correll was forced to travel back to Cambodia, hat in hand, and sign an agreement which gave Hun Sen and his government most of what they wanted.<sup>88</sup>

#### IV. REALITY CHECK

The UN and the RGC signed the Agreement in March 2003 and three years later, despite the recommendations of the Group of Experts and the express reservations of the OLA negotiating team, the first UN personnel arrived to start building a court situated in Cambodia controlled by Cambodians. To understand how the court will operate within this Cambodian context, it is necessary to take into consideration some of the realities of Cambodian politics and the limitations of the Cambodian justice system.

The reality is this: While international donors have made significant efforts over the last fifteen years to help Cambodia build a functioning justice system that includes an independent judiciary, the reality, as I demonstrate below, is that Cambodia’s judges are heavily influenced by Prime Minister Hun Sen, his government, and his ruling party and are not independent. It is also true that Cambodian court officials work within a deeply rooted culture of corruption.

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85. Statement, *supra* note 65.

86. *Supra* note 1, at 200.

87. *Id.* at 204.

88. When Correll was asked if the agreement would provide judicial independence, Correll replied, “As an international civil servant I have been given the task to negotiate this text and I have done so to the best of my ability. My personal opinion is a different matter.” Etcheson, *supra* note 68, at 18 (citation omitted), at [http://www.justiceinitiative.org/db/resource2?res\\_id=103182](http://www.justiceinitiative.org/db/resource2?res_id=103182).

These are troubling assertions to be sure, but they are supported by the facts. There is, of course, no question that Hun Sen is a former Khmer Rouge communist. He started his political career as a low level Khmer Rouge commander operating in the eastern area of Cambodia.<sup>89</sup> When Pol Pot began his purges of Eastern Zone cadres in 1973, Hun Sen fled for his life across the border to Vietnam.<sup>90</sup> The Vietnamese put him in custody for a time but later released him so that he could play a role in the anti-Pol Pot resistance movement the Vietnamese had decided to foster.<sup>91</sup> When the Vietnamese drove Pol Pot from power in 1979, they made Hun Sen, twenty-seven years old at the time, Foreign Minister of the new government.<sup>92</sup> From that position, Hun Sen maneuvered rapidly to the top of the communist government power structure.<sup>93</sup>

The UN's relationship with Hun Sen began with the signing of the 1991 Paris Peace Accords and has been stormy since. In 1993, when the UN was able to deliver a nationwide election in the face of Khmer Rouge threats and dire predictions of failure, Hun Sen robbed them of their success by refusing to acknowledge that his party lost and by threatening violence if he were not allowed to remain in power.<sup>94</sup> He leveraged this threat into an agreement where the true winner of the election, Prince Norodom Ranariddh, was forced to share the office of Prime Minister. This left Hun Sen, the Co-Prime Minister with the strongest support from the military, in *de facto* control of the country.<sup>95</sup> In 1997, Hun Sen seized complete control of the government in a *coup de force* which drove Ranariddh into exile and crushed his party's security forces.<sup>96</sup> During the coup, CPP henchmen tortured and murdered many Ranariddh supporters.<sup>97</sup>

Since 1997, Hun Sen and the CPP have been in full control of the country and have had no need for large scale murder to remain in power. However, they have frequently used less deadly means to intimidate and silence the opposition. For example, they have used the Cambodian judiciary and the arbitrary application of the UNTAC-era Penal Code to eliminate enemies and discourage dissent. Their favorite technique has been to

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89. CORFIELD, HISTORY, *supra* note 5, at 47.

90. KIERNAN, POL POT, *supra* note 19, at 369-70.

91. GOTTESMAN, *supra* note 32, at 31-34. .

92. CORFIELD, *supra* note 5, at 158-59; *see also* GOTTESMAN *supra* note 32, at 45-48.

93. CHANDLER, HISTORY, *supra* note 5, at 228.

94. *See* HENRY KAMM, CAMBODIA: REPORT FROM A STRICKEN LAND 223-229 (1998).

95. *Id.*

96. CHANDLER, HISTORY, *supra* note 5, at 243.

97. *Id.*

charge critics with the crime of defamation and have them arrested and put in prison. The most recent, well-publicized example of this occurred in December 2005 following an International Human Rights Day rally in Phnom Penh. While the facts remain murky, allegations were made that someone had displayed a banner during the rally which included language accusing Hun Sen of selling or giving away Cambodian land to Vietnam. Following the rally, a number of well known human rights advocates involved in sponsoring the rally were arrested and charged with criminally defaming Hun Sen.<sup>98</sup> There was an outcry by the local human rights community,<sup>99</sup> complaint made by some elements of the international community,<sup>100</sup> and an apparent attempt to intervene by a high level U.S. diplomat.<sup>101</sup> At first, Hun Sen claimed no responsibility for the arrests. He claimed that it was the court, not he, that had independently decided to arrest and charge the men. "The government has never used any power to arrest or detain anyone," he stated.<sup>102</sup> Yet, some days later, Hun Sen's senior advisor announced that Hun Sen was releasing the men as a "gift" to visiting U.S. Assistant Secretary of State, Christopher Hill, thereby making Hun Sen's earlier statements seem like a farce.<sup>103</sup> Hun Sen ordered the men's release but warned them in statements he made to the press. "Just let things go quietly," he advised, "[but] if you are rude, the court will summon you, so there will be another problem."<sup>104</sup> At the time of this writing, the charges against the men have not been dropped; they are kept in fear and uncertainty. The message was clear to anyone following the events, Hun Sen controls the courts in Cambodia.

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98. Guy De Launey, *Cambodia Arrests Rights Activists*, BBC NEWS, Dec. 31, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4572208.stm>. The five individuals who were ultimately arrested were Kem Sokha, Director of the Cambodian Center for Human Rights (CCHR), Pa Nguon Teang, Deputy Director for CCHR, Yeng Virak, Director of the Cambodian Legal Education Center (CLEC), journalist Mom Sonando, and President of the Cambodian Teachers Association, Rong Chhun.

99. Vong Sokheng, *Yeng Virak on Bail; Outcry Continues*, PHNOM PENH POST, Jan. 13-26, 2006, at 1.

100. See, e.g., David Gollust, *US Condemns Arrest of Human Rights Activists*, VOA NEWS, Jan. 4, 2006, available at <http://www.voanews.com/english/archive/2006-01/2006-01-04-voa2.cfm?CFID=31385156&CFTOKEN=83029046>.

101. Yun Samean & Lee Berthiaume, *Four Detainees are Freed from Prey Sar on Bail*, THE CAMBODIA DAILY, Jan. 18, 2006, at 1.

102. *Yeng Virak is Released from Prison on Bail*, THE CAMBODIAN DAILY, Jan. 12, 2006, at 1.

103. *Four Detainees are Freed from Prey Sar on Bail*, *supra* note 102, at 1.

104. See *Cambodian PM Again Attacks Foreign Critics of Defamation Arrests*, AGENCE FRANCE PRESS, Jan. 30, 2006, available at <http://www.iri.org/pdfs/1-30-06%20Cambodian%20PM%20says%20courts%20will%20not%20dismiss%20defamati.pdf>.

Will Hun Sen and his government restrain themselves from influencing the court out of respect for the UN and its mission to bring justice to the victims of the Khmer Rouge? Judging by Hun Sen's previous dealings with the UN, this seems unlikely. Over the years he has consistently been able to thwart the UN's most ambitious aims. In the process, he has frequently expressed disrespect for the UN's activities and its representatives.<sup>105</sup> He has been most contemptuous of its human rights advocacy, expressing this contempt whenever it suits his political interests or his rhetorical whim. For example, on March 29, 2006, Hun Sen responded to UN Special Representative for Human Rights in Cambodia, Yash Ghai's criticism of the human rights situation in the country by calling him a "long term tourist" and asking Secretary-General Annan to dismiss him.<sup>106</sup>

Will the Cambodian judges and prosecutors selected for the tribunal be able to resist outside influence? The chances of this are slim. The prospects for independent action by Cambodian judges and prosecutors might be different if they were either in a position to resist intrusion by the executive or had some history of independent action. Regrettably, Cambodia's judicial branch has no history of independence - the current court system is built upon a communist era superstructure where the government leadership had the last say over cases that entered the formal justice system.<sup>107</sup> While Cambodia's Constitution calls for an independent judiciary and requires both the King and an institution named the Supreme Counsel of Magistracy ("SCM") to guarantee that independence,<sup>108</sup> Hun Sen rendered the SCM impotent in May 2005 by dissolving its Secretariat and transferring its powers to the Ministry of Justice, a Ministry now headed by a member of his ruling party.<sup>109</sup> Even before this transfer, the executive branch and the ruling party frequently reached down to influence the actions of the judicial branch. Cambodian judges and prosecutors know that if they do not toe the party line, they are likely to find themselves transferred to a less desirable post or be out of a job entirely.

As disturbing as the lack of judicial independence are the reports of widespread corruption within the ranks of the judges

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105. For more examples, see Yun Samean & Erik Wasson, *PM Steps Up Attack on UN And Its Envoy*, THE CAMBODIA DAILY, Mar. 31, 2006, at 18.

106. Chhim Spheark & Erik Wasson, *PM Says UN Envoy Should be Removed*, THE CAMBODIA DAILY, Mar. 30, 2006, at 1.

107. KOY NEAM, INTRODUCTION TO THE CAMBODIAN JUDICIAL PROCESS 3 (1998).

108. Kingdom of Cambodia Const., art. 113.

109. Prak Chan Thul & Lee Berthiaume, *Power Shift Puts Judiciary Under Government Control*, THE CAMBODIA DAILY, May 9, 2005.

and lawyers.<sup>110</sup> Litigants routinely offer bribes to judges and prosecutors as an expected step in the litigation process. Bribery seems to be such an entrenched part of the system that those who accept bribes often make little effort to deny it. Consider an example particularly relevant to the personnel making up the ECCC. In 2006, the Supreme Council of Magistracy named Battambang Provincial Court President Nil Nonn to become one of the national judges who will sit in the ECCC Trial Chamber. Soon thereafter, it was reported in the press that Judge Nil had indicated to a foreign television news magazine in 2002 that he frequently accepted bribes from litigants. The producer of the news magazine subsequently reported that she possessed both transcripts of the interview and a film on which Judge Nil is recorded saying, "Yes, it happens to me as it does to others as well, but it is not through any efforts on my part. However, if after a trial people feel grateful to me and give me something, that's normal, I don't refuse it. I've settled the case for them and people feel grateful."<sup>111</sup> Confronted with this incriminating evidence, the Cambodian spokesman for the ECCC told the press that the issue was in the past and irrelevant to the proceedings.<sup>112</sup> Judge Nil remains an ECCC Trial Chambers judge.

The reality is that the ECCC is located in Cambodia. Cambodian judges will hold the majority voting power in the court panels, and they will be under the control of Hun Sen and his government. To believe that placing Cambodian officials, be they judges, prosecutors, or lawyers, in a building with international colleagues will somehow block outside influence and make them independent actors imbued with a new sense of professionalism is wishful thinking which can only lead to disillusionment.

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110. In May of 2006, the UN High Commissioner for Human Rights, Louise Arbour, visited Cambodia and reported that the justice system lacked integrity and independence. *UN Urges Cambodia Judicial Reform* BBC, May 19, 2006; also in May 2006, LICADHO, a leading Cambodian NGO stated in their human rights report "Cambodia's judiciary continues to be characterized by corruption, incompetence and political bias while institutional changes made in 2005 have brought the courts further under control of the executive. The judiciary continues to be used as a tool of the government in political cases, and as a theatre of corruption." LICADHO Report, Human Rights in Cambodia: The Facade of Stability, May 2006, at 17, available at <http://www.licadho.org/reports/files/8682LICADHOFacadeDemocracyReport2005-06.pdf>; in 2006, Human Rights Watch reported that, "[t]he courts widely viewed as corrupt, incompetent, and biased- continue to be used to advance political agendas, silence critics, and strip people of their land." Human Rights Watch World Report 2006 – Cambodia, Jan. 2006, available at <http://hrw.org/english/2006/01/18/cambod12269.htm>.

111. James Welsh & Prak Chan Thul, *Amanda Pike Filmmaker: KR Judge Said He Accepted Cash*, THE CAMBODIA DAILY, Jun. 10-11, 2006, at 3 (discussing Amanda Pike's *Pol Pot's Shadow*, in FRONTLINE WORLD, Oct. 2002, <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>).

112. *Id.*

## V. A COURT BUILT FOR DELAY AND CONFUSION

With critical aspects of Cambodian reality set out, the elements of the Agreement can be analyzed in proper context. The discussion must begin with a reminder that the ECCC is *not* an international tribunal, but a Cambodian court in which some international personnel work. The foundational documents of the ECCC place the institution firmly within the Cambodian court structure. It is also important to understand that there are two separate, albeit similar, documents which establish the jurisdiction and structure of the ECCC. The first document is the Agreement reached between the UN and the RGC in 2003, which was ratified in 2004 by the Cambodian National Assembly.<sup>113</sup> The second is the Law passed by the Cambodian National Assembly in 2001 and amended in 2004 to conform to the Agreement.<sup>114</sup> Despite the amendments made to the 2001 Law attempting to conform it to the 2004 Agreement, there are still some differences between the two documents, and there is still uncertainty over which document will prevail in the case of conflict between the two. To fully understand the structure and jurisdiction of the ECCC, one must refer to both of these documents. Nonetheless, the main components of the two documents are the same and, for purposes of this discussion, I will only be referring to the relevant articles of the Agreement.

While the purported aim of the extensive negotiations between the UN and the RGC was to create an institution that would bring those most responsible for the Khmer Rouge atrocities to justice, a closer look at the main components of the Agreement reveals that the court is structured, first and foremost, to protect the interests of the Cambodian government leadership. This analysis also reveals a court structure with an appalling potential for confusion, deadlock, and delay. The five main components discussed here will be: 1) jurisdiction, 2) amnesty, 3) procedural framework, 4) structure and 5) funding.

### A. *Jurisdiction*

The Agreement limits the temporal jurisdiction of the court to crimes “that were committed during the period of April 17, 1975 to January 6, 1979.”<sup>115</sup> This might be considered a reasonable limitation to the extent that it focuses the court’s attention on the time period when the Khmer Rouge were in control of the country and committed the bulk of their offences against the Cambodian population, thus making the number of offenses

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113. Agreement, *supra* note 4.

114. Law, *supra* note 4.

115. Agreement, *supra* note 4, ¶ 3.

under consideration more manageable. However, the four-year period is artificial since the Khmer Rouge committed similar offenses prior to marching into Phnom Penh on April 17, 1975, and continued to commit such offenses after they had been driven from power by the Vietnamese in 1979.<sup>116</sup> Limiting temporal jurisdiction to that four-year time period in the 1970s also eliminates any consideration of possible crimes committed by Hun Sen and his government while fighting the Khmer Rouge-led insurgency in the 1980s and 1990s. Finally, limiting the time period to crimes that occurred before 1979 also has the effect of making prosecution generally more difficult since many of the main suspects are dead or dying, and the evidence against the survivors is fading with each passing day.

The Agreement limits the personal jurisdiction of the court to “senior leaders of Democratic Kampuchea” and those who were “most responsible.”<sup>117</sup> If one accepts the temporal jurisdiction described above, this would seem a reasonable limitation of personal jurisdiction since it is limited to those who were most responsible for the mass killings and is consistent with one of the main goals of any international justice effort – punishing those most responsible for violations of international humanitarian law. Of course, the terms “senior leader” and “more responsible” may be interpreted in various ways. Ultimately, the court will have to determine which individuals fall within these definitions, and therein lies the problem. The majority of the judges sitting on the trial and appellate panels are Cambodian. With Hun Sen exercising control over the Cambodian judges, questions as to who was a “senior leader” and who was “more responsible” will be decided by Prime Minister Hun Sen, and not the court.

### B. *Amnesty*

Consistent with the prohibition in international customary law against granting amnesty or pardon for mass human rights offenders, Article 11(1) of the Agreement states, “The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.” Recalling that the Cambodian government had previously granted a pardon to Ieng Sary, Article 11(2) addresses this apparent conflict by acknowledging that the pardon was granted but leaves the “scope of the pardon” to be decided by the Extraordinary Chambers.

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116. See generally CHANDLER, BROTHER, *supra* note 18.

117. Agreement, *supra* note 4, ¶ 9.

On its face, it appears that the UN got most of what it asked for since the wording of Article 11 suggests that none of Hun Sen's *de facto* amnesties will be recognized by the court. It is not surprising, however, that Hun Sen's government would acquiesce on this point, since Hun Sen can maintain his *de facto* amnesties by controlling the process of indictment through his control of Cambodian court personnel. In fact, Article 11 gives Hun Sen a new way to control former Khmer Rouge leaders in his government. He can hold the threat of ECCC investigation over their heads, and if he decides to have any of them indicted, he can respond to their complaints by claiming that international law and principles of international justice, in the form of Article 11, tie his hands. When it comes to the pardon of Ieng Sary, Hun Sen leaves himself the same ability to control the man's fate that he always had. He may allow the Cambodian Co-Investigating Prosecutor and Cambodian judges to view the scope of Ieng's pardon narrowly so as to allow prosecution, or he may insist that they view it more broadly and uphold the pardon. No one knows what Hun Sen will do, but it is difficult to imagine him giving up Ieng Sary after giving him protection for so many years.

### C. Procedural Law

Representing a significant concession on the part of the UN, the Agreement requires the ECCC to follow Cambodian procedural law, rather than international procedural law. The current criminal procedural law of Cambodia exists in two separate codes,<sup>118</sup> both created in the UNTAC era and both designed as quick fixes until the Cambodian government could draft a more comprehensive criminal procedural code. After years of drafting, it appears that a new procedural code will be passed at some point near the end of 2006.<sup>119</sup> Since this will be *the* Cambodian criminal procedural law, the ECCC will likely have to start using it at some point during its operation. Such a shift would be a difficult prospect for any court operation, much more so for a court in which the judges and prosecutors come from different legal traditions. The switchover, if it occurs, is likely to cause delays and a lot of confusion.

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118. Provisions Dated September 10, 1992 Relating to the Judiciary and Criminal law and Procedure Applicable in Cambodia during the Transitional Period, Sep. 10, 1992, available at [http://www.eu-asac.org/programme/arms\\_law/UNTAC%20Law.pdf](http://www.eu-asac.org/programme/arms_law/UNTAC%20Law.pdf); Law on Criminal Procedure (1993), available at <http://www.cdpcambodia.org/soclaw.asp>.

119. According to members of the French Cooperation helping the Cambodian government to draft the code, the new code, containing more than 900 articles, is expected to be submitted to the Cambodian National Assembly before the end of 2006. Conversations with the author.

The Agreement does not completely ban the court from considering international law and international standards. In fact, it allows the court to seek “guidance. . . in procedural rules established at the international level” in three circumstances. These circumstances are: 1) where issues arise that Cambodian law does not cover, 2) where uncertainty exists regarding the interpretation or application of Cambodian law, and 3) where Cambodian law and international law conflict<sup>120</sup> While this permission to seek guidance in international law was likely intended to encourage the absorption of some international norms into the court’s procedural framework, in the end, it may make things more complicated. This is because the Agreement fails to identify which international procedural rules it is referring to. There are a number of different sets of international procedural law being used in international criminal courts around the world today,<sup>121</sup> and the Agreement leaves all of them open for consideration. While the Agreement requires the Extraordinary Chambers to “exercise their jurisdiction in accordance with international standards” set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR),<sup>122</sup> these Covenant articles will not give much assistance since they provide only a basic list of due process rights.<sup>123</sup> Assuming that there will be gaps in Cambodian law, problems interpreting Cambodian law, or perceived inconsistencies between Cambodian law and international law, each judge will have plenty of latitude to determine which “international level procedures” should be used to guide the court. This creates much uncertainty about how court proceedings will be conducted.

The second problem with the Agreement is that it does not clearly state whether international law or Cambodian law will prevail when a judge finds that a conflict exists between international standards or procedures and Cambodian law. Because the Cambodian government has maintained from the beginning that Cambodian law should prevail, it is reasonable to assume that Cambodian judges will find Cambodian law controlling. It is also

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120. Agreement Article 12(1) states: “The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.” Agreement, *supra* note 4, ¶ 53.

121. See Hakan Friman, *Procedural Law of Internationalized Criminal Courts, in* INTERNATIONALIZED CRIMINAL COURTS, *supra* note 1, at 317-58

122. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 12(2)

123. *Id.*

reasonable to assume that the international judges, who are unlikely to feel an allegiance to the Cambodian government or possess a special affinity for Cambodian domestic law, will take the position that international law should control. This creates more uncertainty and sets the stage for conflict within the judicial panels.

#### *D. Personnel Structure*

Of all the flaws of the ECCC, by far the greatest is that Cambodian judges make up the majority of the court panels and thus have the final say on how cases will be decided. The Agreement creates a trial court with a majority of Cambodian judges - three Cambodians and two internationals.<sup>124</sup> The Agreement creates a single appeals court, a "Supreme Court Chamber," which also has a majority of Cambodian judges - four Cambodians and three internationals.<sup>125</sup> The judges are encouraged to achieve unanimity in their decision-making, but if this does not occur their decisions require a so-called supermajority vote.<sup>126</sup> If it is true that Hun Sen possesses the ability to control the actions of the Cambodian judges, then it will be Hun Sen who will exert the greatest influence on final outcomes, since Cambodian judges make up the majority of the court panels and can outvote their international colleagues. While the supermajority voting scheme does give the international judges (if they vote together) some ability to block decisions made by a majority of Cambodian judges, it does not allow the international judges to convict defendants worthy of conviction without some of the Cambodian judges acquiescing.

The structure of the offices of the Prosecutor and the Investigating Judge raise similar concerns. The Agreement establishes the office of the prosecutor, and the office of Investigating Judge - an institution familiar to those operating in continental systems.<sup>127</sup> The creation of these institutions is unremarkable. What is remarkable is that the Agreement calls for the positions of Investigating Judge and Prosecutor to be filled by "co-investigating judges" — one Cambodian and one international — and "co-prosecutors" - one Cambodian, one international. In neither case does the Agreement give ultimate decision-making authority to one or the other; the Cambodian and the international share equal authority. It is difficult to imagine that this shared

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124. Agreement, *supra* note 4, ¶ 13.

125. *Id.*

126. Agreement, *supra* note 4, ¶ 20.

127. See, e.g., Richard S. Frase, *France, in CRIMINAL PROCEDURE A WORLDWIDE STUDY* 143-85 (Craig M. Bradley ed., 1999).

power structure will work very well in either institution. It is unrealistic to expect the co-prosecutors and co-investigating judges to agree consistently on the myriad of issues demanding resolution, especially when one considers that the Cambodian Co-Investigative Judge and Co-Prosecutor will be working under the influence of Hun Sen and the Cambodian government.

While the Agreement provides a mechanism to resolve conflicts arising within the offices of the Investigating Judge and Prosecutor, this mechanism may only work to tie more knots in the operation. The Agreement creates a "Pre-Trial Chambers" to settle what are labeled "differences" between the co-investigating judges and prosecutors.<sup>128</sup> According to the Agreement, if the judges are not able to reach a supermajority decision, "the investigation or prosecution shall proceed."<sup>129</sup> Thus, the language of the Article seems to limit its application only to those "differences" that involve a determination of whether or not a case should continue down the defined procedural pathway. It does not seem to provide a resolution mechanism for more ordinary disputes, such as disagreements over which witnesses should be interviewed, which charging language should be used in an indictment, or which interpretation of a law is correct. The supermajority voting therefore ensures that worthy cases will not be blocked from proceeding by less than a supermajority of judges, i.e., Cambodian judges. However, it does not appear to create a mechanism for resolving what will likely be a wide range of misunderstandings and disagreements between Co-Prosecutors and Co-Investigating Judges.

### 1. *Pity the Poor Prosecutor*

Let us take a hypothetical situation almost certain to arise when the ECCC starts serious operation and follow its progress through the ECCC system in order to understand how the system is likely to work, or not to work, as the case may be. Let us suppose that in the initial stages of investigation, the international Co-Prosecutor requests investigators working for the office to interview witness "B" in order to gather information expected to lead to the indictment of former Khmer Rouge leader "A." Let us further suppose that A currently holds a high position in the Royal Government of Cambodia and the government does not want A prosecuted or B interviewed.

In this example, it is highly unlikely, indeed almost inconceivable, that the Cambodian Co-Prosecutor will pursue a course of action contrary to her government's wishes. More likely, she

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128. Agreement, *supra* note 4, art. 7

129. *Id.* art. 7(4).

will work to thwart any effort made by the international Co-Prosecutor to have B interviewed. This could take the form of a confrontational refusal of assistance but more likely will take the less confrontational form of delay, obfuscation, excuse making, and more delay. Either way, the result will be the same. The Cambodian Co-Prosecutor will not cooperate. The international Co-Prosecutor will have no power to coerce the interview. As a result, B will not be interviewed.

The international Co-Prosecutor might then consider invoking Article 6(4) of the Agreement to get his dispute with the Cambodian Co-Prosecutor heard by the Pretrial Chambers. However, since Article 6 only allows appeal to the Pretrial Chambers in cases where "prosecutors are unable to agree whether to proceed with a prosecution" and does not allow review of ordinary investigative and procedural disputes, the Pretrial Chambers will not hear the dispute. The almost certain result in this case is that B will not be interviewed.

Let us go on to suppose that the international Co-Prosecutor is not dissuaded by his inability to interview B and uses other evidence to build a case against A. The international Co-Prosecutor attempts to file the case against A in the court. Assuming that Hun Sen and his government still do not want A prosecuted, the Cambodian Co-Prosecutor is certain to oppose the filing. In this case, the Cambodian Co-Prosecutor will make an objection that will be heard by the Pretrial Chambers since this does involve a disagreement over whether to proceed with a prosecution. Assuming the two international judges in the five-judge panel agree with the international Co-Prosecutor, the prosecution can move forward, since Article 7(4) states that if there is no supermajority of four judges, "the investigation or prosecution shall proceed." The case will move on, but much time will have been consumed convening the Pretrial Chambers and considering the matter.

The next stop in the case against A will be at the office of the Investigating Judge. Here, the case will likely run into the same snag it encountered within the offices of the Prosecutor. If the international Co-Investigating Judge feels that the evidence against A is sufficient and the case should go on to the Trial Chambers, this will probably meet an objection from the Cambodian Co-Investigating Judge. He will invoke Article 5(4) which allows a Co-Investigative Judge to bring the dispute to the Pretrial Chamber when, "the co-investigating judges are unable to agree whether to proceed with an investigation." This will result in more delay, but since the international judges can vote to prevent a supermajority block of prosecution, the case will probably move up the ladder to the Trial Chamber.

Assuming that the Cambodian government's position has not changed, the Cambodian judges in the Trial Chamber will be disinclined to see the matter smoothly resolved, and there will be delay. Ultimately, if the court hears the case and the case goes to a vote, there will be no conviction since a conviction requires a supermajority decision and the Cambodians hold the majority votes. If the international Co-Prosecutor chooses to appeal the trial court decision, he will again be headed for certain failure since Cambodian judges are in the majority in the Supreme Court Chamber. Also, he may have to appear again before the Pre-Trial Chamber, since the appeal would seem like another decision on whether to go forward with a prosecution—again with objection from the Co-Prosecutor. The end result of all this effort will be delay, delay, and more delay followed by certain acquittal, if the case is ever allowed to get that far.

## 2. *And Now the Defense*

As mentioned previously, the Agreement protects the rights of the accused as enshrined in the ICCPR. These include the right to engage counsel of choice and to have adequate time and resources to prepare a defense. This guarantee indicates a departure from most of the previous international tribunals, where providing competent defense counsel seems to have been a forced afterthought.<sup>130</sup> In this case, the UN appointed a principal defender and provided him an office at the Extraordinary Chambers.<sup>131</sup> It is unclear, however, how much freedom the defender will have to engage in investigation and discovery activities or what the extent of his office's resources will be. One significant issue yet to be resolved is how international lawyers are supposed to gain the proper authority to represent clients in front of the court. According to the Cambodian Law on the Bar, foreign lawyers cannot represent clients by themselves in court.<sup>132</sup> In fact, they cannot provide legal services in any capacity unless they are given authorization by the Khmer Bar Council.<sup>133</sup> Since the ECCC is a court operating within the Cambodian system, presumably the same restrictions will apply.<sup>134</sup> As it stands, if

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130. See Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, 1 ESSEX HUM. RTS. REV. 66, 71-78 (2004).

131. See Erik Wasson & Kay Kimsong, *KR Defenders Office to Have Foreign Lawyers*, THE CAMBODIA DAILY, Jul. 8-9, 2006, at 3.

132. Law on the Bar, art. 5. An English translation is available at [http://www.cdp-cambodia.org/bar\\_law.asp](http://www.cdp-cambodia.org/bar_law.asp).

133. *Id.*

134. In November of 2006, the President of the Cambodian Bar Association, Ky Tech, in a statement sent in response to a set of draft internal rules circulated by the ECCC, threatened to file suit against any foreign lawyers who attempted to represent clients at the ECCC unless the Cambodian Bar Association was given more

only Cambodian lawyers are allowed to represent defendants in court, the quality of representation will be suspect since very few Cambodian lawyers are likely to have the skills and experience necessary to function effectively in an international court environment.

### E. FINANCING

The UN Member States rejected the assessed contribution option proposed by Secretary-General Annan and decided instead to rely upon voluntary contributions from donors, including a reasonable contribution from the RGC.<sup>135</sup> This funding arrangement is reflected to a certain extent in the Agreement which requires Cambodia to provide the courtroom facilities, court administrative offices and the salaries of Cambodian personnel<sup>136</sup> while the UN pays the salaries of all international personnel, the salaries of defense counsel, the cost of witness travel, the cost of security and, "such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution, and the Extraordinary Chambers."<sup>137</sup> On its face this distribution of financial responsibility seems equitable. However, when it comes to the Cambodian government, signing an agreement is one thing, but complying with that agreement is quite another.

Working on the assumption that the tribunal would complete its work within three years,<sup>138</sup> the UN budgeted \$56.3 million (in U.S. dollars) for the court's operation and reached an agreement with the RGC which required the RGC to provide \$13.3 million of that total figure.<sup>139</sup> In August of 2005, after contributing only \$1.5 million,<sup>140</sup> Hun Sen announced that Cambodia did not have the money to pay the rest of Cambodia's share of the costs.<sup>141</sup> Rather than insist that Cambodia come up with the money, the international community scrambled to make up the shortfall. India provided \$1 million, the European Union \$1.2 million, and the contributors to a still-existing UNTAC-era

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authority to in selecting local defense attorneys and directing defense activities. *Bar Association Demands More ECCC Control*, THE CAMBODIA DAILY, Nov. 17, 2006, at 1.

135. Press Release, *Governments Pledge \$38.48 Million for Khmer Rouge Trials in Cambodia*, U.N. Doc. L/3082 (Mar. 28, 2005).

136. Agreement, *supra* note 4, arts. 14, 15.

137. *Id.* arts. 16,17.

138. See Report on Khmer Rouge Trials, *supra* note 70, at 56.

139. Press Release, *supra* note 138.

140. *EU and Untac Funds Transferred to Tribunal*, DEV. WEEKLY, Jun. 19, 2006.

141. *Khmer Tribunal Stalled Again*, BANGKOK POST, Aug. 22, 2005, available at <http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0822stall.htm>.

trust fund released \$5 million of the fund to the ECCC.<sup>142</sup> As of September 2006, the shortfall remains approximately \$5 million, which will probably be covered at some point by international donors.<sup>143</sup> It would seem then, that the UN's obligation to provide "other limited assistance as may be necessary" may result in the UN paying for pretty much everything.

Of course, there is an even more important question regarding the ECCC's funding, and that is the question of sufficiency. Broken down into years, the total budget will allow the court to spend approximately \$19 million per year. Compared to the expenditures necessary to operate the ICTY and ICTR, this is a pittance. The ICTY had an annual budget of \$128 million in 2003 alone.<sup>144</sup> The ICTR's budget in 2002-2003 was \$180 million.<sup>145</sup> On the other end of the scale, the hybrid tribunals operating in Kosovo, East Timor, and Sierra Leone, operated or are operating on, much smaller amounts. For example, East Timor's 2001 budget was \$6.3 million, the international trial panels in Kosovo operate on about \$15 million annually, and the figure for the Special Court in Sierra Leone is about \$20 million.<sup>146</sup> While each of these hybrids is much different in structure than the ECCC, their experience does suggest that it is at least possible for the ECCC to achieve results with its current funding — if its progress remains carefully monitored.

### 1. *The Escape Clause*

In sum, an analysis of the main elements of the Agreement reveals that, after all of those years of negotiation, Hun Sen got almost everything he wanted. He got a tribunal he can control, and he got the UN to pay for it. If the tribunal fails to meet international expectations, he can blame the UN for the problems. When the time comes for blame to be placed on someone for *creating* such a faulty institution, however, it should not be placed entirely on the Secretary-General and his negotiators. They tried to pull away from a bad deal early on, but the dominant powers would not let them. Also, understanding the rotten nature of the deal they had been forced to take, the UN

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142. *EU and Untac Funds Transferred to Tribunal*, *supra* note 143.

143. There remains the possibility that the gap will ultimately be filled by the U.S. since U.S. officials have indicated a willingness to do so if they feel that the trials meet "international standards." See *KR Tribunal Should Begin Quickly: US Ambassador*, THE CAMBODIA DAILY, Jul. 26, 2006, at 17.

144. See *The Financing of Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 71, at 285.

145. Patrick Fullerton, Cost of Trials, Global Just. Program at the Liu Inst., June 2003, at 1, 2, available at [http://www.gjp.ubc.ca/\\_media/srch/030701costsoftrials.pdf](http://www.gjp.ubc.ca/_media/srch/030701costsoftrials.pdf).

146. *The Financing of Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 71, at 285.

team included an extraordinary provision in the body of the Agreement — an “escape clause.” This escape clause is Article 28, which 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 to 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.

While the existence of this clause might have provided some consolation to the UN negotiators, given the efforts that have been made by so many international players to bring about the creation of a tribunal, any tribunal, over the years, it is unlikely the UN will ever employ it. It is much more likely that the operation will stumble along, no matter what, until the assumed three-year operating period is up or all of the available funds are expended.

#### *F. Who will Hun Sen Allow to be Convicted?*

This, of course, is the million dollar question. In some ways, it should not be that difficult a question to answer, for it is now well known which individuals occupied the top tier of the Khmer Rouge leadership, and the living members of this group still reside in Cambodia and are thus available for prosecution. It could be as simple as the prosecution starting at the top of the command structure and working as far down that structure as time, resources, and of course, proof, would allow. The list would perhaps start with Nuon Chea, Pol Pot's second in command, move on to individuals like Ieng Sary, former Foreign Minister for Democratic Kampuchea (the name the Khmer Rouge gave Cambodia during their time in power), and end with Kang Kech Eav, known as “Duch,” the notorious warden of Tuol Slang prison. A great deal of research and documentary evidence has been compiled over the years that should give the prosecutor's office a running start on building its cases.<sup>147</sup> Scholars and researchers on Cambodian affairs have given significant thought to the question of which individuals should be prosecuted and why. One of these scholars, Stephen Heder, co-authored a book that presents the case against seven likely candidates for prosecution and has been hired as an Investigator for the ECCC prosecutor's office.<sup>148</sup>

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147. Most of this evidence has been collected and archived by the Documentation Center of Cambodia (“DC-Cam”). For an explanation of the work done by DC-Cam and a summary of materials contained in its extensive archives, see DC-Cam, <http://www.dccam.org/>.

148. STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2001).

Unfortunately, bringing the surviving Khmer Rouge leadership to justice is unlikely to be so simple. Hun Sen may be unwilling to back away from the amnesty deal he cut Ieng Sary back in 1996.<sup>149</sup> He may have made deals with other Khmer Rouge leaders he feels an obligation or compulsion to protect. Given the secrecy of Hun Sen's regime over the years and the lack of transparency in his decision making, it is impossible to know in advance what his approach will be. What we do know is that the office of the prosecutor will not be free to work independently since Hun Sen and his government will control the Cambodian members of the prosecutor's office.

Casting further uncertainty onto the question of who will be prosecuted in the ECCC, is the likelihood that the Cambodian government will try to discourage fact-finding that discredits the version of events that the government has been telling its people for the last thirty years. Since the time of the Vietnamese invasion, Cambodia's government has attempted to pile all of the blame on Pol Pot and a few members of his inner circle. It tried thereby to shift the responsibility away from the lower level officials, many of whom later left the Khmer Rouge and joined the government.<sup>150</sup> The Khmer Rouge murdered many people over a long period of time, and there were many more individuals beside Pol Pot and his small circle killing and giving the commands to kill. An unfettered investigation is likely to turn up unsavory facts about current members of the government.

Claims that the ranks of the ruling party and the government are filled with former Khmer Rouge leaders are not hyperbole. It is easy to identify former Khmer Rouge filling very prominent positions. For example, Heng Samrin, currently Honorable President of the CPP and National Assembly member, was formerly Commander of the Eastern Zone of Democratic Kampuchea until Pol Pot's purges caused him to defect to Vietnam in 1978.<sup>151</sup> Chea Sim, currently Chairman of the CPP and President of the Senate, was a Khmer Rouge Eastern Zone party secretary and military commander until he fled to Vietnam in 1978.<sup>152</sup> Keat Chlon, currently Minister of Economy and Finance, was formally an aid to Pol Pot and roving ambassador for the Pol Pot regime.<sup>153</sup> Sar Kheng, currently the head of the powerful Ministry of Interior, was the permanent secretary of the communist party

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149. Hun Sen has frequently indicated over the years that he would uphold Ieng Sary's amnesty. See Etchinson, *supra* note 68, at 12.

150. CHANDLER, HISTORY, *supra* note 5, at 230-31.

151. CORFIELD, *supra* note 5, at 144.

152. *Id.* at 64.

153. *Id.* at 194-95.

for the Northeast Zone in 1976 until he fled to Vietnam.<sup>154</sup> Hor Nam Hong, currently Minister of Foreign Affairs, was formerly Democratic Kampuchea's ambassador to Cuba.<sup>155</sup> The list goes on. Given the positions some of these men held during the Khmer Rouge time, there are likely to be facts about their activities during those years which they would prefer to keep hidden and which might damage the current regime if revealed. Accordingly, the government will almost certainly try to "manage" the fact-finding process to reduce the risk. If the tribunal hearings begin to paint a picture of events significantly different from the picture painted by the government over the years, or if prosecution gets too close to a valued ally, Hun Sen and his government will likely find ways to divert or rein in the fact finders.

### G. Conclusion

Make no mistake: the most troubling aspect of the whole ECCC effort is that because Hun Sen exercises such a strong influence over Cambodia's judges and prosecutors, Hun Sen will be the one determining who gets convicted or whether anyone gets convicted at all. Hun Sen will decide how fast the process will move and how far the investigation will extend. Hun Sen will manipulate the judicial process to achieve his political ends. The aid money will flow, patronage opportunities will expand, and the former Khmer Rouge serving in his government will be more easy to control with the prospect of indictment hanging over their heads. He will blame the UN for the ECCC's failures and take credit for its successes. Because of all of this, the ECCC can already be considered a failure. It may succeed in putting a few old men in prison toward the ends of their lives, but this will be a poor substitute for real justice.

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154. *Id.* at 364; currently listed as Minister of the Interior in WHO'S WHO IN CAMBODIA: THE SOLE AND VITAL REFERENCE BOOK 2006-2007 223 (2006).

155. CORFIELD, *supra* note 5, at 154.