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The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia

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Abstract

The use of ‘hybrid’ tribunals as a means to secure accountability for international crimes seeks to combine national ownership over the trials whilst providing a framework for the inclusion of international standards and personnel in the proceedings. The Extraordinary Chambers in the Courts of Cambodia (ECCC) represents one such hybrid experiment. Yet the ECCC has faced recurring allegations of political interference - allegations which are substantial and create, at the least, an appearance of impropriety. The failure of the ECCC and United Nations to adequately address these allegations derived from a hybrid model that did not provide sufficient safeguards against interference. The international community agreed on a solution to secure accountability with awareness that the trials were likely to be politically tainted. As such, the experiment in Cambodia provides a cautionary tale for the future design of hybrid tribunals.

1. Introduction

The variety of international criminal law’s enforcement mechanisms has increased ever since a prototype emerged at Nuremberg,¹ with each novel incarnation contributing to the ‘community of courts’ which makes up the international criminal justice project.² The ‘hybrid’ tribunals represent one strand of experimentation, typified by the presence of both international and domestic judicial decision makers.³ The Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is the hybrid tribunal established in response to atrocities that took place between 1975 and 1979 under the rule of the Khmer Rouge in Democratic Kampuchea.⁴ The ECCC has been heavily criticised, yet it represents a useful testing ground, relevant to the future evolution of international criminal law under the complementarity regime of the International Criminal Court (the “ICC”). Observations from the ECCC provide useful insight for those working in situations where domestic and international accountability processes co-exist.

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¹ See generally Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice*, (Cambridge: Cambridge University Press, 2003).

² William Burke-White, ‘A Community Of Courts: Toward A System Of International Criminal Law Enforcement’, *Michigan Journal of International Law* 24 (2003): 1-101, p. 75.

³ See Sarah Nouwen (2006) “Hybrid courts” The hybrid category of a new type of international crimes courts’, *Utrecht Law Review* Volume 2 Issue 2 (2006): 190-214.

⁴ For an introduction to the Khmer Rouge era, see, for example David P. Chandler, *A History of Cambodia*, (Westview Press, 1992); Ben Kiernan, *How Pol Pot Came to Power* (Verso, 1985); and William Shawcross, *Sideshow*, (Simon and Schuster, 1979). For an overview of the formation of the ECCC and a general analysis of key criticisms of the Court, see Cesare Romano, André Nollkaemper and Jann Kleffner (eds.) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004); Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004); Phuong Pham, Patrick Vinck et al. (2009), *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, (Human Rights Center, University of California, Berkeley 2009).

Although it is not yet possible to describe the lasting contribution of the ECCC to transitional justice,⁵ observations may be made about its functioning to date, to begin to assess the effectiveness of the hybrid structure. The ECCC faces an onslaught of criticism from a range of stakeholders, centring on recurrent allegations of political interference in the work of the tribunal.⁶ The allegations are significant, wide-ranging, and potentially damaging to the ECCC's credibility and legacy. While not always empirically verifiable, the allegations have been substantial and at the very least create an appearance of impropriety. The following article draws upon material available in the public domain, including the court records of the ECCC, as well as news reports. In addition, it includes insights from a number of personal interviews conducted in Phnom Penh with key stakeholders from the ECCC and Cambodian civil society.

Based on this information, the article examines the substance of the allegations against the ECCC, the mechanisms set up to address problems of political interference, and the degree to which these problems were foreseeable.⁷ The issues considered here are by no means exhaustive – criticism of the tribunal is on-going – for example, the publication of *Un juge face aux Khmers rouges* by a former Co-Investigating Judge (a “CIJ”) Marcel Lemonde in January 2013 shows that criticism continues to be made from those who have direct experience of the Court's functioning.⁸ The present article focuses on the most serious allegations to illustrate the ECCC's key shortcomings. When considering the Cambodian experience of hybrid justice, one ought to remember that all of the international tribunals, the ICC, the International Criminal Tribunal for Yugoslavia (the “ICTY”), the International Criminal Tribunal for Rwanda (the “ICTR”) and the Special Court for Special Leone (the “SCSL”), have been criticised on grounds of political interference; such interference is not unique to Cambodia and the present observations should be viewed in light of a tension between law and politics which pervades the design of all international criminal tribunals.⁹

This article takes a decidedly legal approach to the issue of political interference. The extent to which political interference is perceived to be a ‘problem’ will depend on what are the

⁵ Relying on Rudy Teutel's definition of transitional justice as “the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes”. See Rudy Teutel “Transitional Justice Genealogy” (2003) 16 *Harv Hum Rts J* 69.

⁶ For a recent summary of the criticism, in the context of the domestic rule of law in Cambodia, see Pip Nicholson and Sally Low (2013) Local accounts of rule of law aid: implications for donors, *Hague Journal on the Rule of Law*, 2013, 5(1), 1-43, pp 12, 14.

⁷ Previous commentators foresaw that the ECCC would continue to face these problems, for example Linton argued that “[f]ive star justice, such as that practiced at the international tribunals, is out of the question at the [ECCC]” Suzannah Linton (2006) Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers, *Journal of International Criminal Justice*, 4, 327, at 329 and 341.

⁸ Marcel Lemonde and Jean Reynaud, *Un juge face aux Khmers rouges* (Seuil, Paris 2013). Indeed, parties to proceedings at the ECCC have already sought to argue that this book has evidential value and should be admitted into evidence before the Court, see Khieu Samphan defence team, ‘Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge Marcel Lemonde’, ECCC document number E280 (10 April 2013); Nuon Chea defence team, ‘Request to Consider Additional Evidence’, E189/3/V7 (15 March 2013).

⁹ For a recent overview, see Padraig McAuliffe, ‘Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan’, *Journal of International Law & International Relations*, 7(1), (2011). See Nouwen (2006), *supra* note 3; David Cohen, “Hybrid” justice in East Timor, Sierra Leone, and Cambodia: “lessons learned” and prospects for the future’, *Stanford Journal of International Law*, 43(1) at p. 7 *et seq.* (2007); Suzanne Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor”, *Harvard Human Rights Journal* 16 (245), (2003). See also Parinaz Kermani Mendez, ‘The new wave of hybrid tribunals: a sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?’, *Criminal Law Forum*, 20(1), 53-95. A defence against the criticism of the ECCC based on comparison with other hybrid tribunals was often the first argument raised by staff at the Court during the interviews conducted for this research paper, for example in a personal interview with Issac Endeley, Chief of the Defence Support Section, Phnom Penh, 19 April 2012.

central goals of international criminal justice. Perhaps international tribunals have a broader focus than domestic criminal law systems, since in addition to safeguarding the accused's rights and observing principles of procedural propriety, international tribunals attempt to facilitate reconciliation, contribute to transitional justice goals, and articulate a common history.¹⁰ Accordingly, it could be argued that instances of political interference can be overlooked or at least mitigated by the positive work of the ECCC in fostering a national dialogue and achieving victim participation.¹¹ Seen in this light, it can be said that the ECCC has had a much broader social impact than the first generation *ad hoc* tribunals, which in many respects were detached from the places where the atrocities occurred.¹² The extent to which the ECCC can be regarded as a success in securing other transitional justice goals is an issue of great complexity and space precludes an extensive evaluation in this article. That said, the maintenance of international legal standards, particularly those embodied in human rights instruments, is of crucial importance to the work of *ad hoc* tribunals, and international criminal justice more generally, not least in ensuring legitimacy and furthering historic legacy, and which cannot be compromised at the expense of other laudable transitional justice goals. A legal approach is also reflective of the priorities of the international community and is consonant with the founding principles of the UN, being to promote and encourage respect for international law and human rights.¹³

2. Allegation of Political Interference at the ECCC

2.1 Scope of "Political Interference"

For some commentators the entire project of international criminal justice is fundamentally a political one. In this view, an inherent weakness of the legal institutions that administer international criminal law is that they are not truly 'legal'. Rather, these institutions extend initially from a political imperative, which is merely legitimised by its form as a court of law. A critique in this vein aims at the fundamental basis of an international tribunal; criticising the reasons that its jurisdiction came into being, and showing how international criminal justice tends to be exercised in accordance with political, not legal demands. This view is therefore less concerned with the internal aspects of a court's work, for example the degree of procedural fairness which it achieves during a trial; rather it offers a perspective focused on whether prosecutions are brought by purely objective prosecutors, or ultimately, whether political actors are in control. This reflects the widely held view that international justice is foremost a political project, rather than an unselective attempt to apply universal principles of justice.¹⁴

¹⁰ Mirjan Damaska, Problematic Features of International Criminal Procedure, in Antonio Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 175 at 177

¹¹ For a debate on balancing the conflicting goals of transitional justice, see: Steven D Roper and Lilian A Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (2006), 94; E. R. Higonnet, Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform, 23 *Arizona Journal of International & Comparative Law* (2006) 347, 358.

¹² See Lindsey Raub, 'Positioning Hybrid Tribunals In International Criminal Justice', *International Law And Politics* 41 () 1013, at p.1022; Jose Alvarez, 'Crimes Of States/Crimes Of Hate: Lessons From Rwanda', 24 *Yale J. Int'l L.* (1999) 365, at p. 400; Geoff Gilbert, *Responding to International Crime*, (Leiden: Martinus Nijhoff Publishers), at p.393.

¹³ See U.N. Secretary-General, Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 106, U.N. Doc. S/25704 (May 3, 1993), noted in Sluiter, *supra* note 8, at 610; see also Hakan Friman, Procedural Law of Internationalized Criminal Courts, in *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* 232-324 (Cesare P. R. Romano, Andre Nollkaemper, & Jann Kleffner, eds., 2004).

¹⁴ See for example Clark, Phil (2008) 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.', In: Clark, Phil and Waddell, Nicholas, (eds.), *Courting Conflict? Peace, Justice*

While not engaging substantively in that debate, this article suggests that a distinction must be drawn between different types of political interference, which may be described in terms of two over-lapping but distinct categories. In the first category, at one extreme, political forces affect the whole picture of an international tribunal's operation - the legal project is fundamentally political at its core - and so political interests are determinative of the creation of the court, the establishment of its jurisdiction, and the drafting of its foundational texts. The working parameters of the tribunal are set even before the 'show has begun', such that any subsequent attempts at achieving 'legality' and independence from political motives are overridden by the fact that the tribunal was formed with fundamentally political aims in mind. The second category describes those types of political interference that arise during the proceedings of the tribunal, from political forces acting *on* the legal process as it operates. This second category relates not to whether the tribunals was fundamentally political from the outset, but to whether its operation accords with the legal standards it was given, and whether, as a legal institution, it is able to carry out its work with complete independence.

The present article focuses on the second type of political interference, looking primarily at the way in which political interference has affected the course of litigation at the ECCC since it started. This article therefore puts aside the critique concerning the origins of the ECCC.¹⁵ Instead, it examines the integrity of the litigation process itself and asks what are the effects of political interference on the internal functioning of the ECCC as a judicial institution. The distinction is a fine one, but it is important nonetheless to delineate the questions in this article from those that query the underlying political motives that brought the ECCC into existence.

According to the documents that govern the ECCC, the types of behaviour that may constitute political interference include the disclosure of confidential information; a failure to attend court or produce evidence; destruction or tampering with evidence; interference with witnesses; assisting a defendant to evade the ECCC's jurisdiction; and an incitement or attempt of any of these acts.¹⁶ We add to that definition behaviour that involves interference with a judge or another individual at the Court, which may also be achieved by threats, intimidation, injury, or bribes. Corruption is also indicia of political interference. Corrupt superiors may be politically motivated, using their position to force domestic staff to provide financial kickbacks and to follow outside instructions.

The focus of this section is on the procedural aspects of the ECCC's work (investigations, judicial appointments etc.), rather than assessments based on the substantive quality of the decisions reached. It could be argued that a number of the substantive decisions of the ECCC were politically motivated. A good example of this arises in relation to criminal liability, in the ECCC's decision to deny the application of the third variant of joint criminal enterprise ("JCE III"). Despite there being authority from other tribunals for this form of criminal liability to be cognisable, the ECCC found that JCE III was not part of customary law

and the ICC in Africa. London: Royal African Society; Clark, Phil (2009) 'Tensions in Transitional Justice.', In: Clark, Phil and Kaufman, Zachary D, (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*. London: Columbia University Press; Mike Eckel, Cambodia's Kangaroo Court, *Foreign Policy* (20 July 2011). Hanna Bertelman, 'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia,' *Nordic Journal of International Law* 79(3) (2010): 341-382 at p. 379.

¹⁵ There is a body of literature that examines the political origins of the ECCC: Sara Williams, *The Cambodian extraordinary chambers - a dangerous precedent for international justice?* (2004) *International and Comparative Law Quarterly* 227; Jaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, NY: Edwin Mellen Press, 2005).

¹⁶ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ['Internal Rules'] Rule 35(1)(a)-(g).

during the period of the tribunal's temporal jurisdiction.¹⁷ On the one hand this judgment is explicable based on a straightforward application of the principle of legality, on the other there is a hint of political motivation given that JCE III is an expansive form of criminal liability that would greatly expand the ambit of potential indictees in subsequent investigations. But the focus here will be to evaluate the evidence of political interference, which has arisen most particularly in the procedural context.

It is also important to note that political interference has not occurred in all cases at the ECCC, but rather has arisen where a prosecution or investigation would not be consonant with the political objectives of the serving Cambodian government. To provide some context to the allegations; the ECCC has concluded Case 001, and Case 002 is on going. As will be seen below, there have been efforts to indict more suspects in what have become known as Cases 003 and 004. Yet it is important to note that the extent of political interference has varied depending on the case and issue in question. In Case 001, Duch was convicted for his role as the warden of the notorious S-21 prison. Case 001 was confined to just one site and one low level member of the Khmer Rouge. By contrast, when Case 002 began, it involved four of the Khmer Rouge's most senior members, multiple sites throughout Cambodia and a broad examination of the organisation's criminal enterprise.¹⁸ It follows that, insofar as Case 001 was concerned, the need for political interference was much alleviated given the narrow scope of the indictment and the limited reputational threat posed to the existing Cambodian government. By contrast, the sheer scale of Case 002 inevitably involves investigation into many aspects of Cambodia's recent history and the role of multiple actors, some of who retain official roles to this day.¹⁹ In the same light, Cases 003 and 004 would also prove inconvenient to some high ranking officials in the current Cambodian government, given that Judge Kasper-Ansermet had recommended four government officials be interviewed by the co-prosecutors concerning allegations of war crimes during the period of the ECCC's temporal jurisdiction.²⁰ In short, instances of political interference are more likely to arise where future prosecutions come into conflict with the political objectives of the current Cambodian government. From a historical perspective, this may mean that Case 001 is regarded as a success in broadly adhering to international legal standards, although the scale of political interference in subsequent cases may well taint the legacy of all proceedings at the court.

2.2 Interference into the Investigatory and Prosecutorial Processes

While the ECCC was criticised for its work in Case 002, the criticism levelled at Cases 003 and 004 has been more serious. In the latter cases the effects of political interference have gone so far as to create the real possibility that the prosecutions will not proceed at all - many whose work involves the ECCC are pessimistic about the prospects of further trials taking place after Case 002.

Yet, it does not follow that any decision taken by the ECCC prosecutors or judges to limit the number of trials has necessarily arisen because of political interference. There are other

¹⁷ For an analysis, see: Luke Marsh & Michael Ramsden, 'Joint Criminal Enterprise: Cambodia's reply to Tadić', *International Criminal Law Review* 11 (2011).

¹⁸ Proceedings against two defendants were subsequently halted, following the death of Ieng Sary, and a finding of the Trial Chamber that Ieng Thirith was unfit to stand trial.

¹⁹ See Addendum to Ieng Sary's motion to summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech CHEA Sim, 19 May 2011, E85/2.

²⁰ Open Society Justice Initiative, 'The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia', October 2012, available at http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf (accessed 24 August 2013); Steve Heder "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective.," in Ramji, and van Schaack (eds.), *supra* note 15, pp. 377-423.

plausible explanations presented as to why there should be no further trials after the tribunal has concluded Case 002. A critical factor that has led to much disagreement concerns the scope of the ECCC's personal jurisdiction. The Cambodian government argued that the tribunal could only try senior leaders and that the putative defendants in Cases 003 and 004 extend beyond this category.²¹ It may therefore be said that the failure to hear further trials reflects genuine disagreement as to the scope of the ECCC's jurisdiction rather than political interference as such. Further, practical considerations militate against additional trials. Given the temporal jurisdiction of the tribunal, pertaining to conduct that occurred between 1975 and 1979, a number of potential defendants might no longer be alive or fit to stand trial.²² Similarly, as the Trial Chamber's severance decision in Case 002 made clear, the extent and availability of funding for the ECCC is relevant to determining the scope of the trial process.²³ In this respect, there are valid concerns that any future trials would not be adequately financed given a seemingly general willingness on the part of the international community for the ECCC to conclude its work sooner rather than later.²⁴

Whilst the decision to hold future trials engages all of these factors, the point being made here is that it is for the tribunal to draw its own conclusions free from political interference. Despite there being genuine disagreement over the legality or merits of further trials taking place, and there being financial limitations which the tribunal must take into consideration, these are matters to be determined by the tribunal independently and consistent with the *kompetenz-kompetenz* doctrine. Yet, there have been allegations that the Cambodian government has not respected the tribunal's personnel and processes in determining whether there should be further investigations. The CIJs have identified suspects to be tried in Cases 003 and 004, but the Cambodian government's attitude towards further indictments is clear: Various high-ranking government officials including the Prime Minister have stated publicly that further trials "will not be allowed" as this is a "Cambodian issue".²⁵ The statements represent clear evidence that the Cambodian government intended to interfere with the ECCC's jurisdiction, posing an obvious risk to the prosecutorial independence of the court. If prosecution strategy is determined as a Cambodian issue, then the hybrid structure has been fundamentally undermined, and it will support critiques of international criminal law based on the notion of selective enforcement.²⁶

Whilst it is difficult to conclude that these pronouncements have pressured the tribunal into abandoning further investigations, there is at the very least an appearance of political

²¹ For a detailed commentary on the ECCC's personal jurisdiction, see Steven Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", 1 August 2011, online working paper, downloaded 23 September 2013, at <http://bit.ly/16lr03z>. Heder notes that "despite some inconsistency, neither Hun Sen nor other authoritative [Royal Government of Cambodia] officials had definitively ruled out the possibility that middle-echelon CPK cadre could be prosecuted, as long as early defectors like Hun Sen himself, Chea Sim and Heng Samrin were excluded."

. See also David Scheffer, "How Many are Too Many Defendants?", Phnom Penh Post, 8 January 2009, <<http://www.phnompenhpost.com/national/how-many-are-too-many-defendants-krt>>.

²² Indeed, one of the alleged suspects died in June 2013, see: "Khmer Rouge War Crimes Suspect Sou Met Dead", *The Cambodian Daily*, 27 June 2013 < <http://www.cambodiadaily.com/archive/khmer-rouge-war-crimes-suspect-sou-met-dead-32184>>.

²³ Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013, accessed on 23 September 2013 at <http://www.eccc.gov.kh/en/document/court/decision-severance-case-00201-following-supreme-court-chamber-decision-8-february-201>, at p. 62-63

²⁴ For an overview, see: Open Society Justice Initiative, "The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia", October 2012 < http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf>

²⁵ Human Rights Watch, 'Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign', 3 October 2011.

²⁶ See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005).

interference that can also be damaging to the tribunal's reputation. Following the aforementioned statements of the Cambodian government, the international Co-Investigating Judge, Siegfried Blunk, announced his resignation on 10 October 2011.²⁷ Judge Blunk declared that although he would not let himself be influenced by such statements, "his ability to withstand pressure by Government officials and to perform his duties independently could always be called in doubt..."²⁸ Some commentators blamed Judge Blunk and his domestic counterpart CIJ You Bunleng for a lack of effective investigation into Cases 003 and 004.²⁹ Human Rights Watch noted that the investigations concluded without the notification of suspects, the interviewing of key witnesses, or investigation of crime sites. Consequently, the CIJs' failure to conduct proper and good faith investigations violated their responsibilities to act impartially.³⁰ Blunk's resignation is perhaps an inevitable consequence of the reluctance of his national counterpart to investigate Cases 003 and 004, which itself was alleged to be a product of political influence. The resignation also raised the question of whether Blunk was sufficiently committed to investigating Cases 003 and 004. If not, then this casts doubt on the effectiveness of international judges at hybrid tribunals in providing a safeguard against domestic interference in the trial process, an issue that we return to below.

2.3 Rejection of Co-Investigating Judge Kasper-Ansermet in relation to Cases 003 and 004

One recent episode of political interference clearly demonstrates the effects of domestic Cambodian politics on the ECCC's work in Cases 003 and 004. In this instance, Judge Laurent Kasper-Ansermet was not rightly appointed as a reserve international CIJ, leading to his resignation, the second international CIJ to leave the ECCC in this manner.

The procedure by which the Judge Kasper-Ansermet should have been appointed is as follows. In order to take office, a new CIJ must be formally appointed by the Cambodian Supreme Council of Magistracy (SCM).³¹ However the SCM refused to endorse the reserve CIJ, stating, *inter alia*, that Kasper-Ansermet had made inappropriate posts on his Twitter page showing his wish to investigate further suspects and to look into the allegations of political interference at the ECCC.³² This came at a time when Judges You and Kasper-Ansermet publicly sparred over further investigations taking place.³³ The UN examined the Cambodian government's concerns over the Twitter posts and determined that they were unfounded,³⁴ observing that the circumstances that gave rise to the two resignations of international CIJs

²⁷ ECCC, 'Press Release by the International Co-investigating Judge' (10 October 2011).

²⁸ *Ibid.*

²⁹ By contrast, Case 003 was reopened by the newly appointed international CIJ, Mark Harmon, upon assumption of office in October 2012, which included the assignment of defence and civil party lawyers. See Stuart White, "Lawyers Assigned in Case 003," *Phnom Penh Post*, 17 December 2012 <<http://www.phnompenhpost.com/national/lawyers-assigned-case-003>>; Lauren Crothers, "Government-Opposed KRT Investigation Proceeds," *The Cambodian Daily*, 6 July 2013, <http://www.cambodiadaily.com/archive/government-opposed-krt-investigation-proceeds-33747/>.

³⁰ Human Rights Watch, *supra* note 25.

³¹ The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 ['ECCC Law'], Article 26.

³² The Judge continues to post on Twitter although the previously controversial posts were redacted. A post on 15 January 2012 read: '*Ma détermination reconnue d'instruire les dossiers 003 et 004 expliquerait-elle l'opposition de certains à ma nomination officielle?*'. Twitter, Laurent Kasper-Ansermet, <<https://twitter.com/#!/LKasperAnsermet>>, 22 September 2012.

³³ See further Open Society Justice Initiative, *supra* note 20.

³⁴ 'UN Secretary-General Says Decision by Cambodia not to Appoint Current Reserve Judge to Position on Extraordinary Chambers "Matter of Serious Concern"', SG/SM/14072 (20 January 2012).

“remain[ed] worrying”. While stating that it was essential that the judicial process in relation to Cases 003 and 004 be brought back onto a “positive course”, the UN stopped short of indicating that any action would be taken in response to the resignation.³⁵ On 20 June 2012, the SCM appointed a new international CIJ and a new reserve international CIJ but it remains uncertain whether these appointees will experience similar difficulties in Cases 003 and 004.³⁶

In rejecting Kasper-Ansermet, the SCM also asserted that it had no obligation to appoint him, which constitutes a clear error of law.³⁷ ECCC law is unequivocal about the process of appointing a new CIJ, showing that in the situation where an international CIJ resigns, the appointment of the reserve international CIJ should take place as a matter of course.³⁸ The 2003 Agreement, concluded between the UN and Cambodia, provides that the appointment of CIJs will take place once the UN Secretary-General has submitted a list of two nominees.³⁹ The SCM shall then appoint one nominee to sit as the international CIJ and the other nominee to serve as the reserve international CIJ.⁴⁰ The SCM was empowered to make a decision on which of the CIJs to appoint as the sitting international CIJ and which to appoint to the reserve role, but not to make further decisions about the appointments. In misinterpreting its authority under the 2003 Agreement, the SCM therefore acted *ultra vires* when it announced its decision to decline to formally appoint the reserve international CIJ.⁴¹

The failure of the SCM to direct itself properly in law as to the appointment of Kasper-Ansermet comes as no surprise if one accepts that the SCM is prone to political interference. The King of Cambodia heads the SCM and the remainder of the Council is composed of a selection of Cambodian judges and prosecutors.⁴² Notionally, the SCM has constitutional independence, yet two issues in particular create a risk of interference with the process of judicial appointment. Firstly, the presence of the Minister of Justice is a means for government influence in the SCM’s proceedings and decisions. There is an evident risk that playing a dual role compromises the minister’s ability to remain independent. Second, You Bunleng, the domestic CIJ, is a member of the SCM, and was therefore entitled to participate in the deliberations over Kasper-Ansermet’s appointment.

The problems in Cases 003 and 004 are of a different category to previous problems at the ECCC in that they may effectively prevent the court from proceeding in any way at all. While Cases 001 and 002 may have faced challenges in meeting international standards created by domestic politics, they could still proceed. The frustration expressed by international CIJs in carrying out their work in relation to Cases 003 and 004, as demonstrated by the Kasper-Ansermet episode, suggests a terminal failing in the ECCC’s ability to withstand domestic political pressure.

³⁵ ‘Statement attributable to the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia’, New York (30 March 2012).

³⁶ *Press Release: New Judge will be at Center of Struggle over Khmer Rouge Tribunal*, 30 July 2012, Open Society Foundations, < <http://www.opensocietyfoundations.org/press-releases/new-judge-will-be-center-struggle-over-khmer-rouge-tribunal>>, 25 November 2012.

³⁷ Mark Ellis, ‘The ECCC – A Failure of Credibility,’ International Bar Association (February 2012).

³⁸ ECCC Law, Article 26, Article 27 (new); ‘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, 2003’ [‘2003 Agreement’], Article 5. Rule 7(4).

³⁹ 2003 Agreement, Article 5.

⁴⁰ *Ibid.*

⁴¹ Ellis, *supra* note 37 at 25.

⁴² Law on Organisation and Functioning of the Supreme Council of Magistracy 1994, No. 09 NS.94. [‘SCM Law’], Article 2.

A reason for this failure of independence may lie in one of the central assumptions of the hybrid model, namely that the presence of members of the international judiciary on the hybrid tribunal's judicial bench will mitigate the negative effects of domestic political influence. The fact and manner of the resignation of two international judges from the ECCC suggests that in reality, the presence in a hybrid structure of an internationalised element does not protect against political interference to the degree that might have been expected. At least in relation to Cases 003 and 004, the international CIJs have been unable to prevent the Cambodian government from succeeding in its attempts to impede the progress of prosecutions. The resignations show that the effect of domestic politics on a hybrid tribunal is not confined to domestic judges; rather political interference also extends to the work of international judges and the processes by which they are appointed.

2.4 Ignoring Witness Summons in Case 002

In Case 002, it has been alleged that government officials were prevented from appearing to give evidence at the tribunal. The persons concerned were all high-ranking members of the current government, namely the Senate President, Chea Sim; The National Assembly President, Heng Samrin; the Minister of Foreign Affairs, Hor Namhong; the Minister of Finance, Keat Chhon; and two other senators, Ouk Bunchhoeun and Sim Ka.

The six government officials were summonsed by the ECCC to appear as witnesses in Case 002, but none appeared at the tribunal to provide testimony as ordered, and neither the Government nor the witnesses provided the ECCC with a valid reason for their failure to appear.⁴³ In failing to appear at the tribunal, the witnesses breached the ECCC's Internal Rules which provide that appearing in response to a witness summonses is mandatory and that a person who fails to comply with a witness summons can be compelled to attend by a CIJ.⁴⁴ In addition to the illegality of the actions or omissions of the witness, the Cambodian authorities are themselves under a duty to comply with requests for assistance by the CIJs, including assistance with the service of witness summonses.⁴⁵ It is of note that none of the immunity provisions of the constitution provide functional immunity for members of the National Assembly and Senate in these circumstances.⁴⁶

Following the summons, the government asserted that summonsed witnesses did not need to attend "except for individuals who volunteer to go". The government argued that if ECCC officials were not satisfied with this position then they could "pack up their clothes and return home".⁴⁷ In a recent book, former CIJ, Judge Marcel Lemonde commented on the difficulties he faced, both from his domestic CIJ counterpart and from the government, in attempting to obtain a response regarding the witness summonses. The judge states that after being thwarted in several attempts to communicate with the government officials about the issue, he received a reply from the chief of staff of one of the officials, who stated that a high ranking official could not be summonsed because it could damage his political career.⁴⁸

⁴³ Nuon Chea Defence Team, 'Request to hear defence witnesses and to take other procedural measures in order to properly assess historical context', Trial Chamber E182 (16 March 2011).

⁴⁴ Internal Rules, Rule 60(3).

⁴⁵ 2003 Agreement, Article 25.

⁴⁶ See Constitution of the Kingdom of Cambodia 1993 (as amended in 1999) ['Cambodia Constitution'], at Articles 80, 104 and 126; Penal Code of the Kingdom of Cambodia (2009), at Article 538.

⁴⁷ 'Khmer Rouge Court Calls Government Witnesses', *Associated Free Press*, 7 October 2009.

⁴⁸ « Seul le directeur de cabinet de l'une des personnes convoquées se risque un jour à aborder le fond, déclarant tout de go qu'on ne peut pas convoquer ainsi un haut dirigeant, car cela pourrait nuire à sa carrière politique! » , Marcel Lemonde and Jean Reynaud, *Un juge face aux Khmers rouges* (Seuil, Paris 2013) at p. 176. For an English translation of sections of Judge Lemonde's book, see the filings of the Khieu Samphan and Nuon Chea defence teams, *supra* note 8. The subsequent CIJ Judge Kasper Ansermet has also commented on this issue, see Blog of

The government was clearly willing in this instance to interfere in trial proceedings when a request by the ECCC raised the possibility that current government officials would be compelled to give evidence about the Khmer Rouge era. This particular episode constitutes one of the most serious allegations of political interference to have arisen throughout the course of the litigation of Cases 001 and 002. Although the incident is highly unlikely to pose a fatal threat to the prosecution of Case 002, it has certainly impeded the ability of the defence to call certain witnesses in relation to certain historical facts, and effectively allowed the Government of Cambodia to have an effect on the historical narrative that is created by the court.

2.5. Allegations of Corruption

Allegations of corruption at the ECCC have centred on ‘kick-backs’ paid by staff members to superiors in exchange for gaining or maintaining a position at the court. The allegations are connected to the wider problem of political interference at the tribunal in that they demonstrate the susceptibility of Cambodian court personnel, including judges, to outside influence. The presence of corruption heightens fears that Cambodian judges are subject to government interference and cannot act independently.⁴⁹ As one defence counsel at the ECCC put it succinctly: “Independent Cambodian judges do not exist, it is a contradiction in terms”.⁵⁰

There are two major causes for concern over the manner in which the ECCC and UN have addressed the corruption allegations. Firstly, the judiciary of the ECCC has been cautious in recognising the negative effects of corruption. The CIJs dismissed a defence request for investigative action in response to the allegations, on the basis that the request was limited to “... speculation as to hypothetical negative effects of any form of corruption on the proceedings”.⁵¹ Similarly, in dealing with a defence motion challenging the propriety of the court following the allegations, the Pre-Trial Chamber adopted a narrow definition of independence and impartiality, stating that ‘the allegation that staff members possibly have paid money to a superior cannot lead to the conclusion that these staff members can influence the Judges to manipulate the outcome of the procedure, and therefore affect the independence and impartiality of the court.’⁵² It is submitted that these approaches represent a narrow interpretation of the obligations on the Chambers of the ECCC to prevent corruption, as well as a narrow view of the potential negative implications of corruption.

By way of contrast, the parties and participants to ECCC proceedings have characterised independence and impartiality more broadly, in line with international jurisprudence. By arguing that corruption has negative effects beyond its impact on judicial decision making; by citing the extensive media coverage of the corruption allegations as a negative effect of corruption; and by asserting that it is within the ECCC’s powers to investigate the allegations. The International Co-Prosecutor indicated his concern that the corruption allegations “...threaten[ed] the continuation of the court...” because the ECCC had refused to deal with it.⁵³

Judge Laurent Kasper Ansermet, “KRT defence team wants to see evidence”, 20 March 2013, < <http://laurentkasperansermet.com/tag/marcel-lemonde/> >, 14 May 2013.

⁴⁹ Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly, 14 February 2007, Open Society Justice Initiative, < <http://www.opensocietyfoundations.org/press-releases/corruption-allegations-khmer-rouge-court-must-be-investigated-thoroughly> >, 25 November, 2012.

⁵⁰ Personal Interview, Michiel Pestman, Lead Co-Lawyer for Nuon Chea, Phnom Penh, Cambodia, 23 April 2012.

⁵¹ ECCC Office of the Co-Investigating Judges, ‘Order on Request for Investigative Action’ D158/5 (3 April 2009).

⁵² ECCC Pre-Trial Chamber, ‘Decision on appeal against the Co-Investigating Judges’ order on the charged person’s eleventh request for investigative action’, D158/5/1/15 (18 August 2009).

⁵³ Susan Postlewaite, ‘Khmer Rouge Trial Threatened’, *Asia Sentinel*, 24 April 2009, < http://www.asiasentinel.com/index.php?option=com_content&task=view&id=1841&Itemid=207 > 25 November 2012.

Defence teams argued that the ECCC should adhere to wider anti-corruption principles applicable not only to judges but to judicial support staff.⁵⁴ The nature of the ECCC as a court of justice was said to create 'inherent powers' to investigate corruption, following an approach taken by the International Court of Justice and other international tribunals.⁵⁵ The Civil Party lawyers argued that it was within the scope of the ECCC to deal with the corruption matter, since the ECCC is run on the basis of independence and impartiality.⁵⁶ When the corruption allegations are considered from the perspectives suggested by the parties and participants, the implications of the allegations appear more serious than has been characterised in ECCC jurisprudence so far.

A second concern is the lack of transparency in investigating corruption claims. Transparency has been recognised as a critical tool in deterring and remedying the effects of political interference.⁵⁷ The UN has not treated with complete openness its findings into the corruption allegations. Given that the UN should lead by example in upholding international standards of transparency and accountability, this is unfortunate. The UN Development Programme commissioned an international accounting firm to conduct an audit to investigate the allegations.⁵⁸ In response to the audit, the UN Office of Internal Oversight Services (UNOIOS) undertook a review, submitting a confidential report of its findings to the Cambodian government in September 2008.⁵⁹ Funding to the Cambodian side of the ECCC was frozen pending the outcome of the review,⁶⁰ during which time, Deputy Prime Minister Sok An unveiled a new anti-corruption committee to investigate any allegations of corruption raised by staff at the tribunal.⁶¹ Funding was subsequently re-established, but the UNOIOS report has remained confidential despite defence requests for disclosure and criminal complaints based on violations of the 1992 UNTAC Criminal Code and the Cambodian Penal Code.⁶²

Although the UN offered little by way of official response to the corruption allegations, the Co-Ordinator of the UN Assistance to the Khmer Rouge Trials, Knut Rosandhaug, made several comments to the German Parliament on this issue:

A serious problem is the grave corruption that impedes on the work of the hybrid court. The Cambodian staff of the court must pay protection money in order to work there. In addition, the United Nations has conducted an investigation of the head of the administration of the ECCC, Sean Visoth, and come to the conclusion that he was guilty of corruption.⁶³

The seriousness of the allegations of corruption cannot be underestimated. Although they have not been conclusively proved, the allegations have not been disproven, they have not been dealt with transparently, and they have resulted in resignations. At the very least, the way in which

⁵⁴ Nuon Chea Defence Team, 'Appeal against Order on Eleventh Request for Investigative Action' D158/5/1/1 (4 May 2009).

⁵⁵ *Ibid*, citing *Nuclear Tests (Australia v France)*, Judgment, *I.C.J. Reports* 1974, pp. 259-260.

⁵⁶ Civil Party Lawyers, 'Response on the appeal by Charged Persons', D158/5/1/10 (19 May 2009).

⁵⁷ Ellis, *supra* note 37.

⁵⁸ Craig Guthrie, 'ECCC judges asked to investigate more Khmer Rouge Crimes', *The Mekong Times*, 1 April 2008.

⁵⁹ Nuon Chea Defence Team, Criminal Complaint to the Phnom Penh Municipal Court regarding Corruption at the ECCC (1 September 2008).

⁶⁰ Douglas Gillison, 'ECCC Funding Delayed Over Graft Claims,' *The Cambodia Daily*, 6 August 2008.

⁶¹ Wikileaks, 'Khmer Rouge Tribunal: Sok An Signs Agreement On Anti-Corruption Mechanism, Ambassador Carol A. Rodley, Cable time: 7 August 2009 at 11:16 UTC,' <<http://www.cablegatesearch.net/cable.php?id=09PHNOMPENH564>>, 22 September 2012

⁶² Nuon Chea, *supra* note 59 at 4.

⁶³ German Parliament, 'Committee for Human Rights and Humanitarian Assistance to Cambodia and Indonesia Report of work carried out between 25 October and 3 November 2008', at p. 7.

the ECCC and UN dealt with the allegations created an impression that corruption pervades the Cambodian side of the tribunal administration, and left both institutions open to criticism.⁶⁴

3. Measures Intended to Prevent Interference

Having considered the main allegations of political interference to arise in Cases 001 002, 003, and 004, we now turn to analyse the mechanisms put in place at the ECCC that were intended to prevent interference.

3.1. Inclusion of Standards in the ECCC Texts

Although the ECCC is fundamentally a domestic court within the existing court structure of Cambodia, the constitutive instruments make clear that the intention of the UN and the Cambodian government was that proceedings should be conducted in accordance with international standards.⁶⁵ Pursuant to the 2003 Agreement, the ECCC shall exercise its jurisdiction ‘in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of [the ICCPR]’.⁶⁶ Furthermore, ‘although procedure shall be in accordance with Cambodian law ... where there is a question regarding ... consistency ... with international standards, guidance may also be sought in procedural rules established at the international level’.⁶⁷ Accordingly the ECCC will first turn to domestic law, but only to the extent that the domestic provisions are consistent with international standards. The meaning of ‘international standards’ has been variously interpreted at the ECCC as permitting the court to refer to fair trial standards from several sources, including, *inter alia*, those set by the Universal Declaration of Human Rights, the European Convention on Human Rights, the ICTR and ICTY statutes and jurisprudence; and UN General Assembly Resolutions.⁶⁸ Thus one safeguard against interference is the presence of international standards for a fair trial.

The constitutive instruments also provide for judicial standards. The 2003 Agreement states that judges should be of “high moral character, impartiality and integrity” and hold suitable qualifications. Judges ‘shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.’⁶⁹ Reference is made to the importance of a judge’s level of legal experience, including experience of international law, when considering their appointment in Chambers, which suggests that judges must be familiar with the judicial standards enshrined in international law.⁷⁰

In addition, the ECCC, as a domestic court, is subject to the protections of the Cambodian Constitution, which provides for the separation of powers and the independence of the Cambodian judiciary from the political branches of government.⁷¹ Further safeguards were introduced in a Code of Judicial Ethics, which provides that “judges shall be impartial and ensure the appearance of impartiality in the discharge of their functions” and that “judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.”⁷²

⁶⁴ Craig Guthrie, ‘KRT appoints new chief of troubled personnel department,’ *The Mekong Times*, 12 August 2008.

⁶⁵ 2003 Agreement, preamble at para. 4.

⁶⁶ 2003 Agreement, Article 12(2).

⁶⁷ 2003 Agreement, Article 12(1).

⁶⁸ Bertelman, *supra* note 48.

⁶⁹ 2003 Agreement, Article 3(3).

⁷⁰ *Ibid.* Article 3(4). *See also* ECCC Law, Article 10 new.

⁷¹ Cambodian Constitution, Article 51; Article 128; Article 130; Article 132.

⁷² Code of Ethics Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia, adopted on 31 January 2008, amended on 5 September 2008, Article 2; Article 7.

Specific provisions in the 2003 Agreement relate to interference with the CIJs. Article 5(3) states that “the co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source”.⁷³ It is interesting to note that Article 5(3) goes on to state that “[i]t is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”⁷⁴ Why it is necessary to restate the ECCC’s jurisdictional scope in a provision on investigatory independence is not clear. Perhaps the drafters of the 2003 Agreement foresaw problems with the independence of the investigations and saw it as necessary to include this clause.

The fair trial provisions laid out in the 2003 Agreement are developed further by the internal rules of the ECCC and the jurisprudence of the court. In particular, the internal rules provide for basic fair trial rights, such as that a fundamental principle of proceedings before the ECCC is that they should be fair and adversarial;⁷⁵ that the charged person has a right to be notified of charges against him or her;⁷⁶ that the charged person has rights to consult legal counsel,⁷⁷ and that there are certain rights in relation to provisional detention.⁷⁸

On their face, the legal texts governing the ECCC embrace many of the standards typically found in international instruments relating to procedural fairness and due process. The true measure of whether these standards can be upheld turns on their application by the court and the effectiveness of safeguards against abuse, as addressed below. While the provision of fair trial standards *may* be a source of protection against political interference, it is also true that fair trials and political interference are not mutually exclusive and it is important not to conflate the two terms. A trial may outwardly meet the criteria of fairness and the defendant may have received the benefit of all the relevant rights and procedural guarantees, notwithstanding the presence of extensive political interference.

3.2. Judicial Selection Process

The United Nation’s Basic Principles on the Independence of the Judiciary reflect the fact that in any justice system the process of judicial selection is a key safeguard against appointments for improper motives.⁷⁹ Under these standards, judicial appointments should be carried out in accordance with objective and transparent criteria based on proper qualifications. Where the criteria are not rooted in established and proven tradition, selection should be carried out by an independent body that includes substantial judicial representation.⁸⁰

The international working group set up to assist in the establishment of the ECCC stressed the importance of judicial selection. In its February 2004 report, the group regarded it as “critical to the establishment of a competent, independent and impartial tribunal” that judicial selection be objective and fair.⁸¹ The group’s report outlines various criteria common to mature

⁷³ 2003 Agreement, Article 5(3).

⁷⁴ *Ibid.*, Article 5(3); Article 6(3).

⁷⁵ Internal Rules, Rule 21.

⁷⁶ Internal Rules, Rule 57.

⁷⁷ Internal Rules, Rule 58.

⁷⁸ Internal Rules, Rule 63.

⁷⁹ United Nations Basic Principles on the Independence of the Judiciary, 1985, at Principle 10.

⁸⁰ Universal Charter of the Judge, 1999.

⁸¹ International Standards for the Nomination of Judges to the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, February 2004, at 1.

legal systems that provided high standards of judicial selection.⁸² The report concludes with a prophetic statement that makes clear the consequences of weak judicial selection:

The experience of other international criminal justice mechanisms has highlighted how important it is to have an open and fair appointment process. Ensuring a process in which judicial vacancies are publicly disseminated, applications are rigorously reviewed, and representatives of civil society are consulted will help to ensure the legitimacy and reputation of the Extraordinary Chambers in the eyes of local and international officials, civil society and the public.⁸³

It was decided that the process to be used at the ECCC would be the nomination and selection of judges according to the procedures provided for in the existing Cambodian domestic justice system. The ECCC Law provides that domestic judges are to be appointed from among currently practising judges or alternatively that novel appointments may be made from amongst the domestic judiciary.⁸⁴ The procedure for appointment includes a stipulation that the Supreme Council of the Magistracy (the ‘SCM’) shall appoint domestic judges in accordance with the ‘existing procedures’ found in the domestic system. The ‘existing procedures’ at the domestic level are based on the domestic constitutional provision that the SCM advises the King on the appointment of judges and prosecutors.⁸⁵ The SCM’s constitutional responsibility is to decide all judicial appointments, transfers, promotions, suspensions or disciplinary actions.⁸⁶ Foreign judges are also appointed by the SCM, following nomination by the UN Secretary-General.⁸⁷

There have been allegations that the Cambodian judges selected for appointment to the ECCC have not met international judicial standards. The Trial Chamber President, Nil Nonn, was alleged to have a self-admitted history of accepting bribes in his domestic practice.⁸⁸ The Trial Chamber dismissed an application for the disqualification of Judge Nil Nonn, rejecting the request for an order compelling the disclosure of, *inter alia*, the video footage in which the judge was said to have admitted that he had “accepted cash gratuities from grateful litigants”,⁸⁹ the Trial Chamber concluding as follows:

The Chamber finds that the Application neither alleges, nor seeks to establish, actual bias on the part of Judge Nil Nonn in relation to the case pending before the Trial Chamber. As the Application itself acknowledges, no risk of misconduct arises in the present case. There can accordingly be no apprehension of bias by an objective observer informed of all relevant circumstances insofar as they pertain to Case 002. The Application is therefore dismissed, as it neither pertains to the judges' impartiality nor objectively gives rise to the appearance of bias in the case against the Accused.⁹⁰

⁸² *Ibid.*

⁸³ *Ibid.*, at 4.

⁸⁴ ECCC Law, Article 10(New).

⁸⁵ Cambodian Constitution, Article 134.

⁸⁶ SCM Law, No. 09 NS.94, Article 11.

⁸⁷ *Ibid.*, Article 11(New).

⁸⁸ Ieng Sary Defence Team, ‘Application to disqualify judge Nil Nonn due to his Purported Admission that he has Accepted Bribes and Request for a Public Hearing or in the Alternative for Leave to Reply to Any Submissions Presented by Judge Nil Nonn in Response to this Application,’ E5 (14 January 2011).

⁸⁹ *Ibid.*, preamble, para. 1. *See also*: Ieng Sary Defence Team, ‘Ieng Sary’s Request for Investigative Action Regarding Ieng Sary’s Application to Disqualify Judge Nil Nonn for Purportedly Admitting to Accepting Bribes by Requesting or Ordering Filmmaker Amanda Pike to Disclose the Video Footage of Her Interview with Judge Nil Nonn and his signed Release Form’, E6, (14 January 2011).

⁹⁰ ECCC Trial Chamber, ‘Decision on Ieng Sary’s Application to Disqualify Judge Nil Nonn and Related Requests’, E5/3, (28 January 2011), para. 17.

The co-lawyer for Khieu Samphan, Kong Sang Ok was involved in the domestic case of Mu Sochea, widely regarded as politically motivated.⁹¹ The Trial Chamber Judge You Ottara was the presiding judge in that case,⁹² and in March 2011 defence teams at the ECCC sought to have him disqualified on grounds that he lacked independence.⁹³ Notwithstanding the view of one defence counsel, cited above, that no better alternatives exist amongst Cambodian judges, the selection mechanisms, based as they were on existing domestic procedures, can be criticised as failing to provide a safeguard against the political appointment of judges via the SCM.

3.3. Supermajority System

The ECCC operates a supermajority voting system.⁹⁴ Every decision requires the vote of at least one international judge. The rationale is clear – if all Cambodian judges vote in favour of a decision, perhaps because they are under political pressure to do so, then an international judge can block the decision. One problem lies in determining what should be the default position if a supermajority cannot be reached. In relation to conviction, then the default position shall be an acquittal, this much is specified in the Internal Rules.⁹⁵ However, little guidance is given on the default position in relation to disagreements on other decisions. The premise behind the supermajority system is to prevent the passage of affirmative judicial decisions that are tainted by political interference. However, what the system does not countenance is the fact that political goals can equally be achieved through the presence of voting deadlock between domestic and international judges. For instance, assume that a defence team files a motion seeking the disqualification of a domestic judge on allegations of political interference. If all of the domestic judges vote against the motion, while the international judges are unanimous in their support, then there is deadlock. Since no particular course of action is provided for in these circumstances, no positive decision can be reached. The situation will remain, with no action possible in response to the alleged political interference.

An additional attempt to prevent political interference can be found in the introduction of a mechanism for resolving disputes between the CIJs. The two CIJs must be in agreement before pursuing an investigation, and where there is a disagreement, the matter is referred to the Pre-Trial Chamber. The Pre-Trial Chamber must then reach a decision under the supermajority rules before an investigation may proceed. This is an unusual dispute resolution process because it means that in effect judges have a role in the prosecution strategy.⁹⁶ Once again, the problem with this system of dispute resolution is that there is little guidance provided in the ECCC texts to determine what should be the default position if there is a disagreement within the Pre-Trial Chamber.

3.4. Legal Mechanisms for Raising Issues of Political Interference

⁹¹ Cambodian Supreme Court, *Prosecutor General v. Mu Sochea*, Criminal Proceeding No. 201 (13 November 2009).

⁹² *Ibid.*

⁹³ See eg, Ieng Thirith Defence Team, ‘Application to Disqualify Judge You Ottara from the Special Bench for Lack of Independence’, E63 (9 March 2011).

⁹⁴ For an analysis of the supermajority system and how it has impacted on the area of substantive crimes, particularly the inclusion of domestic crimes, see: Goran Sluiter et al, *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013) at 1172-1176.

⁹⁵ Internal Rules, Rule 98(4).

⁹⁶ Scott Worden, ‘An anatomy of the Extraordinary Chambers’, in Yaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice, Prosecuting Mass Violence Before the Cambodian Courts*, (New York: The Edwin Mellen Press, 2005) p. 194.

Two main legal mechanisms exist at the ECCC for parties to raise complaints of political interference. A number of incidents demonstrate that these mechanisms have at times proved inadequate.

3.4.1 Sanctioning those who Interfere with the Tribunal

Rule 35 of the Internal Rules provides a means for the ECCC to sanction or refer to the appropriate authorities any person who knowingly and wilfully interferes with the administration of justice.⁹⁷ In the situation where the CIJs or one of the Chambers has reason to believe that a person may have committed an act falling into a relevant category of behaviour, they are entitled to deal with the matter summarily; refer the matter to the appropriate Cambodian authorities or the UN; or, under the provisions of Rule 35(2)(b), they may “conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings”.⁹⁸

Defence teams have relied upon this rule in a number of political interference complaints.⁹⁹ There have been no investigations under Rule 35(2)(b) to date, despite the existence of evidence submitted to the court suggesting the likelihood of political interference, and the acknowledgment of the Pre-Trial Chamber that the threshold for triggering an investigation is extremely low.¹⁰⁰ As one defence counsel puts it, when requests have been raised under this mechanism they have been “treated like hot potatoes”, passed between the OCIJ and Pre-Trial Chamber with no action taken, or alternatively left for the CIJs to investigate in cases 003 and 004.¹⁰¹

The effectiveness of Rule 35 in facilitating the investigation of allegations of government interference has been limited, since it depends on the assent of domestic judges, who find themselves in a majority. Those domestic judges are themselves alleged to be the subjects of government interference. On one occasion, the international judges of the Pre-Trial Chamber noted, “due to the grave nature of the allegations of interference, the Pre-Trial Chamber must intervene.”¹⁰² However, the domestic judges in the Chamber disagreed unanimously so it was not possible to decide to take investigatory action.¹⁰³ There are insurmountable difficulties in providing a mechanism for investigating domestic political interference, when the approval of the domestic judges is necessary for investigations to take place.

3.4.2 Disqualification of Judges Pursuant to Rule 34

A mechanism for the recusal and disqualification of judges is provided for in Rule 34 of the Internal Rules, based on situations pertaining to personal or financial interests in the case or associations that might affect impartiality or create an appearance of bias.¹⁰⁴ To date, no judge

⁹⁷ Internal Rules, Rule 35(1).

⁹⁸ Internal Rules, Rule 35(2).

⁹⁹ See eg Pre-Trial Chamber, ‘Decision on request for leave to file amicus curiae brief,’ D158/5/1/14 (4 August 2009).

¹⁰⁰ Pre-Trial Chamber, ‘Second decision on Nuon Chea's and Ieng Sary's appeal against OCIJ order on request to summons witnesses,’ D314/1/12 (9 September 2010).

¹⁰¹ Personal Interview, Jasper Pauw, Nuon Chea defence lawyer, Phnom Penh, Cambodia, 21st December 2011.

¹⁰² ECCC Pre-Trial Chamber, ‘Second decision on Nuon Chea's and Ieng Sary's appeal against OCIJ order on request to summons witnesses,’ D314/1/12 (9 September 2010).

Pre-Trial Chamber (2010) at 20-21.

¹⁰³ ECCC Pre-Trial Chamber, *supra* note 102 at 41.

¹⁰⁴ Internal Rules, Rule 34(1). As to the rule against bias applied in other tribunals, see dictum in *Prosecutor v. Furundzija*, Case No. IT-95-17/1A, Judgment (July 21, 2000) at 189; Ruth Mackenzie and Philippe Sands “International Courts and Tribunals and the Independence of the International Judge” 44 *Harvard Journal of International Law* (2003) pp. 271-285.

has sought recusal. Parties to the proceedings may apply for disqualification of judges on the same grounds as recusal.¹⁰⁵ Numerous unsuccessful applications to disqualify judges on these grounds have been made.¹⁰⁶ One reason that Rule 34 has not been useful in practice is the high threshold required to show a causative link between the impugned behaviour and its impact on a particular case before the ECCC.¹⁰⁷ Rule 34 has not been successfully employed to disqualify a judge where evidence of impropriety has arisen which does not directly and demonstrably relate to a particular case before the ECCC.¹⁰⁸ Also excluded from the purview of Rule 34 are any allegations about the general fitness of an individual to serve as a judge.¹⁰⁹

A number of conclusions arise from this section. The ECCC's structure contains several safeguards against political interference. The inclusion of international standards in the ECCC's texts was intended to ensure not only fairness but judicial independence. In addition, the selection process for judges, the mechanisms under Rule 34 and Rule 35, and the supermajority system held the potential to provide a buffer against interference. The safeguards were an aspect of the experimental nature of the tribunal and the supermajority system in particular was a novel idea for which there was no direct precedent.¹¹⁰ However, as the above examples show, the safeguards had limited effectiveness in challenging alleged political interference. This calls into question whether the safeguards were appropriate and sufficient given the palpable deficiencies of the domestic judiciary, from which ECCC judges were drawn, and the flaws of existing Cambodian legal structures.

4. Inevitable and Foreseeable Interference?

Difficulties encountered during the negotiation process that led to the establishment of the ECCC may be linked to the structural weaknesses identified above.¹¹¹ Once such weaknesses were part of the structure of the ECCC, subsequent political interference was perhaps inevitable, and the UN negotiators should perhaps have foreseen this.

Firstly, it could not have been ignored that the domestic court system into which any hybrid tribunal would be established was tainted by bribery, corruption, and political manipulation. Yash Ghai, Special Representative for Human Rights in Cambodia, noted that there had been many complaints filed about political interference in the judiciary's work and that there were many alarming examples of domestic trials that failed to meet basic due process standards.¹¹² The argument that interference was inevitable and foreseeable was put by Nuon Chea's defence counsel:

¹⁰⁵ Internal Rules, Rule 34(2).

¹⁰⁶ See eg ECCC Trial Chamber, 'Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges NIL Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony,' E55/4 (23 March 2011).

¹⁰⁷ Internal Rules, Rule 34(4).

¹⁰⁸ See for instance ECCC Trial Chamber, *supra* note 106.

¹⁰⁹ *Ibid.*, at 7.

¹¹⁰ Personal Interview, Clair Duffy, Open Society Justice Initiative, Phnom Penh, Cambodia, 11 January 2012.

¹¹¹ For a good overview of the negotiation process, told in the context of the establishing of the personal jurisdiction of the ECCC, see David Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction, May 22, 2011, Cambodia Tribunal Monitor*, website accessed on 14 May 2013 at http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf.

¹¹² See eg *Report of the Special Representative of the Secretary-General for human rights in Cambodia*, E/CN.4/2006/110 (24 January 2006), 28.

The UN should never have started this. And this is not with hindsight. People knew at the time this was not going to work. I have reached the point where I believe a trial at a local court could be better. Such a trial would offer the so-called ‘advantages’ of local trials, which the ECCC does not offer, while a conviction is a certainty anyway, because that is what Hun Sen wants.¹¹³

Second, Cambodia’s previous attempts at accountability for members of the Khmer Rouge could not have instilled confidence. In August 1979, the new People’s Republic of Kampuchea established the ‘People’s Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique’. The trials had serious procedural flaws that lent little international credibility to the findings of guilt and the sentences of death.¹¹⁴ In 1996, Ieng Sary was granted an amnesty by the Cambodian Government and a pardon by the King.¹¹⁵ In 1997, as the Khmer Rouge movement began to fall apart, Pol Pot was tried again in a ‘People’s Tribunal’. Pol Pot was sentenced to life imprisonment, although again this trial was widely regarded as comprised of a kangaroo court and there remains doubt over whether in fact it took place.¹¹⁶ For a few hours on 15 April 1998, there existed the real prospect of bringing Pol Pot to justice according to international standards, when the Voice of America announced that the Khmer Rouge would surrender him to an international tribunal, but his death was announced later the same evening.¹¹⁷ The failure of Cambodian authorities to accord proper standards of justice may be easily understood, taking into account that the judicial system remains rudimentary following decades of conflict. Yet these factors, particularly continued concerns over the integrity of the domestic judicial process, ought to have supported stronger safeguards, or a hybrid solution less reliant on the domestic judiciary.

The ECCC was negotiated against a backdrop of domestic and international forces that were fundamentally at odds over the type of tribunal that should be established. In June 1997 Cambodia requested that the UN Secretary-General provide “the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979”.¹¹⁸ A group of experts was established in 1998 to visit Cambodia and examine the feasibility of an international tribunal, its final report recommending that the best course of action was to establish an international tribunal with a majority of international judges.¹¹⁹ Hun Sen, the then Co-Prime Minister, challenged the concept of an international tribunal.¹²⁰ To Hun Sen, reconciliation implied peace and stability in Cambodia under his leadership. To international officials, reconciliation meant developing a more liberal and tolerant multiparty democracy in Cambodia.¹²¹ While the US pushed for a tribunal based on the ICTR and ICTY, even proposing that the UN create an ‘International Criminal Tribunal for Cambodia’ in The

¹¹³ Personal Interview, Michiel Pestman Nuon Chea Lead Co-Lawyer, Phnom Penh, Cambodia, 23 April 2012.

¹¹⁴ John Ciorciari and Anne Heindel, *On Trial: The Khmer Rouge Accountability Process*, Documentation Center of Cambodia (2009), 40.

¹¹⁵ *Ibid.*, at 25.

¹¹⁶ ‘Doubt Cast on Report that Pol Pot Has Been Given a Life Sentence’, *Chicago Tribune* 27 July 1997.

¹¹⁷ John Gittings and Mark Tran, Pol Pot ‘killed himself with drugs’, *The Guardian*, 21 January 1999.

¹¹⁸ Cambodian Government (1997) Letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, 24 June 1997, A/51/930.

¹¹⁹ *Expert Group Report for Cambodia established pursuant to General Assembly resolution 52/135*, (A/53/850), p. 219.

¹²⁰ David Scheffer, ‘The Extraordinary Chambers in the Courts of Cambodia’, in Cherif Bassouni, (ed), *International Criminal Law* (Leiden: Brill Publishing, 2008).

¹²¹ Ciorciari, *supra* note 114, at 66.

Hague, the Cambodian government had in mind a tribunal with domestic ownership, assisted by international support.¹²²

The negotiations turned to the determination of a draft law to govern the tribunal, prepared by Cambodian officials. The King of Cambodia signed the draft law in August 2001.¹²³ The Cambodian attitude to the negotiations was evident in that the UN had not at this stage formally agreed to the terms of the draft law. UN dissatisfaction with the negotiation process grew, and in February 2002 Hans Corell, the UN Under-Secretary-General for Legal Affairs, announced that the UN would not continue its participation in the negotiations. Corell stated that the UN believed that the ECCC “as currently envisaged would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have.”¹²⁴

In December 2002, following pressure from the Australian, Japanese, and French governments, the General Assembly adopted a further resolution in relation to the negotiations with the Cambodian government.¹²⁵ Resolution 57/228 requested that the Secretary-General restart negotiations, but this time on the basis that the ECCC would be a national court within the domestic structures of Cambodia, with the provision of international assistance and cooperation. By this stage, the UN’s bargaining position was irredeemably weakened and the Government of Cambodia was able to demand the concessions to domestic control of the tribunal that it wanted and had expressed in the draft law in 2001. As the current Senior Legal Officer to the ECCC Trial Chamber put it, the “only game in town was the arrangement which came to be reflected in the final tribunal ... the UN had to choose between withdrawal, or agreement to the tribunal which the Cambodian Government wanted. Under the prevailing international legal order, there were not too many creative outlets left for the UN.”¹²⁶

The Secretary-General published a report in March 2003 stating that “[the only agreement now possible] was one that accepted the structure and organisation of the Extraordinary Chambers foreseen [in the draft law of 10 August 2001]”.¹²⁷ On this basis, the Secretary-General expressed concern over whether the draft agreement would ensure the tribunal’s credibility.¹²⁸ The General Assembly noted these concerns but nonetheless adopted the draft agreement with no modifications on 22 May 2003.¹²⁹ The National Assembly of Cambodia ratified the Agreement on 19 October 2004. The facts of the negotiation process paint a picture of a Cambodian government intent on establishing a tribunal within the confines of a domestic structure; a Secretary-General and Group of Experts who were keenly aware of the difficulties posed by such a structure; and a General Assembly committed to pushing through the negotiations and finding at any cost a workable form of retributive justice. As Yash Ghai put it in February 2008,

¹²² Scheffer, *supra* note 103.

¹²³ United Nations, ‘Statement by the UN Legal Counsel Hans Corell at a press briefing to UN Headquarters in New York, 8 February 2002, <<http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>>, 22 September 2012.

¹²⁴ *Ibid.*, at para. 3.

¹²⁵ *Resolution Adopted by the General Assembly 57/228 Khmer Rouge Trials*, (A/RES/57/228).

¹²⁶ Personal Interview, Susan Lamb, Phnom Penh, Cambodia, 14 April 2012.

¹²⁷ *Report of the Secretary-General on the Khmer Rouge trials*, (A/57/769), para. 23.

¹²⁸ *Ibid.*, at para. 28.

¹²⁹ Resolution 57/228, *supra* note 125.

“political expediency overruled the concerns of the Group of Experts and the Secretary-General”.¹³⁰

If proposals to include a majority of international judges at the ECCC had been successful, a critical safeguard against the domestic judges’ control of the tribunal would have existed; a safeguard which the supermajority system proved unable to provide. Throughout the negotiations the Cambodian government insisted on a majority of domestic judges.¹³¹ When it became clear that the desired majority of international judges would not materialise, the US government suggested the supermajority system as a concession to the Cambodian position. Concern was voiced that such a system would create future difficulties, but UN negotiators had limited options since the Cambodian government knew by this stage that the UN would not continue to insist on a majority of international judges.¹³² The supermajority system was agreed, and the UN and Cambodia became committed to an aspect of the tribunal structure that would prove inadequate to prevent problems arising from the domestic judiciary. Had the negotiations taken a different course, then political interference in the trials may have been mitigated. As it was, the concessions agreed by both parties proved to impact significantly on the credibility of the trials.¹³³

Perhaps it was foreseeable too, that the judicial selection processes stipulated by the ECCC Law would be incapable of providing suitable domestic judges. The UN agreed to a judicial selection process based on “existing procedures” at the domestic level. The UN may have entered into the 2003 Agreement in the knowledge that requisite international standards could not be met, in contravention of the UN Basic Principles on the Independence of the Judiciary. In contrast to the way that the mechanism for the selection of domestic judges was left primarily to domestic processes, the international judges, although being approved domestically, were sourced from initial nominations taking place at an international level. It may in fact have been preferable for both UN and Cambodian authorities to have played a more equal role in selecting domestic and international judges. In that case, the UN may have been more successful in securing itself a role in appointing domestic judges by offering, *quid pro quo*, the domestic government a corresponding role in international judicial appointments.¹³⁴ Perhaps the UN conceded too much by agreeing to the powers of the Cambodian in selecting domestic judges, and perhaps the UN relied too heavily on the assumption that retaining control of the selection of international judges would be an effective safeguard against political interference.

5. Conclusion

Allegations of political interference at the ECCC continue to undermine the credibility of the tribunal. The most serious allegations are aimed at Cases 003 and 004 and they indicate that domestic political forces interfered with those cases to the extent that they may not proceed at all. If that proves to be the case, it will be difficult not to view Cases 003 and 004 as determined by political exigency, rather than by an independent prosecutorial strategy in accordance with the ECCC’s legal framework.

¹³⁰ *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, (A/HRC/7/42), para. 82.

¹³¹ Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, (July 2010), 2.

¹³² Ciorciari, *supra* note 114.

¹³³ Personal Interview with anonymous source, Phnom Penh, Cambodia, 13 January 2012.

¹³⁴ Personal Interview, Daniel Breger, Ieng Thirith defence lawyer, Phnom Penh, Cambodia, 5 April 2012.

In relation to a host of other allegations, primarily in relation to Case 002, it can be said that although significant for the quality of justice achieved by the ECCC, they are unlikely to be ‘fatal’ to the prosecution of those cases in accordance with basic international standards. The ECCC may well meet fair trial standards in Cases 001 and 002, but a fair trial should not be confused with the issue of political interference – adherence to international standards may contribute to preventing interference in certain circumstances, but cannot be assumed to do so. Accordingly, a number of conclusions can be drawn from these ‘non-fatal’ allegations.

The difficulties faced by international judges in carrying out their duties at the ECCC should provide food for thought for future tribunals and for organisations providing judicial assistance to developing countries. Notwithstanding the efforts of the international judges, their presence, as an aspect of hybrid design, was not enough to prevent domestic political interference.

The failure to appoint Judge Kasper-Ansermet suggests that the Cambodian SCM, due to its composition, is prone to executive interference in its decision-making. It was foreseeable that the SCM would be unable to act with independence, and negotiators of future tribunals should pay careful attention to the details of judicial appointment mechanisms and the role played by domestic bodies.

In some respects the safeguards for preventing interference in the ECCC’s work have not performed as expected, and their failures may inform future tribunal design. A flaw of the supermajority system is the lack of guidance in the ECCC’s founding texts on deadlock situations. Rules 34 and 35 of the Internal Rules have proved to be of limited use to parties wishing to raise complaints of political interference, in part because the practical application of these provisions relies on the approval of the domestic judges who may themselves be connected to the complaint.

In sum, these are significant allegations of political interference at the ECCC, extensive enough to paint a picture of a tribunal that has failed to maintain independence. The allegations may be difficult to prove conclusively but the ECCC and its stakeholders have failed to transparently investigate and disprove the allegations. Independence is important, not least to ensure the legacy left by the tribunal, and, as the International Civil Party Lead Co-Lawyer points out, the tribunal must, out of respect for the victims, take responsibility for resolving the problems of political interference.¹³⁵ At the very least, the allegations have created the impression of interference, violating the principle that justice must not only be done but be seen to be done.

The prospect of political interference was foreseeable at the negotiation stage. The ideal form of tribunal as envisaged by the international actors did not emerge, and instead, major concessions were made to the insistence of the Cambodian government on a domestic structure, with a majority of domestic judges. The negotiations delivered a hybrid tribunal that made the ECCC vulnerable to political interference; the safeguard measures included were inadequate to prevent this. If there are future hybrid tribunals in the mould of the ECCC, negotiators should place most emphasis on establishing from the outset a balance between the international and domestic sides of a tribunal. Perhaps international standards were compromised in the case of the ECCC in order to find a workable solution to the negotiations, thus rendering subsequent checks and

¹³⁵ Personal Interview, Elisabeth Simonneau Fort, International Civil Party Lead Co-Lawyer, Phnom Penh, Cambodia, 14 April 2012.

balances on domestic power deficient. The question for future tribunals will therefore be how willing are negotiators to knowingly compromise international standards, in order to find workable solutions. At least following the Cambodian example it will be difficult to be ignorant of the risks of excessive domestic control in a hybrid tribunal.

The theoretical basis of hybrid tribunals is challenged by the practical application of the model at the ECCC. The notion that accountability according to international standards can be provided by a tribunal that exists within a domestic justice system that lacks independence is seriously undermined. Senior staff at the tribunal query whether this model should be used in future. As the former Senior Legal Officer to the Trial Chamber observed:

Looking prospectively, I would not advocate that the Cambodian model be used in future tribunals. Firstly it is simply inefficient, for example in the lack of a Presidency, which can be a unifying, cohesive voice, and make tough management decisions. It is a court in two halves, and it is dependent on a painstaking collaboration on every minute technical issue. Second, the model is wrongheaded, because it is based on the false notion that unless you have an enshrined majority of domestic judges then the notion of national ownership is not genuine. There was a tendency to scoff at the *ad hoc* tribunals, by suggesting that they never employed Rwandans or Yugoslavs, but in fact there was a significant proportion of such employment in those tribunals.¹³⁶

International criminal justice is a constantly evolving project, even more so in light of the development of the ICC and, as such, it requires experimentation. Notwithstanding the complementarity jurisdiction created by the Rome Statute, internationalised tribunals continue to be employed, as seen in the recent opening of the Extraordinary African Chambers to try Hissène Habré.¹³⁷ Future tribunals of this type should not abandon the ideals that underpin international standards of justice in order to reach politically satisfactory compromises. Striving to achieve these standards is the challenge of the international criminal justice project. Risks of political influence should be thoroughly explored during negotiations, with well-considered safeguards implemented in response.

¹³⁶ Personal Interview, Susan Lamb, formerly Senior Legal Officer to the Trial Chamber, Phnom Penh, Cambodia, 14 April 2012.

¹³⁷ See: Extraordinary African Chambers, website of Les Chambres Africaines Extraordinaires, <http://www.chambresafricaines.org/>, accessed on 14 April 2013.