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# National Ownership and International Standards

Independence and Impartiality in Hybrid Courts: The  
Extraordinary Chambers in the Courts of Cambodia

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# Summary

The ICTY and the ICTR were established in the 1990s to determine individual accountability for mass atrocities. The tribunals have had a great impact on the development of international criminal law, yet their effects in the concerned societies have been disputed. As the courts are located outside the territory in which the crimes took place, and are composed of international lawyers and personnel, they have little interaction with the affected population. This weakness can be described as a lack of national 'ownership' in the proceedings. In the last decade a number of hybrid courts have been established, that to a varying extent are integrated in the national legal system, and that apply both national and international law. The ECCC, which is the focus of this thesis, is an example of such a court.

There is yet no general procedural law applicable in international criminal courts, and procedures have developed from national legal systems, human rights instruments, and a number of non-binding instruments. While some rules may be directly applicable, others must be adapted to the international setting and the *sui generis* nature of hybrid courts. National ownership can be broken down to a number of components, including the participation by national judges and victims, and the acceptance that a court enjoys among the general population. The success of victim participation and outreach programmes will in many ways determine the legacy that the court will enjoy, at least at a national level. At the same time, national ownership should not be promoted at the cost of international standards. While the two concepts are far from contradictory, at times one may have to be prioritized over the other.

A number of concerns have been raised with regard to independence and impartiality at the ECCC. Cambodian law falls short of the safeguards required to ensure an independent judiciary, and concerns have been raised regarding political influences at the Court. Since 2007 corruption allegations have been raised, an issue which the Court has failed to adequately address. The Court is dependent on voluntary contributions by states for its operation, something that can call into question the institutional independence of the ECCC. Funds to the Cambodian side have been frozen since 2008 due to the allegations of corruption. The fact that all Cambodian judges lived through the Khmer Rouge era, and are part of an establishment which for decades fought politically and militarily against its remaining leaders, can affect their objective impartiality. Finally, the decisions taken regarding jurisdiction and composition of an *ad hoc* tribunal can affect its appearance of independence throughout the proceedings.

In conclusion, there are a number of ways in which the ECCC does not live up to international standards of independence and impartiality. These flaws can partly be explained by the lack of responsibility and authority that has followed with the dual structure of the Court.

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# Abbreviations

<b>Abbreviation</b>	<b>Explanation</b>
ACHPR	African Convention on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court of Human and Peoples' Rights
CDF	Civil Defence Forces
CGDK	Coalition Government of Democratic Kampuchea
CPC	Criminal Procedural Code
CPP	Cambodian Peoples' Party
DC-Cam	Documentation Center of Cambodia
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
<i>Et. al.</i>	<i>Et alia</i> (and others)
<i>Et seq.</i>	<i>Et sequentes, et sequential</i> (and the following)
Funcinpec	<i>Front Uni National pour un Cambodge Indépendent, Neural, Pacifique et Coopératif</i>
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
IBAHRI	International Bar Association Human Rights Institute
<i>Ibid.</i>	<i>Ibidem</i> (same as above)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
KR	Khmer Rouge
LAWASIA	The Law Association for Asia and the Pacific
NATO	North-Atlantic Treaty Organization
NGO	Non-governmental organization
PRK	People's Republic of Kampuchea
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SFOR	Stabilization Force for Bosnia and Herzegovina
SNA	Supreme National Authority
SPSC	Special Panels for Serious Crimes, Dili, East Timor
UN	United Nations
UN HRC	United Nations Human Rights Committee
UNAKRT	United Nations Assistance to the Khmer Rouge Trials
UNAT	United Nations Administrative Tribunal
UNCSW	United Nations Commission on the Status of Women
UNDP	United Nations Development Fund
UNICEF	United Nations Children's Fund

UK	United Kingdom
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
USA	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics

# 1 Introduction

## 1.1 Background

In May 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>1</sup> In an innovative interpretation of its mandate, the Council created a criminal tribunal as a response to a threat against international peace and security.<sup>2</sup> This was the first international body to try individuals for international crimes since the Nuremberg and Tokyo tribunals four decades earlier. It differed from its predecessors in that punishment was not inferred by the victors in a conflict, but by a third party, in the name of the international community.<sup>3</sup> The establishment of the ICTY was closely followed by the creation of the International Criminal Tribunal for Rwanda (ICTR), similar in creation and structure.<sup>4</sup> The Security Council has after the establishment of these two institutions been reluctant to intervene with similar responses to gross violations of human rights. For a number of reasons, focus has shifted from large international institutions to locally situated courts that in various ways are integrated in the judicial system and the society of the country in which mass atrocities have taken place. The ICTY and the ICTR were extraordinarily expensive, covering up to 15 % of the UN regular budget.<sup>5</sup> Moreover, the *ad hoc* tribunals do not appear to have had the deterring effect upon the conflicts in the former Yugoslavia and in Rwanda that was hoped for.<sup>6</sup> Finally, the two tribunals have been criticised for having little effect upon the societies in which they operate.<sup>7</sup>

Courts with international components have thereafter been established in Sierra Leone,<sup>8</sup> East Timor,<sup>9</sup> Kosovo<sup>10</sup> and Cambodia.<sup>11</sup> These have been

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<sup>1</sup> United Nations Security Council resolution 827 (1993) of 25 May 1993.

<sup>2</sup> W. A. Schabas, *The UN International Criminal Tribunals The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, the United Kingdom (2006), p. 48.

<sup>3</sup> K. D. Magliveras, 'Difficulties and Status of Efforts to Establish an International Criminal Court in Cambodia', *Asia Pacific Journal of Human Rights* 2 (2006), p. 105.

<sup>4</sup> United Nations Security Council resolution 955 (1994) of 8 November 1994.

<sup>5</sup> United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary General*, 23 August 2004, UN Doc. S/2004/616, para. 42.

<sup>6</sup> G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, the United States (2005), pp. 3-4.

<sup>7</sup> D. Cohen, "Hybrid" Justice" in East Timor, Sierra Leone and Cambodia: "Lessons Learnt and Prospects for the Future", 43 *Stanford Journal of International Law* (2007), p. 5.

<sup>8</sup> Special Court for Sierra Leone, established through Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, entered into force on 12 April 2002.

<sup>9</sup> Special Panels for Serious Crimes (SPSC), established by UNTAET, Regulation No. 2000/15, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, 6 June 2000, UN Doc. UNTAET/REG/2000/15. UNTAET received its mandate from UN Security Council resolution 1272 (1999), 25 October 1999, UN Doc. S/RES/1272(1999).

called a ‘second generation’ of UN trials.<sup>12</sup> They have not been established by the Security Council under the mandate of Chapter VII of the UN Charter, are to a varying degree integrated in the national legal system of the countries in which they are based, and apply both national and international law. It is unclear what the consequence will be of the establishment of a permanent criminal court (the ICC) on the proliferation of hybrid courts, yet it appears that the two forms of prosecutions rather compliment than contradict each other.<sup>13</sup> Ideally, hybrid courts will both fulfil international standard and include national participation by a range of actors in the proceedings, combining the best of two worlds.<sup>14</sup> The focus of this thesis is the ECCC established in 2004 in Phnom-Penh, as an example of a hybrid court.

## 1.2 Scope and Delimitations

The scope of this thesis is to study the Extraordinary Chambers as an example of a hybrid court, and to assess to what extent it adheres to international standards of independence and impartiality. This assessment is made against the background of national ‘ownership’ of the proceedings. My research questions can be summarized as follows:

1. What are the international standards of independence and impartiality applicable in international criminal law, and at the ECCC in particular? (chapter 4)
2. What are the implications of national ‘ownership’ of judicial proceedings, and how is such ownership implemented at the ECCC? (chapter 5)
3. To what extent does the ECCC adhere to international standards of independence and impartiality? (chapter 6)

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<sup>10</sup> The appointment of international judges and prosecutors in the courts in Kosovo was decided in UNMIK regulation 2000/34 amending regulation 2000/6, 27 May 2000, UN Doc. UNMIK/REG/2000/34, under the authority of United Nations Security Council resolution 1244(1999) of 10 June 1999, UN Doc S/RES/1244(1999)

<sup>11</sup> Extraordinary Chambers in the Courts of Cambodia, established through the 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 (hereinafter, the ECCC Agreement), Phnom-Penh, 6 June 2003, entered into force 19 October 2004.

<sup>12</sup> D. Shraga, ‘The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions’, in C. R. Romano *et. al.* (eds.), *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford University Press, the United States (2004), p. 15.

<sup>13</sup> Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, entered into force 1 July 2002. According to article 17, primary jurisdiction over serious crimes continues to lie with domestic courts. Only when states are unable or unwilling to prosecute criminals, in accordance with international standards of justice will cases be admissible to the ICC (Rome Statute article 17).

<sup>14</sup> See *e.g.* L. A. Dickinson, ‘The Promise of Hybrid Courts’, 97 *The American Journal of International Law* 2 (2003).

In the final chapter, an attempt will be made to determine if any flaws regarding independence and impartiality can be said to be the result of the dual ownership at the ECCC.

### **1.3 Methodology and Sources**

At the focus of this thesis are the international standards of independence and impartiality applicable at the ECCC, and an analysis of to what extent the ECCC complies with those standards. A number of other issues are however raised which are essentially non-legal in character and require a different methodology than a traditional legal method. Nonetheless, my approach is essentially legalistic and normative, that is, it is my assumption that the ECCC must adhere to certain norms to maintain its legitimacy. Legalism further assumes that universal human rights norms should be promoted, and that “efforts to change the prevailing social pattern of behaviour should begin with forceful advocacy of generalized rules embodied in principled institutions, such as courts”.<sup>15</sup> Such an approach adequately illustrates the underlying outlook of this thesis. Sources primarily used are international treaties, jurisprudence and decisions by international and national judicial bodies and writings by legal scholars. Non-binding international instruments are further used as a reference, as are publications by non-governmental organizations.

The concept of ‘ownership’ is a key notion in this thesis, yet it is not a legal concept. It is not defined in the literature, though it is often referred to as a sense of control or participation retained by various actors in a particular process. In attempting to depict its implications, a number of sources are used from related fields in social and political science. The concept is commonly referred to in writings concerning transitional justice and national reconciliation, and references are made to those contexts.

I spent two months in Phnom Penh in February-March 2009, and had the opportunity to attend hearings at the ECCC, as well as meeting with a number of court officials and representatives from NGOs. While the results of those studies do not directly form a base of the thesis, the experience was invaluable for achieving a better understanding of the Court and the context in which it operates. When it comes to describing and analyzing the proceedings at the ECCC, most court documents are public and available on the ECCC homepage. Documents that are not available on the homepage are on file with the author. In addition, a number of less traditional sources are used in relation to some of the issues raised regarding the Court. Such sources include articles from Cambodian and international media, and reports, press releases, statements and reports by national and international NGOs. While the content of such sources must be critically assessed (as must sources originating from more official organs), their use is motivated for a number of reasons. The large NGO community surrounding the ECCC

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<sup>15</sup> J. Snyder and L. Vinjamuri, ‘Trials and Errors Principle and Pragmatism in Strategies of International Justice’, 28 *International Security* 3 (2003-2004), p. 10.

provides an extraordinary resource of knowledge and experience of both international criminal law and the Cambodian context. As such, writings by NGOs provide important insights regarding the court, and address relevant and current legal issues. Regarding some of the issues dealt with, the criticism put forward in this thesis is the fact that the Court has not yet dealt transparently with certain issues. That being the case, official documents are unavailable to the public.

Some methodological challenges have presented themselves while writing this thesis. The first substantive hearings on the merits were held at the ECCC in late March 2009, and a long way remains before it concludes its first case. That being the case, the assessments made in this thesis can only be preliminary to the extent that circumstances may change throughout the proceedings. Any final conclusions concerning the legacy of the Court will have to be made once it has concluded its mandate. Most literature concerning the ECCC was published around the time of the conclusion of the ECCC Agreement 2003-2004. Secondary sources on the current proceedings are to a large extent limited to reports in the media and publications by monitoring NGOs. That being the case, uncertainties remain concerning empirical facts, as mentioned above. Caution is therefore taken when references are made to such sources. A final challenge has been to find official translations of Cambodian official sources, such as laws or decrees. While some official translations are available on the Internet, other translations have been made available by NGOs or other bodies. When an official translation has not been available, a note is made thereof in the footnotes.

## **1.4 Thesis Outline**

The structure of this thesis is as follows: Chapter 2 will provide a historical background to the ECCC, outlining Cambodian history leading up to and following the regime of Democratic Kampuchea (DK), the political transition of the 1990s and the process of establishing a tribunal in Cambodia. Chapter 3 introduces the jurisdiction, structure and composition of the Court, and addresses some of the issues that were left unresolved by the ECCC Agreement. In Chapter 4 a thorough analysis is made of the concepts of independence and impartiality in international law, in order to define the international standards applicable at the ECCC. Chapter 5 explores the concept of national ‘ownership’ of judicial proceedings, the extent of participation by different actors, and the implications of national ownership at the ECCC. Chapter 6 provides an analysis of the issues that may be raised with regards to independence and impartiality at the ECCC. Finally, concluding remarks will be provided in chapter 7.

## 2 The Extraordinary Chambers: A Historical Background

The history of the Khmer Rouge regime and its aftermath will in this chapter be described in some detail. This will serve as a background to explain some of the attitudes in and outside Cambodia towards the establishment of a court. Those attitudes and the political context in which they were formed were acutely present in the negotiations between the Cambodian government and the UN during the late 1990s. They are important for an understanding of some of the compromises which were struck during the negotiations, and which today are reflected in the structure, composition and jurisdiction of the ECCC, to be outlined in the following chapter. While these circumstances are specific to the ECCC, they serve as an illustration of the historical and political processes that condition an analysis of any *ad hoc* tribunal.

### 2.1 Cambodia 1953-1979

Cambodia became independent from France in 1954, after a coup by King Sihanouk in late 1953. In 1955 the King abdicated the throne to his father, Prince Suramarit, and entered politics as a civilian. Having consolidated his power through a referendum in 1955, Sihanouk became the leading political figure for the fifteen years to come.<sup>16</sup> When the king died in 1960, Sihanouk continued to rule under the title Chief of State.<sup>17</sup> The Democratic party, in 1955 the major political opposition, was dissolved in 1957 after a wave of persecution by Sihanouk, leaving little political opposition.<sup>18</sup>

From 1960 on, events in Cambodia were closely linked to those in Vietnam. Sihanouk attempted to retain Cambodian neutrality in the war, yet in 1964 he broke off diplomatic relations with the United States, and in 1966 he secretly entered into an alliance with the North Vietnamese troops.<sup>19</sup> The Cambodian communist party had been formed in 1951, and was closely linked to the Vietnamese communists. A source of recruits for the party was Cambodian university students in France, among them Saloth Sar (later known as Pol Pot), Ieng Sary and Kieu Samphan. From 1968 the communist forces gained momentum, following a shift in alliances from Vietnam to China, and by 1970 they controlled directly or indirectly a fifth of Cambodia's territory.<sup>20</sup>

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<sup>16</sup> D. Chandler, *A History of Cambodia Fourth Edition*, Westview Press, the United States of America (2008), pp. 230-231. Voters were at the referendum asked to choose between a white ballot with a picture of the King on it, and a black ballot inscribed with the word 'no'.

<sup>17</sup> H. Kamm, *Cambodia Report from a Stricken Land*, Arcade Publishing, the United States (1998), pp. 28-29.

<sup>18</sup> D. Chandler, *supra* note 16, pp. 234 and 241.

<sup>19</sup> *Ibid.* p. 237.

<sup>20</sup> *Ibid.* p. 247.

In March 1970, while Sihanouk was abroad on vacation, the National Assembly voted to replace him, and Prime-Minister Lon Nol assumed power and proclaimed the Khmer Republic. Sihanouk was forced into exile and agreed to head a front against Lon Nol's regime, thereby allying himself with the communists, by Sihanouk labelled the 'Khmer Rouge'. The following years were violent, and by 1972 the government controlled little but Phnom-Penh, some provincial capitals and most of the province of Battambang.<sup>21</sup> American interventions escalated, and in 1973 carpet-bombings were initiated to prevent a communist victory.<sup>22</sup> Nonetheless, in early 1975 communist forces circled in on Phnom-Penh stopping food and ammunition supplies, and on 17 April the Khmer Rouge occupied the city.<sup>23</sup> They soon pronounced the Democratic Kampuchea (DK).

The same day Phnom-Penh was captured, the DK gave order to evacuate the city.<sup>24</sup> They claimed to turn the country back to the "Year Zero", aiming to create a radical agrarian society with a unified national race and no class boundaries.<sup>25</sup> Apart from the Constitution adopted in 1976, the new regime passed no laws or decrees, and its centre of power was surrounded by secrecy, known only as 'Angkor', 'the organization' or the 'Standing Committee'.<sup>26</sup> The regime was xenophobic and adhered to an extreme form of self-reliance accepting no goods, including modern medicines, from foreign states. Currency was abolished, all cities were evacuated and agrarian collectives were set up across the country.<sup>27</sup> Education was discontinued, religion forbidden, family life disrupted, forced marriages arranged and courts and other public institutions abolished.<sup>28</sup> After an initial stage of eliminating supporters of the previous Lon Nol regime, purges within the party intensified in 1976. It is estimated that between 1,5 and 2 million persons, up to a fourth of Cambodia's population at the time, died from starvation, disease and execution.<sup>29</sup> For almost everyone in Cambodia, the three years, eight months and twenty days of the DK era was a period of "unmitigated suffering, violence and confusion".<sup>30</sup>

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<sup>21</sup> *Ibid.* p. 252.

<sup>22</sup> S. Luftglass, 'Crossroads in Cambodia: The United Nations Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge', 90 *Virginia Law Review* (2004), p. 898.

<sup>23</sup> D. Chandler, *supra* note 16, p. 254.

<sup>24</sup> H. Kamm, *supra* note 17, p. 134.

<sup>25</sup> M. Bunyanunda 'The Khmer Rouge on Trial: Wither the Defense?', 74 *South California Law Review* (2000-2001), p. 1582.

<sup>26</sup> H. Kamm, *supra* note 17, pp. 130-131.

<sup>27</sup> S. Luftglass, *supra* note 22, pp. 899-900.

<sup>28</sup> H. Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence', 11 *Human Rights Quarterly* (1989), p. 85.

<sup>29</sup> *Ibid.*, p. 94.

<sup>30</sup> D. Chandler, *supra* note 16, p. 276.

## 2.2 Political Transition: Cambodia 1979-1998

From 1977, DK's links to China were strengthened, and Chinese arms, ammunition and equipment were shipped into the country. At the same time, tension increased with Vietnam. In late 1978, Vietnam launched an attack, and on 7 January 1979 captured Phnom-Penh, while DK forces fled towards the Thai border.<sup>31</sup> The Vietnamese invasion brought an end to the DK era; a new government was installed in Phnom-Penh, and the People's Republic of Kampuchea (PRK) was established. The new government consisted mainly of the few surviving intellectuals and former DK military officials who had fled to Vietnam. Among the latter was Hun Sen, who became Prime Minister in 1985, and remains in that position today. While life for Cambodians radically improved after the fall of the DK regime, distrust in the new government remained as it owed its existence to a foreign invasion. Many of its officials had served under the DK, and "educated Cambodians sensed an unwholesome continuity between the successive socialist regimes".<sup>32</sup>

In 1979 a trial was held against Pol Pot and Ieng Sary, labelled by the new regime as the 'genocidal Pol Pot - Ieng Sary clique'.<sup>33</sup> The prosecutor issued arrest warrants for the two defendants in July 1979,<sup>34</sup> and in early August the Presiding Judge issued the rules of procedure for the trial.<sup>35</sup> The trial itself took only a few days, and on 19 August Pol Pot and Ieng Sary were sentenced to death *in absentia*.<sup>36</sup> A number of international observers attended the trial, primarily from countries of the Soviet bloc. Lawyers from Algeria, Cuba, India, Japan, Laos, Syria, USSR, USA and Vietnam were invited to participate, and did so on part of the defence, the victims or as observers.<sup>37</sup> Although important testimonies about the DK regime were delivered, the tribunal far from complied with international standards, and it has been dismissed as a political 'show trial'.<sup>38</sup>

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<sup>31</sup> T. Fawthrop and H. Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, Pluto Press, the United Kingdom (2004), p. 17.

<sup>32</sup> D. Chandler, *supra* note 16, p. 280.

<sup>33</sup> Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol-Pot Ieng Sary Clique for the Crime of Genocide, 15 July 1979, reprinted in H. J. De Nike et. al. (eds.), *Genocide in Cambodia Documents from the Trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press, the United States of America (2000), p. 45.

<sup>34</sup> Decision No. 3: Prosecutor of the People's Revolutionary Tribunal at Phnom-Penh, Arrest Warrant, 26 July 1979, reprinted in H. J. De Nike et. al. (eds.), *supra* note 33, p. 52.

<sup>35</sup> Presiding Judge, Decision on Trial Procedure at the Session on the Crime of Genocide of the Pol-Pot – Ieng Sary Clique, 4 August 1979, reprinted in H. J. De Nike et. al. (eds.), *supra* note 33, p. 53.

<sup>36</sup> Judgement of the Tribunal, 19 August 1979, reprinted in H. J. De Nike et. al. (eds.), *supra* note 33, p. 523.

<sup>37</sup> T. Fawthrop and H. Jarvis, *supra* note 31, pp. 43-45.

<sup>38</sup> See e.g. H. J. De Nike, 'Reflections of a Legal Anthropologist on the Trial of Pol Pot and Ieng Sary', in H. J. De Nike et. al. (eds.), *supra* note 33, p. 19.

Although almost all Cambodians welcomed the end of the DK regime, relations with the international community remained complicated for the next decade. Both China and the USA continued to support the DK, rather than recognizing the Vietnamese invasion. On 11 January 1979 the Security Council discussed a proposed resolution that called for a withdrawal of foreign troops from Cambodia. Although ultimately vetoed by Russia, thirteen members voted in its favour.<sup>39</sup> Thus it came that the Khmer Rouge continued to occupy Cambodia's seat at the UN for over ten years after they had been driven from Phnom-Penh. In 1981 the Khmer Rouge formed an exile government (the Coalition Government of Democratic Kampuchea, CGDK) together with former king Sihanouk and former prime minister Son Sann. As pointed out by Fawthrop and Jarvis, the CGDK was not much of a coalition, could hardly be considered a government, less so democratic, and had little presence within Cambodia.<sup>40</sup> It nonetheless provided a certain legitimacy to the Khmer Rouge, as information was starting to spread abroad of the horrors of the DK regime. The Vietnamese forces withdrew from Cambodia in 1989, after which the Khmer Rouge increased their military activities.<sup>41</sup>

A tentative peace process began for Cambodia in 1988, and culminated in a conference held in Paris in 1991. The Paris Peace Agreements, signed on 23 October 1991 established a Supreme National Authority (SNA) with six representatives of the CGDK and six from the Cambodian government, in which the 'independence, sovereignty and unity' of Cambodia would be enshrined during a period of transition, until general elections could be held.<sup>42</sup> In addition, the Agreement established the United Nations Transitional Authority in Cambodia (UNTAC), mandated to oversee the execution of the Agreement.<sup>43</sup> The Agreement made few references to past human rights violations, simply requiring Cambodia to "take effective measures to ensure that the policies and practices of the past shall never be allowed to return".<sup>44</sup> When the Khmer Rouge leaders thus returned to Phnom-Penh in late 1991, the sentences against Pol Pot and Ieng Sary were not executed. Attacks by Khmer Rouge forces continued in rural areas, on civilian as well as UN personnel, and in 1993 the Khmer Rouge withdrew entirely from the SNA.<sup>45</sup> General elections were held in 1993 under UN supervision, in which at least four million Cambodians participated. The Royalist party FUNCINPEC, led by Sihanouk's son Rinariddh, won by a close majority. Hun Sen, prime minister since 1985 and leader of the Cambodian People's Party (CPP) however refused to accept defeat, and a

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<sup>39</sup> T. Fawthrop and H. Jarvis, *supra* note 31, p. 26.

<sup>40</sup> *Ibid.*, p. 69.

<sup>41</sup> D. Chandler, *supra* note 16, pp. 283-284.

<sup>42</sup> Agreement on a Comprehensive Settlement of the Cambodia Conflict, Paris, 23 October 1991, entered into force 23 October 1991 (hereinafter the 'Paris Peace Agreement'), articles 3 and 12. For a comprehensive analysis of the Agreement and the negotiations at the Paris Conference, see S. R. Ratner, 'The Cambodia Settlement Agreements', 87 *American Journal of International Law* 1 (1993).

<sup>43</sup> Paris Peace Agreement, article 2.

<sup>44</sup> Paris Peace Agreement, article 15(2).

<sup>45</sup> T. Fawthrop and H. Jarvis, *supra* note 31, p. 106.

coalition was formed between the two parties. The Khmer Rouge, outlawed through a 1994 Law,<sup>46</sup> continued a clandestine existence, and in the early 1990s kidnapped and killed a number of timber workers and some foreign travellers. The two main parties, CPP and FUNCINPEC competed to include Khmer Rouge defectors into their own ranks. Both also tentatively initiated negotiations with sections of the Khmer Rouge, offering generous conditions, including continued control over some territory, autonomy, resources, and *de facto* amnesties.<sup>47</sup>

1997 was marked by political unrest and violence in Phnom-Penh. In March a demonstration in support of politician Sam Rainsy was stopped by a grenade attack, killing twenty persons. In July Hun Sen launched a coup against his coalition partners and killed hundreds of FUNCINPEC officials and supporters. Nonetheless, elections were held in 1998, after which CPP in and FUNCINPEC once again formed a coalition.<sup>48</sup>

## 2.3 Establishing a Tribunal: 1997-2004

In June 1997, the two Prime-Ministers, Hun Sen and Prince Ranariddh, submitted to the UN Secretary-General a letter in which they requested assistance in bringing to justice persons responsible for genocide and crimes against humanity during the period of Democratic Kampuchea.<sup>49</sup> The request was initiated, and the letter drafted by the UN Special Representative for Human Rights in Cambodia, who saw a strong link between impunity for current human rights abuses in Cambodia and the impunity for the atrocities committed by the Khmer Rouge.<sup>50</sup> Upon request by the General Assembly, the UN Secretary General appointed a Group of Experts to assess the feasibility to bring Khmer Rouge leaders to justice and to explore options for doing so under national or international jurisdiction.<sup>51</sup> The Group of Experts delivered its report in 1999, in which it recommended that the United Nations establish an international *ad hoc* tribunal for the prosecution of the most serious violation of international humanitarian law. Further it recommended that the tribunal be located in the Asia-Pacific region, but outside Cambodia, and that the prosecutor of the ICTY and the

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<sup>46</sup> Law on the Outlawing of the “Democratic Kampuchea” Group, 7 July 1994, 01.NS.94, unofficial English translation available at <law.scu.edu/site/beth-van-schaack/File/law\_to\_outlaw\_dk.pdf>.

<sup>47</sup> T. Hammarberg, ‘How the Khmer Rouge Tribunal was agreed: Discussions between the Cambodian government and the UN’, *Searching for the Truth*, Documentation Center of Cambodia, Khmer version from 2001, English translation available at <www.dccam.org/Tribunal/Analysis/How\_Khmer\_Rouge\_Tribunal.htm>.

<sup>48</sup> D. Chandler, *supra* note 16, pp. 290-291.

<sup>49</sup> United Nations General Assembly and Security Council, *Identical Letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council*, 23 June 1997, UN Doc. A/51/135-S/1997/488 (*Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General annexed thereto*)

<sup>50</sup> T. Hammarberg, *supra* note 47.

<sup>51</sup> United Nations General Assembly resolution 52/135 of 12 December 1997.

ICTR also serve as prosecutor for that tribunal.<sup>52</sup> Negotiations were initiated in 1999.<sup>53</sup> The Cambodian representative insisted on a tribunal incorporated in the Cambodian legal system, functioning with some international components or assistance, whereas proposals from the UN ranged from a fully international court in line with the ICTY and the ICTR, to a mixed tribunal. The main points of disagreement regarding a mixed tribunal were whether the majority of the judges should be Cambodian or international, whether the prosecutor and investigating judge respectively should be Cambodian or international, and whether the tribunal should exist as a separate entity, or be incorporated in the Cambodian legal system.<sup>54</sup> In 2001, Cambodia unilaterally passed a law establishing the Extraordinary Chambers in the Courts of Cambodia (hereinafter '2001 ECCC Law'),<sup>55</sup> largely in line with the Cambodian proposals. In 2002, the UN negotiator broke off the negotiations. The UN Secretary-General cited as the main reason the lack of urgency on part of the Cambodian government, and absence of commitment to implement an agreement.<sup>56</sup>

In late 2001, the UN General Assembly adopted resolution 57/228,<sup>57</sup> in which it welcomed the adoption of the 2001 ECCC Law and requested the UN Secretary General to resume negotiations with the government of Cambodia. The mandate was to conclude an agreement that essentially corresponded with the terms of the 2001 ECCC Law. Notably, the General Assembly adopted on the same day a resolution on the human rights situation in Cambodia, in which it noted with concern "the continued problems related to the rule of law and the functioning of the judiciary resulting from, *inter alia*, corruption and interference by the executive with the independence of the judiciary".<sup>58</sup> Negotiations were recommenced in early 2003; an agreement was drafted in March, and was adopted by the General Assembly in May.<sup>59</sup> The Cambodian National Assembly ratified the agreement in October 2004.<sup>60</sup> The ECCC Agreement, though essentially based on the 2001 ECCC Law, contained some provisions that warranted an

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<sup>52</sup> United Nations General Assembly, *Identical Letters dated 15 March 1999 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council*, UN Doc. A/53/850 (*Report of the Groups of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, 18 February 1999 annexed thereto (hereinafter '*Report by Group of Experts*')), p. 57.

<sup>53</sup> For a detailed description of the negotiation rounds, see T. Fawthrop and H. Jarvis, *supra* note 31, pp. 155 *et seq.*

<sup>54</sup> United Nations General Assembly, *Report of the Secretary-General on Khmer Rouge trials*, 31 March 2003, UN Doc. A/57/769, p. 4.

<sup>55</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, promulgated in Reach Kram, No. NS/RKM/0801/12, 10 August 2001.

<sup>56</sup> *Report of the Secretary-General on Khmer Rouge trials* (2003), *supra* note 54, p. 6.

<sup>57</sup> United Nations General Assembly resolution 57/228 of 18 December 2002.

<sup>58</sup> United Nations General Assembly resolution 57/225 of 18 December 2002.

<sup>59</sup> United Nations General Assembly resolution 57/228B of 13 May 2003.

<sup>60</sup> Law Approving the 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, NS/RKM/1004/004, 19 October 2004.

amendment of the Cambodian Law.<sup>61</sup> The law was amended by the Cambodian legislature shortly after ratifying the Agreement (hereinafter ‘the ECCC Law’).<sup>62</sup> The Agreement entered into force in 2004, and the Office of the Prosecutor began its work in the summer of 2006.

## 2.4 The Khmer Rouge Leaders before the ECCC

Most of the senior Khmer Rouge leaders had in fact defected, been arrested or been pardoned at the time of establishment of the ECCC. Former Deputy Prime Minister for Foreign Affairs, Ieng Sary, defected in 1996 and received a royal pardon covering both his 1979 sentence and the 1994 law outlawing the Khmer Rouge.<sup>63</sup> Pol Pot, the former Prime Minister, had lost his position of power after a split in the party in 1997. He died in 1998, prisoner to his former comrades.<sup>64</sup> In 1998, while the Group of Experts was outlining the possibilities of an international tribunal, Nuon Chea, Deputy Secretary of the Communist Party and Kieu Samphan, Chair of the State Presidium, defected from the Khmer Rouge and were received by Prime Minister Hun Sen in Phnom-Penh.<sup>65</sup> Following a controversial statement by the Prime Minister, claiming that “Cambodians should dig a hole and bury the past”,<sup>66</sup> the two defectors were allowed to walk free, with *de facto* amnesties. Ta Mok, former Secretary of the South-West Zone, and Second Secretary-Deputy of the Communist Party was arrested in 1999. Following his arrest, the Cambodian government sent a letter to the UN Secretary-General in which it was asserted that Ta Mok would be tried in a national court, with the participation of foreign experts upon invitation by that court.<sup>67</sup> Ta Mok died in July 2006.<sup>68</sup> In 1999, Kang Guev Eav, *alias* Duch, former chief of the S-21 prison in Phnom-Penh, was arrested and placed in provisional detention. He was initially charged with genocide under the 1979 Law, and in 2002 with crimes against humanity under the 2001 ECCC Law. In 2007 he was transferred to the ECCC.<sup>69</sup> In July 2007, the Co-Prosecutors filed an Introductory Submission in which they requested that a

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<sup>61</sup> In article 28 of the ECCC Agreements the United Nations reserves the right to withdraw its cooperation should the tribunal’s structure or organization function in a manner which does not conform with the Agreement.

<sup>62</sup> Law on the amendment of the Extraordinary Chambers in the Courts of Cambodia, NS/NRKM/1004/006, 27 October 2004.

<sup>63</sup> Law on the Outlawing of the “Democratic Kampuchea” Group, *supra* note 46.

<sup>64</sup> D. Chandler, *supra* note 16, p. 290.

<sup>65</sup> T. Hammarberg, *supra* note 47.

<sup>66</sup> The statement was broadcasted on national television and radio, cited in *inter alia*, K. Whitley, ‘History of the Khmer Rouge Tribunal: Origins, Negotiation and Establishment’ in J. D. Ciociari (ed.), *The Khmer Rouge Tribunal*, Documentation Series No. 10, Documentation Center of Cambodia, Cambodia (2006), p. 37.

<sup>67</sup> T. Hammarberg, *supra* note 47.

<sup>68</sup> J. Fromholz, ‘Proving Khmer Rouge Abuses: Uses and Limitations of the Available Evidence’, in J. D. Ciociari (ed.), *supra* note 66, p. 116.

<sup>69</sup> *Kang Guev Eav alias Duch*, ECCC Pre-Trial Chamber, Report of Examination on Appeal by Kang Guev Eav (Duch), 11 November 2007, Case No. 002/14-08-2006, p. 2.

number of persons be arrested.<sup>70</sup> Following arrest warrants issued by the Co-Investigating Judges, Ieng Thirith, former Minister of Social Affairs, Nuon Chea and Kieu Samphan, were arrested.

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<sup>70</sup> The Introductory Submission is not public, but is referred to in *Ieng Thirith*, Report of Examination, ECCC Pre-Trial Chamber, 20 May 2008, Case File No. 002/19-09-2007-ECCC/OCIJ (PT02), p. 2.

# 3 The Extraordinary Chambers in the Courts of Cambodia

## 3.1 Jurisdiction

The ECCC Agreement and the ECCC Law constitute together the ‘statute’ of the ECCC. They are complemented by the Internal Rules, adopted by a Plenary Session of the ECCC on 12 June 2007, and as amended thereafter.<sup>71</sup>

The jurisdiction of the ECCC extends from 17 April 1975 to 6 January 1979, and includes crimes committed by *senior leaders* of Democratic Kampuchea and those *most responsible* for serious crimes under national and international law.<sup>72</sup> From the Cambodian 1956 Penal Code the Court has jurisdiction over homicide, torture and religious persecution. The statute of limitations for these crimes is extended by an additional 20 years, to the extent that they fall within the jurisdiction of the ECCC. In addition, the penalty of the crimes is limited to maximum of life imprisonment, bringing the Law in accordance with the present day Constitution, which prohibits death penalty.<sup>73</sup> Under international law, the tribunal has jurisdiction over genocide, as defined in the 1948 Genocide Convention,<sup>74</sup> crimes against humanity, grave breaches of the 1949 Geneva Conventions,<sup>75</sup> the destruction of cultural property under armed conflict under the 1954 Hague Convention on Cultural Property,<sup>76</sup> and crimes against internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations.<sup>77</sup> The question of amnesties or pardons granted previously to the establishment of the ECCC is to be decided by the Court itself. The Cambodian government does however undertake to not request any further amnesties or pardons for persons who may be investigated under the jurisdiction of the Court.<sup>78</sup>

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<sup>71</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules Rev. 3, as revised on 6 March 2009 (hereinafter ‘ECCC Internal Rules’).

<sup>72</sup> See ECCC Law articles 3-8.

<sup>73</sup> ECCC Law article 3 new.

<sup>74</sup> Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, entered into force 12 January 1951.

<sup>75</sup> Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War and Geneva Convention relative to the Protection of Civilians in Time of War, Geneva, 12 August 1949, entered into force 21 October 1950.

<sup>76</sup> Convention on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, entered into force 7 August 1956.

<sup>77</sup> Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, entered into force 24 April 1964.

<sup>78</sup> ECCC Law article 40 new.

## 3.2 Structure and Composition

The court consists of one Trial Chamber, composed of three Cambodian and two foreign judges, and one Supreme Court Chamber, composed of four Cambodian and three foreign judges. The Supreme Court Chamber serves as both appellate and final instance.<sup>79</sup> In both Chambers the President is one of the Cambodian judges. Decisions are made by a so-called ‘supermajority’, requiring four votes in the Trial Chamber, and five votes in the Supreme Court Chamber, ensuring that at least one foreign judge has voted in favour of the decision.<sup>80</sup> In the case that such a majority cannot be reached, a number of ‘default decisions’ will determine the result. For example, on the question of guilt, the failure of the chamber to reach a ‘supermajority’ will result in the acquittal of the accused.<sup>81</sup> The Cambodian judges are appointed by the Supreme Council of the Magistracy from the ranks of practicing judges in Cambodia. The same organ appoints the five foreign judges from a list of at least seven candidates submitted by the UN Secretary-General.<sup>82</sup> Judges are appointed for the entire period of the proceedings.<sup>83</sup>

In addition to the Chambers, there is one foreign and one Cambodian Co-Investigating Judge, who are responsible for the investigations of the case and closing orders against the defendant.<sup>84</sup> The two similarly composed Co-Prosecutors prepare the indictment against the suspects.<sup>85</sup> Should a disagreement arise between the two Co-Prosecutors or the two Co-Investigating Judges, a dispute settlement mechanism is provided for in the form of a Pre-Trial Chamber, to be convened when needed. The Pre-Trial Chamber, composed of three Cambodian and two foreign judges takes decisions with a ‘supermajority’ like the two other Chambers. Should such majority not be reached, the ‘default’ decision is to proceed with the investigation.<sup>86</sup> Like the ordinary judges, the Co-Prosecutors, Co-Investigating Judges and Pre-Trial Chamber Judges are appointed by the Supreme Council of the Magistracy, the international appointments being made after nomination by the UN Secretary-General.<sup>87</sup>

In addition to these organs, the Internal Rules of the ECCC, provide for a Judicial Police force, to carry out investigations under the instructions of the Co-Investigating Judges and the Co-Prosecutors.<sup>88</sup> Through the application of Cambodian procedure, the ECCC further allows for participation by victims as civil parties.<sup>89</sup> Civil parties have the right to attend and intervene

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<sup>79</sup> ECCC Law article 9 new.

<sup>80</sup> ECCC Law article 14 new.

<sup>81</sup> ECCC Internal Rules rule 98.4.

<sup>82</sup> ECCC Law article 11 new.

<sup>83</sup> ECCC Law article 12.

<sup>84</sup> ECCC Law article 23 new.

<sup>85</sup> ECCC Law article 16.

<sup>86</sup> ECCC Law articles 20 new and 23 new.

<sup>87</sup> ECCC Law articles 18 new and 26.

<sup>88</sup> ECCC Internal Rules rule 15.

<sup>89</sup> CPC article 311.

in proceedings,<sup>90</sup> and to request compensation for their injuries.<sup>91</sup> The Court's Victims Unit has the responsibility to assist victims that wish to participate as civil parties.<sup>92</sup>

### 3.3 The ECCC Agreement – What's Missing?

The achievement of an agreement on the Extraordinary Chamber came after a process that has been described as a “gargantuan struggle”,<sup>93</sup> between parties that set out with fundamentally different views. The result has been a number of compromises that are less-than-perfect. Because of a number of gaps in the framework governing the trials, the court has had to rely on solutions being reached during the proceedings, and through the writing of internal rules. While some structural flaws “might be corrected by the dynamics of the process itself, [...] this is no reason to accept an unsatisfactory model”.<sup>94</sup> The unclear relation between national and international law at the ECCC can be considered a problem at least on a doctrinal level. The question is complicated by the adoption of internal rules, which according to a court decision are to have supremacy over the applicable Cambodian procedural law.

The relationship between the ECCC Agreement and the ECCC Law was one of the major points of contention during the negotiations between by the UN and the Cambodian government.<sup>95</sup> The UN, insisting on its policy to not be bound by national law, could not accept that the Court be governed solely by the ECCC Law. Article 2.2 of the Agreement stipulates that it shall be implemented through the Law on the Establishment of Extraordinary Chambers in the Courts, as amended and adopted. Article 31 however states that the Agreement “shall apply as law within the Kingdom of Cambodia”. It would therefore appear that both the ECCC Agreement and the ECCC Law are directly applicable at the ECCC. While it is not clarified in the Cambodian Constitution whether its approach to international law is monistic or dualistic, it can most probably be considered a dualistic one.<sup>96</sup> Should the Law be found to be in contradiction with the Agreement, Cambodia has an obligation to amend the law accordingly.<sup>97</sup> The UN further has a right to withdraw its cooperation should the Cambodian government “change the structure or organization of the Extraordinary

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<sup>90</sup> See *e.g.* CPC articles 134, 268 and 292.

<sup>91</sup> CPC article 14.

<sup>92</sup> ECCC Internal Rules rule 12.

<sup>93</sup> E. 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 Court’, in C. R. Romano et. al. (eds), *supra* note 12, p. 231.

<sup>94</sup> T. Hammarberg, *supra* note 47, p. 31.

<sup>95</sup> *Ibid.*, p. 209.

<sup>96</sup> *Ibid.*, p. 210.

<sup>97</sup> See ECCC Agreement article 2.2, which refers to the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force 27 January 1970, articles 26 and 27.

Chambers or otherwise cause them to function in a manner that does not conform with the terms of the [...] Agreement”.<sup>98</sup> It remains to be seen which instrument would be considered *lex superior* in the case of a conflict between the terms the two respective instruments.

The procedural law, apart from provisions provided in the ECCC Law and Agreement, applied at the Court is the Criminal Procedural Code (CPC) of Cambodia from 2007.<sup>99</sup> To be noted is that the CPC was adopted after the establishment of the ECCC. At the time that the ECCC Agreement was reached, the applicable law was the UNTAC Code of 1992, and a Law on Criminal Procedure adopted in 1993.<sup>100</sup> The Internal Rules of the Court further clarify the procedure to be applied by the ECCC. The writing of internal rules is not provided for in the ECCC Agreement or Law. The Internal Rules were first adopted on 12 June 2007, and have thereafter been amended on 1 February 2008, 5 September 2008 and 6 March 2009. The purpose of the Internal Rules is to “consolidate applicable Cambodian procedure for proceedings before the ECCC”, and to, in accordance with the ECCC Law,<sup>101</sup> “adopt additional procedures where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards”.<sup>102</sup> Some controversy has arisen regarding inconsistencies between the CPC and the Internal Rules. Such inconsistencies have been raised both by the defence, regarding the procedure for annulment of investigative action,<sup>103</sup> and by civil party lawyers regarding various actions available to civil parties during the proceedings<sup>104</sup> and the possibility to award monetary compensation to victims.<sup>105</sup> In a decision in August 2008, the Pre-Trial Chamber found that

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<sup>98</sup> ECCC Agreement article 28.

<sup>99</sup> Code of Criminal Procedure of the Kingdom of Cambodia, [Official] English Translation, First Edition, available at <[cambodia.ohchr.org/KLC\\_pages/KLC\\_files/section\\_011/S11\\_CriminalProcedureCode2007E.pdf](http://cambodia.ohchr.org/KLC_pages/KLC_files/section_011/S11_CriminalProcedureCode2007E.pdf)>

<sup>100</sup> Supreme National Council, Provisions relating to the Judiciary and Criminal Law Procedure applicable during the Transitional Period, 10 September 1992. Unofficial translations available at: <[www.cdpcambodia.org/cambodian\\_law.asp](http://www.cdpcambodia.org/cambodian_law.asp)>. See also G. Sluiter, ‘Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers’, *Journal of International Criminal Justice* 4 (2006), p. 319.

<sup>101</sup> Articles 20 new, 23 new and 33 new of the ECCC Law provide that the procedure to be applied by the Co-Prosecutors, the Co-Investigating Judges and the Chambers is the existing Cambodian law. Where these procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards, “guidance may be sought in procedural rules established at the international level”.

<sup>102</sup> ECCC Internal Rules, Preamble.

<sup>103</sup> *Nuon Chea*, 25 February 2008, *Appeal against order refusing request for annulment*, Case No. 002/19-09-2007.

<sup>104</sup> *Nuon Chea*, 13 October 2008, *Civil Party Co-Lawyer’s request for reconsideration of Nuon Chea’s request for annulment*, 002/19-09-2007-ECCC/OCIJ (PTC06).

<sup>105</sup> Speech held by Civil Party Co-Lawyer Silke Studzinsky at conference on ‘Reparations for Victims of the Khmer Rouge’ organized by the Cambodian Human Rights Action Committee and the ECCC Victims Unit, held in Phnom-Penh 26-27 November 2008 (transcript on file with the author).

the Internal Rules were to have precedence over applicable Cambodian procedural law:

“Internal Rules do not stand in opposition to the [CPC] but the focus of the ECCC differs substantially enough from the normal operation of the Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC, where there is a difference between the Internal Rules and the CPC.

*Provisions of the CPC should only be applied where a question arises which is not addressed by the Internal Rules”*<sup>106</sup> [emphasis added]

This position must be considered highly questionable considering that the Internal Rules have no legal basis in the ECCC Law or the ECCC Agreement, and that both instrument clearly identify Cambodian procedure as the applicable law at the ECCC.

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<sup>106</sup> *Decision on Nuon Chea’s appeal against order refusing request for annulment, supra* note 106, paras. 14-15.

# 4 International Standards of Independence and Impartiality of the Judiciary

According to article 33 new of the ECCC Law and article 12(2) of the ECCC Agreement the Extraordinary Chambers shall “exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights”.<sup>107</sup> In addition, the Cambodian CPC can in certain cases be complemented with “procedural rules established at an international level”.<sup>108</sup> This chapter explores what those international standards of independence and impartiality are. The point of departure will be human rights instruments applicable in national legal systems, but the study will also cover the implications of independence and impartiality in international courts, including hybrid criminal courts. An introduction to the relevant legal sources will be provided, and subsequently an analysis made of the two concepts separately. The survey is limited to those aspects that are relevant in the context of the ECCC, to be investigated further in chapter 5.

## 4.1 An Overview

Independence and impartiality are fundamental characteristics of the judiciary in any state governed by the rule of law. They have by the Special Rapporteur on judicial independence and impartiality been asserted to form part of the “general principles of law recognized by civilized nations” in the meaning of article 38(1)(c) of the Statute of the International Court of Justice (ICJ).<sup>109</sup> Not only do the two characteristics constitute a prerequisite for the fulfilment of other aspects of a fair trial - they are also closely related to the principles of the rule of law, separation of powers, and the legitimacy of judicial proceedings.<sup>110</sup> While commonly mentioned as a pair, independence and impartiality represent two distinct concepts. Independence refers to the institutional and functional autonomy of a tribunal, or in other words the lack of connections between the judiciary and other branches of political power.<sup>111</sup> Impartiality, on the other hand, implies that judges do not have any preconceptions concerning the matter before them, or act as to promote

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<sup>107</sup> Cambodia ratified the ICCPR on 26 May 1992.

<sup>108</sup> ECCC Law articles 20 new, 23 new and 33 new.

<sup>109</sup> Statute of the International Court of Justice, annexed to the Charter of the United Nations, adopted on 26 June 1945 (hereinafter ‘ICJ Statute’).

<sup>110</sup> P. Rädler, ‘Independence and Impartiality of Judges’, in D. Weissbrodt and R. Wolfrum (eds.), *The Right to a Fair Trial*, Springer-Verlag, Germany (1998), p. 729.

<sup>111</sup> See e.g. *Findlay v. the United Kingdom*, ECHR Judgement, 25 February 1997, Application No. 22107/93, para. 73.

the interests of any party.<sup>112</sup> On a doctrinal level, impartiality is the core principle, as it preconditions any assessment of the fairness or objectivity of judicial proceedings.<sup>113</sup> If the judges have already made up on their mind on the matter of guilt, other procedural rights of the accused are indeed redundant.

The history of judicial independence is not directly tied to that of judicial impartiality. As explained by Pasquino, judicial power was for a long time exercised directly or indirectly by the political authorities in the Athenian Democracy, the Chinese Empire, and in African cultures based on common law.<sup>114</sup> Only towards the end of the Roman Empire did these functions begin to be performed by a specialized (yet not independent) legal profession.<sup>115</sup> The Magna Carta from 1215 stipulates that “[n]o freeman shall be taken and imprisoned [...] except by lawful judgment of his peers or by the law of the land”.<sup>116</sup> In the French Declaration on Human and Civic Rights of 1789, it is prescribed that “no man may be accused, arrested or detained except in the case determined by the Law. Those who solicit, expedite, carry out or cause to be carried out arbitrary orders must be punished”.<sup>117</sup> The right to a “trial by an impartial jury” provided for in the Sixth Amendment to the American Constitution<sup>118</sup> has been traced back to the provision in Magna Carta. The presence of laypersons in American courts is primarily seen as a safeguard against arbitrary exercise of state power.<sup>119</sup>

One can note that also tribunals that adjudicate over inter-state disputes contain provisions on independence and impartiality.<sup>120</sup> While constituting a fundamental aspect of the right to a fair trial, one can draw the conclusion that independence and impartiality also serve other purposes than protecting the rights of the individual. An independent judiciary is an indispensable means of holding a government accountable to its own laws, upholding the

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<sup>112</sup> *Karttunen v. Finland*, Human Rights Committee, 23 October 1992 Communication, No. 387/1989, UN Doc. CCPR/C/46/D/387/1989, para. 7.2.

<sup>113</sup> United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers. Final Report by the Special Rapporteur, Mr. L. M. Singhvi* (hereinafter *Final Report by Special Rapporteur Mr. Singhvi*), 31 July 1985, UN Doc. E/CN.4/Sub.2/1985/18, para. 80.

<sup>114</sup> P. Pasquino, ‘Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History’, 2 *Law and Practice of International Courts and Tribunals* 11 (2003), p. 13.

<sup>115</sup> P. Pasquino, *supra* note 114, p. 13.

<sup>116</sup> R. Clayton and H. Thomlinson, *Fair Trial Rights*, Oxford University Press, the United States (2001), para. 11.09.

<sup>117</sup> Declaration of Human and Civic Rights, 26 August 1789, available at <[www.conseil-constitutionnel.fr/conseilconstitutionnel/root/bank\\_mm/anglais/cst2.pdf](http://www.conseil-constitutionnel.fr/conseilconstitutionnel/root/bank_mm/anglais/cst2.pdf)>.

<sup>118</sup> The Constitution of the United States, Sixth Amendment

<sup>119</sup> T. M. Massaro, ‘Peremptories or Peers? – Rethinking Sixth Amendment Doctrine, Images and Procedures’, 64 *North Carolina Law Review*, (1985-1986), p. 508.

<sup>120</sup> ICJ Statute articles 2 and 20.

rule of law and separation of powers.<sup>121</sup> As an independent judiciary is more likely to be perceived as fair, it is further instrumental in encouraging parties to turn to a tribunal, rather than settling their disputes by other means.<sup>122</sup>

## 4.2 Relevant Legal Instruments

Different international tribunals apply different procedural standards. While the Statute and Rules of Procedure and Evidence (RPE) of the ICC are often referred to, no general criminal procedure can yet be said to have developed in international law. Guidance can nonetheless be sought in a number of legal instruments that deal with judicial independence and impartiality. The extent to which these instruments are directly applicable varies between different *ad hoc* tribunals. This section provides an overview of binding and non-binding instruments that will serve as a basis for a more detailed analysis of the concepts of independence and impartiality.

### 4.2.1 Human Rights Law

Procedural requirements of international human rights law are to varying degree directly applicable in hybrid criminal courts. To the extent that the court is expressly a part of the national legal system, human rights treaties ratified by that state and incorporated in national law (or in monistic systems, simply ratified) may be applicable. Other tribunals incorporate human rights treaties or provisions thereof in their statute or other constituting instrument.<sup>123</sup> In the case where human rights treaties are not formally binding, it would be difficult to imagine a tribunal set up through an agreement with the UN that does not respect international human rights standards. In his report on transitional justice, the UN Secretary General finds that, where mandated to execute judicial functions, “United Nations-operated facilities must scrupulously comply with international standards for human rights in the administration of justice”.<sup>124</sup> In line with this view, both the ICTY and the ICTR have referred to the practice of international and regional human rights courts in their jurisprudence.<sup>125</sup>

Relevant provisions on judicial independence and impartiality can be found in a number of universal and regional human rights treaties. Article 10 of the Universal Declaration of Human Rights reads: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any

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<sup>121</sup> T. Meron, ‘Judicial Independence and Impartiality of International Criminal Tribunals’, 99 *American Journal of International Law* 2 (2005), pp. 359-360.

<sup>122</sup> See with regard to the *ad hoc* judge at the ICJ I. I. Scobbie, “‘Une Heresie en Matire Judiciaire?’” The Role of the Judge *Ad Hoc* in the International Court’, *The Law and Practice of International Courts and Tribunals* 4 (2005), p. 422.

<sup>123</sup> ECCC Law article 33 new.

<sup>124</sup> Report of the Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, *supra* note 5, para. 10.

<sup>125</sup> See e.g. the *Prosecutor v. Kupreskić*, 14 January 2000, ICTY, Trial Chamber, Judgement, Case No. IT-95-16-T (hereinafter *Kupreskić Judgement*), paras. 537-542.

criminal charge against him”. The subsequent International Covenant on Civil and Political Rights (ICCPR) prescribes: “In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>126</sup> Similar provisions are found in the European Convention on Human Rights (ECHR)<sup>127</sup> and the American Convention on Human Rights (ACHR).<sup>128</sup> The African Charter on Human and People’s Rights (ACHPR)<sup>129</sup> differs somewhat from the other instruments in that it in article 7.1 d) proscribes an individual right “to be heard within reasonable time by an impartial court or tribunal”, while article 26 imposes a duty on member states to guarantee the independence of the courts.

Common to these instruments is that they all refer to independence and impartiality, but without further specifying their meaning. A substantial case law has however evolved under a number of judicial and semi-judicial bodies that provides for further guidance on which characteristics a tribunal must have to live up to those requirements. This case law will be outlined in relevant parts in sections 4.3 and 4.4 below.

## 4.2.2 International Criminal Law

As noted above, a uniform procedure for international and internationalized criminal tribunals has yet to develop. The enforcement of international criminal law takes place in different types of forums in a decentralized system. Yet, as argued by Burke-White, these forums are interconnected in different ways through an exchange of information, ideas and personnel, forming a “community of courts”.<sup>130</sup> The law applied by the tribunals is to a high degree identical or similar, both in terms of procedure and substantive law. Guidance can therefore be sought in the jurisprudence of other international tribunals, in particular the substantive case law of the ICTY and the ICTR. Consideration must however be taken to the national elements in hybrid courts, and differences such as whether procedures, as is the case at the ECCC, primarily derives from national law.

In the *Kupreskić* case, the ICTY Trial Chamber outlined its use of precedent from national and international courts.<sup>131</sup> Judicial precedent cannot be

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<sup>126</sup> International Covenant on Civil and Political Rights, adopted by the UN General Assembly resolution 1200A (XI) on 6 December 1966, entered into force on 23 March 1976 (hereinafter ‘ICCPR’), article 14.1.

<sup>127</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, entered into force on 3 September 1953, article 6(1).

<sup>128</sup> American Convention on Human Rights, San José, 22 November 1969, entered into force 18 July 1978, article 8.1.

<sup>129</sup> African Charter on Human and Peoples’ Rights, Nairobi, June 1981, entered into force 21 October 1986.

<sup>130</sup> W. W. Burke-White, ‘A Community of Courts: Toward a System of International Criminal Law Enforcement’, 24 *Michigan Journal of International Law* 1 (2002-2003), p. 4.

<sup>131</sup> *Kupreskić* Judgement, *supra* note 125, paras. 537-540.

considered a distinct source of law, but can nonetheless persuade a court that a particular approach was the correct one.<sup>132</sup> It may at times be difficult or inappropriate to translate norms formulated for a domestic setting directly into the context of hybrid criminal courts, because of their *sui generis* nature. An example of such a case is the requirement that a tribunal be established “by law”.<sup>133</sup> This has been interpreted literally to mean an act of legislation by parliament or a legal norm under common law.<sup>134</sup> It is difficult to find a parallel to such a requirement under international law. When the legitimacy of the ICTY was questioned in this regard, the Appeals Chamber found that the requirement was nonetheless fulfilled as the tribunal was found to offer all the protections associated with the rule of law.<sup>135</sup> The case is illustrative of the usefulness of the jurisprudence of other international tribunals, as it takes into account the transformation of norms from a national to an international setting.

### 4.2.3 Non-binding Instruments

International bodies have elaborated a significant number of non-binding instruments relating to the independence and impartiality of the national and international judiciary, specifying in greater detail requirements on judges and judicial institutions. Most prominently, the United Nations Basic Principles on the Independence of the Judiciary (hereinafter, the ‘UN Basic Principles’)<sup>136</sup> contains provisions regarding the qualification, selection and training of judges, their conditions of service and tenure, and the possibilities for disciplinary actions, suspension and removal of judges. While obviously not imposing any obligations on states,<sup>137</sup> the UN Basic Principles “by virtue of their unanimous adoption, and subsequent widespread endorsement in general forums, [...] may be viewed as contributing to the development of a transnational body of rules and principles”.<sup>138</sup> Other instruments relating to the independence of the judiciary have been adopted by the UN Human Rights Committee,<sup>139</sup> and by the International Bar

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<sup>132</sup> *Ibid.*, para. 540.

<sup>133</sup> See *e.g.* ICCPR article 14.1, ECHR article 6.1 and ACHR article 8.1.

<sup>134</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, N. P. Engel, Germany (1993), p. 245.

<sup>135</sup> *Prosecutor v. Tadić*, 2 October 1995, ICTY, Appeals Chamber, *Appeals Chamber Decision on Defence Motion of Lack of Jurisdiction*, Case No. IT-94-1-AR72 (hereinafter *Tadić Appeals Jurisdiction Decision*), para. 45.

<sup>136</sup> *United Nations Basic Principles on the Independence of the Judiciary*, adopted on the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>137</sup> It must however be noted that the UN Basic Principles form part of Cambodian law following their incorporation in the 1992 UNTAC Code.

<sup>138</sup> B. Olbourne, ‘Independence and Impartiality: International Standards for National Judges and Courts’, 2 *The Law and Practice of International Courts and Tribunals* (2003), p. 106.

<sup>139</sup> Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law*, adopted on 13 April 1984.

Association.<sup>140</sup> In 1983 the World Conference on the Independence of Justice was held in Montreal, at which representatives from twenty international organizations participated, including international courts. The conference resulted in the Montreal Declaration on the Independence of Justice, which includes standards for judges in both national and international courts.<sup>141</sup> In 1997 the Conference of Chief Justices for Asia and the Pacific adopted the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.<sup>142</sup> The Council of Europe has further adopted a recommendation on the independence, efficiency and role of judges.<sup>143</sup> The most recent instrument regarding independence and impartiality is the Bangalore Principles of Judicial Conduct, adopted in 2002 UN Judicial Group on Strengthening Judicial Integrity. The principles outline a number of values of judicial conduct, including independence, impartiality, integrity, propriety, equality, and competence and diligence.<sup>144</sup>

#### 4.2.4 National Law

In hybrid tribunals, national law is to a varying degree directly applicable in both substantive criminal and in procedural matters. National practice from third states may also be relevant in a number of ways. National law can be relied upon to determine principles of criminal law common to major legal systems of the world, or the emergence of such principles.<sup>145</sup> In *Furundzija*, the ICTY Appeals Chamber was faced with the question of determining the existence of bias on part of one of the judges. In determining international standards in this regard, the tribunal undertook a survey of national legislation and practice, including jurisprudence from the United Kingdom, Canada, South Africa, the United States, Germany and Sweden. Moreover it distinguished in greater detail the case before it from the *Pinochet* case from the United Kingdom.<sup>146</sup> Thus, national law, at least when found to be relatively uniform in its interpretation, may be used as guidance in the determining of a particular legal question.

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<sup>140</sup> International Bar Association, *International Bar Association's Code of Minimum Standards of Judicial Independence* (1982)

<sup>141</sup> Universal Declaration on the Independence of Justice (hereinafter the Montreal Declaration), adopted on 10 June 1983, contained in Annex IV to *Final Report by Special by Mr. Singhvi*, *supra* note 113.

<sup>142</sup> Conference of Chief Justices for Asia and the Pacific Resources, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region*, adopted on 10 August 1995, and revised on 28 August 1997.

<sup>143</sup> Council of Europe Committee of Ministers, *Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges* (hereinafter Council of Europe Recommendation), 13 October 1994.

<sup>144</sup> *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening the Judiciary, as revised at the Round Table Meeting of Chief Justices, The Hague, 25-26 November 2002.

<sup>145</sup> *Kupreskić* Judgement *supra* note 125, para. 539.

<sup>146</sup> *Prosecutor v. Furundzija*, 21 July 2000, ICTY Appeals Chamber, Judgement, IT-95-17/1-A (hereinafter *Furundzija* Appeals Judgement), paras. 179-188 and 193-194.

## 4.3 Independence

When looking closer at the meaning of judicial independence, an immediate question one may ask is: ‘Independent from what?’. The question essentially has two answers; the judiciary is to be independent from the parties to the case, and independent from outside influences by other institutions.<sup>147</sup> The first case is often remedied through general rules that disqualify judges to sit in cases in which they are related to the parties, or where they otherwise have a personal interest in the outcome of the proceedings. It is closely related to the topic of impartiality, and will be considered in that context below. The second case is related to the structural and functional independence of the court and its judges, namely the separation of powers and functions, and guarantees against influence from outside pressures. The ECtHR has explained that it does not suffice to impose an obligation upon judges to act independently. Rather, the “to be truly ‘independent’, the body concerned must be independent of the executive in its functions and as an institution”<sup>148</sup>.

Judicial independence is often equated with the principle that judges shall be guided only by the law.<sup>149</sup> The extent to which judges should take an active part in the interpretation of the law has been much debated, particularly in the North American context with reference to ‘judicial activism’. Typically a pejorative, yet vaguely defined concept, ‘judicial activism’ is usually taken to mean that courts are exercising functions which are beyond their mandate, and which ought to be exercised by political bodies.<sup>150</sup> The question can, *mutatis mutandis*, legitimately raised in international and hybrid courts where judges often play an active role *e.g.* through the drafting of their own rules of procedure and evidence. Not seldom are international judges in fact advocates of international criminal law and the establishment of *ad hoc* criminal tribunals.<sup>151</sup>

### 4.3.1 Appointment of Judges and Conditions of Service

The procedures of appointment of judges and their conditions of service have been much discussed in both the national and international context. While it under human rights law remains up to the individual state to establish such procedures, a number of safeguards are required to ensure the

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<sup>147</sup> P. Pasquino, *supra* note 114, pp. 14-15.

<sup>148</sup> *Campbell and Fell v. the United Kingdom*, ECHR, Judgement, 28 June 1984, Application Nos. 7819/77 and 7878/77, para. 77.

<sup>149</sup> P. Rädler, *supra* note 110, p. 737.

<sup>150</sup> For an overview of the historical and contemporary use of the concept of judicial activism, see K. D. Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’, 92 *California Law Review* (2004).

<sup>151</sup> L. Vinjiamuri and J. Snyder, ‘Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice’, 7 *Annual Review of Political Science* (2004), p. 348

independence of the judges. The Montreal Declaration recognizes that “there is no single proper method of judicial selection provided it safeguards against judicial appointments for improper reasons”.<sup>152</sup> The procedure for nomination of judges must, like the establishment of a tribunal, be prescribed by law, and may not be done on an *ad hoc* basis.<sup>153</sup> On a national level, procedures vary greatly; judges are elected in popular elections, appointment by parliament, by the government or by special commissions, and in some countries lower court judges are appointed by higher courts. Different models may also exist for professional and lay judges respectively.<sup>154</sup> The Council of Europe recommends against the involvement of the executive in the appointment of judges; “the authority taking the decision on the selection and career of judges should be independent from the government and the administration”.<sup>155</sup> It does however recognize that such involvement is provided for in some constitutional or legal provisions or traditions, and prescribes that guarantees then should be in place to ensure that procedures of appointment are transparent and independent in practice, and that decisions are only based on objective criteria.<sup>156</sup> The ECtHR has found that appointment of judges by the executive does not *per se* interfere with the principle of independence, provided that sufficient safeguards against interference are in place once the appointment has been made.<sup>157</sup> The Beijing Statement acknowledges the involvement of executive and legislative branches in the appointment of judges, but recommends consultation with members of the judiciary and legal profession in the process.<sup>158</sup> Such appointments can however interfere with the principle of independence if it is “as a whole unsatisfactory” or if appointments are made on grounds that are “influenced by improper motives”.<sup>159</sup>

A judge, once appointed, must enjoy sufficient independence as to exclude any fear of disciplinary actions or other consequences due to the exercise of his or her functions. The security of tenure is considered a corollary of judicial independence,<sup>160</sup> ensuring that the possibility of repercussions does not influence the decision-making of judges. The IBA Minimum Standards state: “judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law”.<sup>161</sup> This does not however amount to a requirement that judges should be wholly irremovable or enjoy life-long tenure.<sup>162</sup> In the case *Campbell and Fell*, the

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<sup>152</sup> Montreal Declaration article 2.14 a)

<sup>153</sup> P. Rädler, *supra* note 110, p. 738.

<sup>154</sup> P. Rädler, *supra* note 110, pp. 738-739.

<sup>155</sup> Council of Europe Recommendation, *supra* note 143, article 1.2 c).

<sup>156</sup> *Ibid.*

<sup>157</sup> S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, the United States (2005), pp. 54-55.

<sup>158</sup> Beijing Statement para. 15.

<sup>159</sup> *Zand v. Austria*, 12 October 1978, Report of the European Commission on Human Rights, Application No 7360/76, para. 77.

<sup>160</sup> *Campbell and Fell v. the United Kingdom*, *supra* note 148, para. 80.

<sup>161</sup> IBA Minimum Standards, article 22.

<sup>162</sup> P. Rädler, *supra* note 110, p. 743.

ECtHR found that appointments for a period of three years or less, as decided by the U.K. Home Secretary, did not threaten the independence of the judicial body in question.<sup>163</sup> Another area to which considerable attention has been paid is the extent to which judges can engage in judicial or non-judicial activities outside the work of the tribunal. With some reservations, it is generally not accepted that judges hold positions in the government, the legislative branches or municipal councils during their term of office. Judges should further refrain from business activities, save personal investments, and not hold positions in political parties or practice law during their term of office.<sup>164</sup>

While the appointments of judges, as seen above, in practice can be made by the executive, the procedure for their removal must fulfil the requirements of independence and impartiality. This excludes the possibility for the executive to annul an appointment, and requires that an independent and impartial body take the decision.<sup>165</sup> The IBA Minimum Standards require that the grounds for removal must be fixed by law and clearly defined.<sup>166</sup> Removal should only come into question when a judge has shown him- or herself manifestly unfit to hold the position of a judge by reason of a criminal act or through gross or repeated neglect, or mental or physical incapacity.<sup>167</sup> Disciplinary hearings shall be fair and held *in camera*, unless otherwise requested by the judge subject to investigation.<sup>168</sup>

In the inter-state context, the appointment of judges has to a high degree assumed a different function than in domestic courts, given the emphasis on judges' nationality. Appointments are made through a highly political, more or less transparent, process.<sup>169</sup> Compared to their national colleagues, international judges enjoy a relatively short tenure, but are in contrast often eligible for re-election. The possibility of re-election does open up for criticism regarding judicial independence, as chances of re-election for any candidate will be small without the support of influential states.<sup>170</sup> At the ICTY and ICTR, judges are nominated by states, and elected by the UN General Assembly based on a list prepared by the UN Security Council.<sup>171</sup> The procedure for election is substantially less transparent in hybrid courts. In Kosovo, the Special Representative of the Secretary-General appoints and removes from office international judges and prosecutors.<sup>172</sup> In East Timor, both national and international judges are appointed by the Transitional

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<sup>163</sup> *Campbell and Fell v. the United Kingdom*, *supra* note 148, para. 80. The Court found that there was an understandable reason for the short tenure, as members of the Board were unpaid.

<sup>164</sup> IBA Minimum Standards articles 35, 37 and 39, and Montreal Declaration paras. 2.26, 2.28 and 2.29.

<sup>165</sup> P. Rädler, *supra* note 110, p. 744.

<sup>166</sup> IBA Minimum Standards, article 29 a).

<sup>167</sup> IBA Minimum Standards article 30.

<sup>168</sup> IBA Minimum Standards article 27.

<sup>169</sup> R. Mackenzie and P. Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 *Harvard International Law Journal* (2003), p. 278.

<sup>170</sup> R. Mackenzie and P. Sands, *supra* note 169, p. 278.

<sup>171</sup> ICTY Statute article 13 *bis* and ICTR Statute article 12.3.

<sup>172</sup> UNMIK regulation 2000/34, *supra* note 10, articles 1.1 and 4.1.

Administrator of UNTAET.<sup>173</sup> At the SCSL, international judges are appointed by the UN Secretary-General, while the Government of Sierra Leone appoints a minority of judges.<sup>174</sup> Judges are elected for a limited period of time, and are eligible for re-election.<sup>175</sup> While more transparent proceedings may have been desirable, it is unlikely that the manner of appointment of international judges seriously affects the tribunals' independence.<sup>176</sup> Questions can however be posed regarding the national judges, which may not be entirely independent from the government by which they were appointed. In Sierra Leone, the government, including the President, participated in the conflict over which the Court has jurisdiction. One of the accused was in fact a minister in the Government at the time of the establishment of the Court, and when judges were appointed.<sup>177</sup> Under such circumstances, at least the appearance of independence can be said to be encroached upon.

Remuneration at international tribunals is high, and in general the independence and impartiality of the judges cannot be called into question in this regard. The issue was raised in Sierra Leone, where the remuneration of judges in practice is dependent on the financial resources of the court itself – which at times have been rather insecure.<sup>178</sup> In 2004, the Appeals Chamber rejected as “far-fetched” the argument that the funding arrangements of the Court by itself could impute a real likelihood of bias to a judge.<sup>179</sup> The conclusion may however be another one if the risk of national court staff not being paid their salaries actually materializes, as has been the case at the ECCC (see section 6.4).

### 4.3.2 Composition of the Court

The composition of courts varies widely between different domestic legal systems, and there are no international standards that regulate the presence of or distribution between professional and lay judges on the bench. In practice, independence in regard to the composition of a court is very closely linked to the question of objective impartiality (section 4.4.2). This can be exemplified though the case *Constitutional Rights Project v. Nigeria*. In regard to a specially constituted tribunal, consisting of one professional

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<sup>173</sup> UNTAET regulation 2000/11, 6 March 2000, UN Doc. UNTAET/REG/2000/11.

<sup>174</sup> SCSL Statute article 12.1. The phrase “Sierra Leonean Judges” was during the negotiations changed to “Judges appointed by Sierra Leone” in order to allow for Sierra Leone to appoint foreign judges should it wish to do so. See United Nations Security Council, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 27 September 2001, UN Doc. S/2000/915, p. 14.

<sup>175</sup> SCSL Statute article 2(4), ICTY Statute article 13 *bis* (2), ICTR Statute article 12 *bis* (3).

<sup>176</sup> W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, the United Kingdom (2006), p. 507.

<sup>177</sup> *Ibid.*, p. 507.

<sup>178</sup> *Ibid.*, p. 509.

<sup>179</sup> *Prosecutor v. Kallon, Norman and Kamara*, 13 March 2004, SCSL, Appeals Chamber, *Decision on Constitutionality and Lack of Jurisdiction*, SCSL-2004-14-AR72(E), para. 30.

judge, one member of the police force and one member of the military, the ACtHPR found that “its composition alone creates the appearance, if not actual lack, of impartiality”.<sup>180</sup> In *Castillo Petruzzi*, the IACtHR found that a military tribunal that tried a number of civilians for treason did not fulfil the requirements of an independent and impartial tribunal. The judges on the bench were taken from the ranks of the military, which was engaged in combating the insurgency groups that the applicants were suspected of engagement in. The judges could thereby not be said to be independent.<sup>181</sup>

There is no express prohibition of participation of civil servants or members of parliament in courts, although a joint exercise of judicial and non-judicial activities clearly has a bearing on judicial independence.<sup>182</sup> In *Sramek*, the ECtHR in fact found that a majority of civil servants on the bench in a civil case did not infringe upon the independence of the court.<sup>183</sup> Different considerations do however apply in criminal proceedings, which in a way inherently promote states interests.<sup>184</sup> The UN Working Group on Arbitrary Detentions has dismissed criminal proceedings in which the majority of the bench consisted of government officials.<sup>185</sup> In *Belilos*, it was claimed that a Police Board that imposed a fine upon the applicant had not been independent. The lawyer in the Board was from the police force, and the ECtHR found that “the ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues”.<sup>186</sup> The appearance of independence had thus been violated.

Independence is not required only from the tribunal as a collective, but from each of the individual judges.<sup>187</sup> An exception from this must however be cases in which lay judges are appointed by organs with interest in certain cases, such as has been the case regarding *e.g.* labour law or housing disputes. In these cases the court as a whole is considered to achieve a “balance of interests” which does not *per se* violate its independence. In *Langborger* however, the Court found that the lay judges had a common interest contrary to that of the applicant, that the balance of interests therefore was upset.<sup>188</sup> The contrary conclusion was reached in *AB Kurt Kellerman*, in which lay assessors appointed by the labour union and employers’ union respectively were not found to have interests contrary to

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<sup>180</sup> *Constitutional Rights Project v. Nigeria*, African Court of Human and Peoples’ Rights, Communication No. 60/91, 1995, para. 14.

<sup>181</sup> *Castillo Petruzzi et. al. v. Peru*, IACHR, Judgement, 30 May 1999, Petition No. 11319, paras. 130-134.

<sup>182</sup> P. Rädler, *supra* note 110, p. 741.

<sup>183</sup> *Sramek v. Austria*, ECHR, Judgement, 22 October 1984, Application No. 8790/79, para. 41.

<sup>184</sup> P. Rädler, *supra* note 110, p. 742.

<sup>185</sup> Decision No. 40/1993 (*Djibouti*), 29 September 1993, United Nations General Assembly, Human Rights Council, Working Group on Arbitrary Detention, in UN Doc. E/CN.4/1994/27.

<sup>186</sup> *Belilos v. Switzerland*, Judgement, 29 April 1988, Application No. 19328/83, para. 67.

<sup>187</sup> P. Rädler, *supra* note 110, p. 742, citing *Sramek*, *supra* note 183.

<sup>188</sup> *Langborger v. Sweden*, ECHR, Judgement, 22 June 1989, Application No. 11179/84, para. 35.

those of the applicant, who wanted to remain outside the labour market organizations.

In international courts, great importance has been given to the nationality of the judges in the composition of the tribunal. Rather than disqualifying judges who are related to the parties of the case, the parties have the possibility to appoint an *ad hoc* judge to ensure, if they so wish, that their nationality is represented on the bench.<sup>189</sup> Seen from a domestic perspective, such appointments could be considered a violation of the principle *nemo iudex in sua causa*.<sup>190</sup> In the international context however, they have been seen as in fact promoting the impartiality of the tribunal, by upholding procedural equality between the parties.<sup>191</sup> Questions have arisen when a judge previously has acted in capacity of legal advisor or counsel to one of the parties to the case. In the case *Anglo-Iranian Oil Co* the Iranian judge, who had represented his government at the Security Council when the case had been discussed, did not take part in deliberations on the merits of the case.<sup>192</sup> In practice, there appears to be little evidence that national bias should affect the voting patterns of international judges, although some tendencies can be deciphered with regard to *ad hoc* judges.<sup>193</sup>

Nationality remains to play a significant role also at the appointments to international criminal courts. In fact, the distinction between national and foreign judges “lies at the very heart of the notion of an internationalized criminal body”.<sup>194</sup> At the ICTY as the ICTR, the nomination of international judges is to adequately represent the principal legal systems of the world.<sup>195</sup> No such provisions are found in the statutes of either the ECCC nor the SCSL, but commonly the nationality of judges reflect major donors or supporters of the tribunals. Focus has however increasingly been placed on expertise and experience rather than nationality.<sup>196</sup>

### 4.3.3 Independence from External Pressure

The ‘functional’ independence of a tribunal excludes interference of non-judicial organs in the exercise of its functions.<sup>197</sup> This implies a division of powers and functions, so that different branches of government through different office-holders exercise exclusive competencies.<sup>198</sup> Naturally, a

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<sup>189</sup> ICJ Statute article 31(2) and ECHR Rule of the Court rules 26(1) a) and 29(1) a).

<sup>190</sup> I. Scobbie, *supra* note 122, p. 428.

<sup>191</sup> *Ibid.*

<sup>192</sup> G. Guillaume, ‘Some thoughts on the Independence of International Judges Vis-a-vis States’, *The Law and Practice of International Courts and Tribunals* 4 (2005), p. 165.

<sup>193</sup> *Ibid.*, p. 167, citing L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987).

<sup>194</sup> C. P. R. Romano, ‘The Judges and Prosecutors of Internationalized Criminal Tribunals’ in C. P. R. Romano, *supra* note 12, p. 235.

<sup>195</sup> See ICTY Statute article 13 *ter* 1.c) and ICTR Statute 12.3 c).

<sup>196</sup> C. P. R. Romano, *supra* note 194, p. 244.

<sup>197</sup> Rädler, *supra* note 110, p. 735.

<sup>198</sup> *Ibid.*, p. 737.

tribunal that receives binding instructions from the legislative or executive power cannot be said to be independent. The UN HRC has stated that “a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal”.<sup>199</sup> It follows from the same principle that judgements by tribunals are final, and cannot be altered by a non-judicial authority. Such binding authority has been found by the ECtHR to be inherent in the very notion of a ‘tribunal’.<sup>200</sup> Similarly, a body that only provides advice for a political authority, which renders the final decision, cannot be considered to be an independent judicial body.<sup>201</sup>

The ECtHR has repeatedly held that not only must a tribunal be independent; it must also uphold an *appearance* of independence. This is a crucial element in protecting the confidence that courts must inspire in a democratic society.<sup>202</sup> In the case *Findlay v. the United Kingdom*, all the members of a court martial were subordinate to the ‘convening officer’, whose task it was to both convene the court and to ratify the judgement to render it effective. The same officer had the power to dissolve the court, and to alter its judgement. The ECtHR found that “in order to maintain confidence in the independence and impartiality of the court, appearances may be of importance”, and concluded that the applicant’s doubts regarding the court were indeed objectively justified.<sup>203</sup> Inspiring respect for and confidence in courts are important aspects of the appearance of independence. Meron describes this as a reciprocal relationship between the courts and the public, and emphasizes the significance of reasoned decisions as a safeguard in upholding such respect.<sup>204</sup>

While related to the doctrine of separation of powers, the ECtHR has explained that the requirements of independence do not oblige states to adhere to any particular constitutional theory. The question is whether the guarantees protected under the Convention are met in each particular case.<sup>205</sup> A ‘constitutional theory’ cannot be said to be applied as such on an international level, nor is there in any real sense a separation of powers.<sup>206</sup> An analogous concern for international tribunals is nonetheless their independence from the bodies by which they were created. In 1953 the International Court of Justice (ICJ) was asked to consider whether the UN

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<sup>199</sup> *Bahamonde v. Equatorial Guinea*, United Nations Human Rights Committee, 10 November 1993, Communication No. 468/1991, UN Doc. CCPR/C/51/D/414/1990, para. 6.7.

<sup>200</sup> *Van de Hurk v. the Netherlands*, ECHR, Judgement, 19 April 1994, Application No. 16034/90, para. 45.

<sup>201</sup> *Bentham v. the Netherlands*, ECHR, Judgement, 23 October 1985, Application No. 8848/80, para. 45.

<sup>202</sup> *Sramek v. Austria*, *supra* note 183, para. 42.

<sup>203</sup> *Findlay v. the United Kingdom*, *supra* note 111, paras. 75-77.

<sup>204</sup> T. Meron, *supra* note 121, p. 360.

<sup>205</sup> *McGonnell v. the United Kingdom*, ECHR Judgement, 8 February 2000, Application No. 28488/95, para. 51.

<sup>206</sup> B. Olbourne, *supra* note 138, p. 124.

General Assembly could refuse to give effect to an award by a judicial body (the UN Administrative Tribunal, UNAT) which it itself had created. The Court found that it was clear from the language used and the functions conferred upon UNAT that the General Assembly had intended to create an independent judicial body, rather than a advisory organ or subordinate committee. As such, its judgements were final and binding also upon its creator.<sup>207</sup> A similar conclusion has been reached by the ICTY Appeals Chamber, which in a decision in 1995 stressed its independence as a judicial organ.<sup>208</sup> Asked to consider the legality of its own creation under the UN Charter the Appeals Chamber, unlike the Trial Chamber,<sup>209</sup> found that it had jurisdiction to decide on the matter, although it indirectly involved a review of the legality of a decision by the Security Council. Like the ICJ, the Appeals Chamber found that the Tribunal could not, as a judicial body, be considered a ‘subsidiary organ’ to the body by which it was created.<sup>210</sup>

In 2003, when presenting the annual report of the ICTY to the UN Security Council, the President of the Tribunal remarked that, while it is entirely appropriate for the Council to issue general directives, detailed instructions regarding prosecutions would encroach upon prosecutorial independence.<sup>211</sup> It is important that international courts do not appear to receive instructions from the political bodies by which they were created. The independence however only extends so far as prohibiting influence in individual cases. Like their national counterparts, international courts are monitored and ultimately subject to the decisions of political organs. The SPSC was in 2005 closed down before the completion of its work, as the UN mission to East Timor (UNTAET) was discontinued through a decision of the Security Council.<sup>212</sup> With a large numbers of indictments pending, the responsibility for further trials was placed upon East Timorese courts, clearly lacking both resources and experience to take on such caseloads.<sup>213</sup> To close down a tribunal before the completion of its mandate illustrates its vulnerability to decisions by political organs – which may in politicized cases call into question its independence.

A court must further be independent from other institutions that may have interests in the conduct of the proceedings or the outcome of the trials. As plainly put by Cogan:

“international criminal courts are dependent on other organizations – states mostly – to give them things. These things – money, evidence, defendants, witnesses, witness protection,

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<sup>207</sup> *Effect of Awards of compensation made by the UN Administrative Tribunal*, ICJ Advisory Opinion, 13 July 1954, ICJ Reports 1954, p. 53 and p. 61.

<sup>208</sup> *Tadić* Jurisdiction Appeals Decision, *supra* note 135.

<sup>209</sup> *Prosecutor v. Tadić*, ICTY Trial Chamber, Decision on the Defence Motion on Jurisdiction, 10 August 1995.

<sup>210</sup> *Tadić* Jurisdiction Appeal Decision, *supra* note 135, para. 15.

<sup>211</sup> Statement by Mr. Meron, United Nations Security Council Verbatim Records 4838<sup>th</sup> meeting on 9 October 2003, UN Doc. S/PV.4838, p. 30.

<sup>212</sup> UN Security Council resolution 1543 (2004) of 14 May 2004.

<sup>213</sup> P. Rapoza, ‘Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?’, 21 *American University International Law Review* (2005-2006), p. 537.

court personnel, prison facilities and the enforcement of orders and judgements – are all necessary for the court’s success”<sup>214</sup>

Not being permanent institutions, *ad hoc* tribunals are to a higher degree reliant on *ad hoc* solutions and the good will of other institutions for their proper functioning. Several instances have shown how this may lead to a vulnerability to political influences, both directly and indirectly. One such example is the *Barayagwiza* case at the ICTR, where the Appeals Chamber in 1999 decided that the defendant should be released due to repeated violations of his procedural rights.<sup>215</sup> The Rwandan government publicly condemned the decision and announced that it would suspend all cooperation with the tribunal.<sup>216</sup> The Prosecutor sought review of the decision, claiming ‘new facts’ as a ground for review. There was however no indication that the ‘new facts’ could not have been known to the prosecutor at the time of the original decision.<sup>217</sup> Before the Chamber the Prosecutor argued:

“Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecutions and investigations depend on the Government of Rwanda. That is the reality we face. And what is the reality? Either Barayagwiza can be tried in this Tribunal, in the alternative; or the only other solution you have is for Barayagwiza to be handed over to the State of Rwanda. [...] Otherwise, I am afraid, [...] we can as well [...] close that door [of the Tribunal], and open that of the prison.”<sup>218</sup>

The Appeals Chamber found that the Rules of Procedure merely were “directory in nature”, and that the decision therefore, despite the lack of ‘new facts’, could be reviewed.<sup>219</sup> It can be discussed whether the Appeals Chamber took the prosecutor’s arguments into account when overturning its original decision.<sup>220</sup> A similar example is that of *Todorović*, who was indicted by the ICTY in 1995. Todorović claimed that he had been illegally apprehended in Serbia and brought to the Bosnian border where he was arrested by the multinational military force in Bosnia (SFOR).<sup>221</sup> In response to two motions made by the defendant, the Trial Chamber ordered SFOR and states participating in SFOR to provide documents relating to his apprehension, and issued a subpoena for U.S. General Shinseki to testify

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<sup>214</sup> J. K. Cogan, ‘International Criminal Courts and Fair Trials: Difficulties and Prospects’, 27 *Yale Journal of International Law* (2002), p. 119.

<sup>215</sup> *The Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, 3 November 1999, ICTR, 97-19AR-72 (hereinafter *Barayagwiza* 1999 Appeals Decision).

<sup>216</sup> M. Momeni, ‘Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics’, 7 *ILSA Journal of International & Comparative Law* (2000-2001), p. 319. While operations did continue at the tribunal, the new Chief Prosecutor was not granted a visa for some time.

<sup>217</sup> *Ibid.*, p. 322.

<sup>218</sup> Statement by Chief-Prosecutor del Ponte, quoted in *The Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, 31 March 2000, ICTR 97-19-AR72, Declaration of Judge Rafael-Nieto Navia, p. 2.

<sup>219</sup> *The Prosecutor v. Barayagwiza*, 31 March 2000, ICTR, Appeals Chamber, Decision, ICTR 97-19-AR72 (hereinafter *Barayagwiza* 2000 Appeals Decision), para. 65.

<sup>220</sup> M. Momeni, *supra* note 216, p. 322 and S. Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, the United States (2003), p. 104.

<sup>221</sup> J.K. Cogan, *supra* note 214, p. 125.

about the arrest.<sup>222</sup> Nine States and NATO filed requests for review of the decision. In its legal brief the United States maintained that security concerns impeded disclosure, and added not so subtly that the Trial Chamber's decision "will be of utmost significance to the future of the tribunal, and its relationship with those engaged in the apprehension of persons indicted for war crimes".<sup>223</sup> Before a decision was taken, Todorović entered a plea bargain and therewith withdrew all his outstanding motions.<sup>224</sup> Whether or not political considerations were taken into account, both the *Barayagwiza* and the *Todorović* cases illustrate the dependency of the tribunals on cooperation by other institutions and states, and the importance of not only judicial integrity but also that an appearance of independence be upheld.

Judicial independence can further be considered from a financial perspective. It is true that also domestic legal systems are dependent on annual budgets decided upon by political bodies, yet *ad hoc* courts are to a larger degree vulnerable in this regard. The expenses of the ICTY and the ICTR are covered by the regular UN budget. The SPSC and the courts in Kosovo were funded from the UN missions' budgets, and therefore had to compete with a large number of priorities to address the post-conflict situation.<sup>225</sup> The SCSL and the ECCC are wholly dependent on voluntary contributions by states for their operation. The latter solution has made the tribunals less dependent on the UN machinery, yet opens up for other concerns. The theoretical possibility that a donor state could withdraw funds following a certain decision by the court makes this form of financing questionable. Another aspect is what conditions donors can and should place upon tribunals. The question of interference by donors was raised in Sierra Leone, where the Trial Chamber found that recommendations made by an independent expert appointed by the Management Committee interfered with the Court's independence. Mandated to review the efficiency of the Court, the expert pointed out *inter alia* the long time taken by the Chambers to reach decisions on some motions, and suggested a more active and inquisitorial form of courtroom management.<sup>226</sup> In a comment to the report, the Judges of Trial Chamber I held that the appointment of an expert to review the Court's efficiency was an attempt to interfere with its judicial independence.<sup>227</sup>

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<sup>222</sup> *Prosecutor v. Todorović*, 18 October 2000, ICTY, Trial Chamber, Decision on Motion for Judicial Assistance, Case No. IT-95-9/1. Extracts of the decision available at <[www.icty.org/sid/7811](http://www.icty.org/sid/7811)>.

<sup>223</sup> J. Socolovsky, *U.S. rejects subpoena of army commander*, 6 December 2000, Associated Press, cited in J. K. Cogan, *supra* note 214, p. 126.

<sup>224</sup> *Prosecutor v. Todorović*, 26 February 2001, ICTY, Trial Chamber, *Decision on Prosecution motion to withdraw counts of the indictment and defence motion to withdraw pending motions*, Case No. IT-95-9/1.

<sup>225</sup> D. Cohen, *supra* note 7, p. 13.

<sup>226</sup> A. Cassese, *Report on the Special Court for Sierra Leone*, 12 December 2006, available at <[www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176](http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176)> (visited on 17 May 2009).

<sup>227</sup> *Ibid.*, Annex C, *Comments on the Independent Expert Draft Report by the Judges of Trial Chamber I, Special Court for Sierra Leone*, available at <[www.sc-](http://www.sc-)

Finally, independence is not only a characteristic of the tribunal as a whole, but an individual attribute of every one of the judges on the bench. The Bangalore Principles provide that “a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of the government, but must also appear to a reasonable observer to be free therefrom”.<sup>228</sup> In an international context, judges must appear to be independent from influences from a variety of institutions. Concerns regarding the independence of an individual judge has been raised at the ICTR. One of the international *ad litem* judges, Judge Gwaunza from Zimbabwe was reported in 2008 to have received a farm as a gift from President Mugabe, as had many other judges appointed by him. A condition placed upon the gift was that the government without reason or compensation might take the farm away.<sup>229</sup> Such dependency on an outside institution or person must be considered inappropriate, and clearly has a bearing on the perceived independence of the judge in question.

## 4.4 Impartiality

Little or nothing is said explicitly in human rights instruments to specify the meaning of judicial impartiality. Nonetheless, a substantive case law has developed under various human rights bodies. Non-binding instruments often refer to impartiality in general terms or in terms of a freedom of the judiciary to act impartially, free from state inference.<sup>230</sup> While the independence of a tribunal is related to a number of structural and functional factors, impartiality ultimately reflects a state of mind. It implies that “the judges must not harbour any preconceptions about the matter put before them, and they must not act in ways that promote the interests of one of the parties”.<sup>231</sup> Independence, though important in itself, can be seen as a means to achieve, or create the conditions for, impartiality. Impartiality is divided into a subjective and an objective component.<sup>232</sup> Subjective impartiality reflects the absence of actual bias, animosity or sympathy on part of the judge towards any of the parties.<sup>233</sup> Objective impartiality implies that there are sufficient guarantees to exclude any legitimate doubts as the judges’

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sl.org/LinkClick.aspx?fileticket=ZlcibDmj76U=&tabid=176> (visited on 17 May 2009), para. 2.

<sup>228</sup> Bangalore Principles on Judicial Conduct, principle 1.3.

<sup>229</sup> International Bar Association Human Rights Institute (IBAHRI), *IBAHRI expresses concern at the presence of Judge Gwaunza at the bench of the ICTY*, 3 November 2008, available at <[www.ibanet.org/Article/Detail.aspx?ArticleUid=811B4E19-8A01-4455-AE0B-1DB9DCB24D47](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=811B4E19-8A01-4455-AE0B-1DB9DCB24D47)> (visited on 14 April 2009).

<sup>230</sup> Council of Europe Recommendation, principle 1.2 d), UN Basic Principles principle 8, IBA Minimum Standards article 40, Beijing Statement article 3 a).

<sup>231</sup> *Karttunen v. Finland*, *supra* note 112, para. 7.2.

<sup>232</sup> See *inter alia*, *Piersack v. Belgium*, ECHR, Judgement, 1 October 1982, Application No. 8692/72.

<sup>233</sup> International Commission of Jurists, *International Principles of the Independence and Accountability of Judges, Lawyers and Prosecutors A Practitioner’s Guide* (2004), p. 27.

impartiality.<sup>234</sup> This dual approach has been adopted by the ICTY, which in *Furundzija* described judicial impartiality thus:

“ A judge should not only be subjectively free from bias, but also [...] there should be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i. a judge is a party to the case or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification is automatic; or

ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”<sup>235</sup>

Subjective (personal) and objective impartiality will be discussed separately below.

#### 4.4.1 Personal Impartiality

Ultimately, impartiality is a relative concept. How a judge interprets the law is, in the words of Special Rapporteur Singhvi, related to his or her “training and legal culture, personal, social and professional background, and unconscious and subterranean predilections”.<sup>236</sup> Judges are, like all persons, conditioned by their background, as well as their previous professional experience as practicing lawyers, judges, prosecutors or activists.<sup>237</sup> Such differences emphasize the impossibility of undivided impartiality; “absolute neutrality can hardly if ever be achieved”.<sup>238</sup> In the case of the *South African Rugby Football Union*, cited by the ICTY Appeals Chamber in *Furundzija*, it was held that:

“The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves”.<sup>239</sup>

A Judge is thus expected, by virtue of his legal training, to disassociate himself from his personal beliefs and convictions. In international courts, judges may come from different legal cultures and traditions, and their interpretation of the law may therefore also vary therewith. They are also

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<sup>234</sup> *Piersack v. Belgium*, *supra* note 232, para. 30.

<sup>235</sup> *Furundzija* Appeals Judgement, *supra* note 146, para. 189.

<sup>236</sup> *Final Report by Special Rapporteur Singhvi*, *supra* note 287, para. 87.

<sup>237</sup> L. Caflisch, ‘Independence and Impartiality of Judges: The European Court of Human Rights’, *The Law and Practice of International Courts and Tribunals* 2 (2003), p. 169.

<sup>238</sup> *Furundzija* Appeals Judgement, *supra* note 146, para. 203.

<sup>239</sup> *South Africa Rugby Football Union v. Commissioner for the South Africa Revenue Services*, South Africa Supreme Court of Appeal, Case No. 90/98, 1 October 1999, para. 48, cited in *Prosecutor v. Furundzija*, *supra* note 344, para. 196.

likely to, as scholars or in other capacities, have spoken or written on matters that come before the tribunal. This does not necessarily affect their impartiality, as they are in fact appointed judges because of their knowledge of international law, manifested through publications, judicial decisions and public statements.<sup>240</sup> Subjective impartiality will therefore be presumed until there is actual proof of bias.<sup>241</sup>

Statutes for international courts often require that judges shall be of “high moral character”<sup>242</sup> and that they are persons of “impartiality and integrity”.<sup>243</sup> It is difficult to prove that a judge is personally biased, as the motives behind any decision are difficult to ascertain even when a decision is extensively reasoned. Evidence must usually be derived from the attitudes or behaviour or the judge during the proceedings.<sup>244</sup> Hence complainants will often rely on the objective conception of impartiality, rather than trying to prove a violation of subjective impartiality.<sup>245</sup>

The personal impartiality of a judge was questioned in *Boeckmans*, in which a judge had uttered a warning to the defendant that upholding a certain defence may lead to an increase in penalty. The judge had at a hearing described the defence relied upon by the defendant as “scandalous”, “disgraceful” and “distasteful”.<sup>246</sup> The case was eventually solved through a friendly settlement. In *Werner*, the ECtHR was convinced of personal bias on part of a judge. The applicant had been dismissed as a judicial liquidator by the District Court, following a motion by a judge who also took part in the decision on the matter. The ECtHR found that “it cannot be said that the insolvency judge did not have a preconceived idea on the issue” and that “it is only reasonable to expect that [she] held a personal conviction that the motion [...] should be allowed”.<sup>247</sup> In that case the judge had in fact clearly taken a stand on the merits before the hearing, and could thus not be considered impartial. Similarly in *Levants* the Court found that a judge had shown personal bias. The judge had in an interview said that she was not yet sure whether the accused would be found guilty or partially acquitted. In a later interview she expressed her surprise that the accused had pleaded innocent on all counts.<sup>248</sup> This was according to the Court enough to show

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<sup>240</sup> T. Meron, *supra* note 121, p. 368.

<sup>241</sup> *Prosecutor v. Furundzija*, *supra* note 146, para. 196 and *Le Compte et. al. v. Belgium*, ECHR, Judgement, 23 June 1981, Application Nos. 6878/75 and 7238/75, para. 58.

<sup>242</sup> See e.g. ECHR Statute article 21.1,

<sup>243</sup> ICTY Statute article 13, ICTR Statute article 12, SCSL Statute article 13, ECCC Law article 10 (new).

<sup>244</sup> P. Van Dijk et. al. (eds.), *Theory and Practice of the European Convention on Human Rights Fourth Edition*, Intersentia, the United Kingdom (2006), p. 616.

<sup>245</sup> See e.g. *Gregory v. the United Kingdom*, ECHR, Judgement, 25 February 1995, Application No. 22299/93, para. 40, *Campbell and Fell v. the United Kingdom*, *supra* note 148, para. 84, *Piersack v. Belgium*, *supra* note 232, para. 30 and *Langborger v. Sweden*, *supra* note 188, para. 35.

<sup>246</sup> *Boeckmans v. Belgium*, Application No. 1727/62, Yearbook of the European Convention on Human Rights Vol. 8 (1965), p. 412.

<sup>247</sup> *Werner v. Poland*, Judgement, 15 November 2001, ECHR, Application No. 26760/95, para. 40.

<sup>248</sup> *Levants v. Latvia*, 28 November 2002, ECHR, Application No. 58442/00, para 127.

that the judge had a preconceived conviction on the question of guilt in at least one of the charges.

#### 4.4.2 Objective Impartiality: General Rules Of Disqualification

Objective impartiality implies that ‘justice must not only be done, it must also seem to be done’. In the words of the ICTY, the principle of impartiality requires that there is not an unacceptable appearance of bias, regardless of the *de facto* impartiality of the individual judge.<sup>249</sup> General rules for disqualification of judges relate to their independence vis-à-vis the parties to the case, and can be found in most national legislations. Such rules do not take into account the circumstances of the particular case, but exclude judges who, *e.g.* are related to one of the parties, or otherwise have an interest in the outcome of the case.<sup>250</sup> Unlike personal impartiality, grounds for disqualification that are laid down in law are to be considered *ex officio* by the Court.<sup>251</sup>

The Bangalore Principles provide that a judge has the duty to excuse her- or himself from the proceedings when the judge has actual prejudice concerning a party or knowledge of disputed evidentiary facts, when the judge has previously served as a lawyer or been a material witness in the matter, and when the judge or a member of her or his family has an economic interest in the outcome of the case.<sup>252</sup> At the ICJ, judges may not participate in cases in which they have previously taken part as an agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a mission of inquiry, or any other capacity.<sup>253</sup> The interpretation of this provision has varied, particularly when a judge has not been a counsel for a party, but *e.g.* participated in debates in the UN General Assembly on the topic.<sup>254</sup>

The ECHR does not differentiate between grounds for disqualifications laid down in law and a lack of impartiality on the basis of legitimate doubts (see below). In *Sigurdsson*, the ECtHR found that the economic links between a judge and one of the parties, the Icelandic National bank, were such as to give raise to reasonable fears as to her impartiality.<sup>255</sup> The ECHR itself follows similar rules, set out in rule 28 of the Rules of the Court. Grounds

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<sup>249</sup> *Furundzija* Appeals Judgement, *supra* note 235.

<sup>250</sup> P. Rädler, *supra* note 110 p. 731.

<sup>251</sup> *Karttunen v. Finland*, *supra* note 112, para. 7.2.

<sup>252</sup> Bangalore Principles of Judicial Conduct, principle 2.5.

<sup>253</sup> ICJ Statute article 17.

<sup>254</sup> G. Guillaume, *supra* note 192, p. 165. Guillaume cites *inter alia* the *Western Sahara* (1975) advisory opinion, where Judges Ammoun and Ignacio-Pinto participated in the proceedings although they had participated as representatives of their respective governments in the debates in the UN General Assembly in 1960 on the admission of Mauritania to the UN

<sup>255</sup> *Sigurdsson v. Iceland*, ECHR, Judgement, 10 August 2003, Application No. 39731/98, para. 45.

for disqualifications constitute, *inter alia*, family, business, personal or professional relationship with any of the parties, previous involvement as agent, advocate or advisor, or opinions expressed publicly that are objectively capable of affecting adversely his or her impartiality.

The Rules of Evidence and Procedure of the ICTY and ICTR respectively provide for similar, though less detailed provisions. Judges may not sit in a case in which he or she has a personal interest, or has had any association that might affect his or her impartiality.<sup>256</sup> In *Furundzija*, the defendant sought to have Judge Mumba disqualified, claiming that she sat in a case which “could advance and in fact did advance a political and legal agenda which she had helped to create whilst a member of the United Nations Commission on the Status of Women (UNCSW).”<sup>257</sup> While not contending that Judge Mumba was actually biased, the defendant argued that the objective impartiality of the tribunal was breached through the previous activities of the Judge. The Appeals Chamber found that the Judge had acted in official capacity, and while she may have shared the convictions of the UNCSW, those were of a general nature and reflected the objects of the UN. A reasonable observer would therefore not apprehend bias based on Judge Mumba’s previous activities.<sup>258</sup> A very similar question was raised before the SCSL in which the impartiality of Judge Winter was questioned based on his previous involvement in a UNICEF report entitled “International Criminal Justice and Children”, dealing, *inter alia*, with the question of child soldiers.<sup>259</sup> Like the ICTY, the SCSL dismissed the motion and concluded that Judge Winter’s previous experiences rather were one of his qualifications for the post.<sup>260</sup>

#### 4.4.3 Objective Impartiality: Legitimate Doubts

In addition to those grounds for disqualification laid down in law, other circumstances may give rise to legitimate doubts as to the impartiality of a tribunal. Such situations have been the subject of examination in a number of cases by the ECtHR, and have also been considered by international criminal tribunals. Important to note is that the fear that a tribunal lacks impartiality has to be objectively justified. The standpoint of the accused is therefore important, but not decisive in the matter.<sup>261</sup>

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<sup>256</sup> ICTY Rules of Procedure and Evidence rule 15 and ICTR Rules of Procedure and Evidence rule 15.

<sup>257</sup> *Furundzija* Appeals Judgement, *supra* note 146, para. 169.

<sup>258</sup> *Ibid.*, paras. 201-202.

<sup>259</sup> International Criminal Justice and Children, No Peace Without Justice, UNICEF Innocenti Research Centre, September 2002. Available at <[www.unicef.org/emerg/files/ICJC.pdf](http://www.unicef.org/emerg/files/ICJC.pdf)>.

<sup>260</sup> *Prosecutor v. Norman*, 28 May 2004, SCSL, Appeals Chamber, *Decision on the Motion to Recuse Judge Winter from Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers*, SCSL-2004-14, para. 30.

<sup>261</sup> *Hauschildt v. Denmark*, ECHR, Judgement, 24 May 1989, Application No. 10486/83, para. 48.

The notion of objective impartiality was analyzed in some detail in the *Piersack* case.<sup>262</sup> The applicant argued that there were legitimate doubts as to the court's impartiality in a murder case, as the presiding judge had previously served as senior deputy of the Prosecutor's Office. Although not personally involved in the investigation against the applicant, he had had supervisory functions over those who were. The Court concluded that the court was "capable of appearing open to doubt",<sup>263</sup> and that its objective impartiality hence had been violated. Not any involvement by a judge in the pre-trial stage of the proceedings can however lead to legitimate doubts as to his or her impartiality. It is the "extent and nature" of such involvement which is decisive.<sup>264</sup> In *Hauschildt*, the same judge who decided upon the merits of the case had taken a number of decisions to hold the applicant in custody awaiting trial. While such decisions do not *per se* affect the court's impartiality, the judge had in this case based his decisions on a "particularly confirmed suspicion", interpreted as "a high degree of clarity" as to the question of guilt.<sup>265</sup> His impartiality was therefore open to doubt.

Judicial impartiality is closely linked to the presumption of innocence, a fundamental aspect of the defendant's right to a fair trial.<sup>266</sup> Like the principle of impartiality, it implies that judges must base their decision exclusively on the evidence put forth during the proceedings.<sup>267</sup> Care must be taken by officials of the judiciary in their public statements, as to not appear to have preconceived conception on the merits of the case. In the above-mentioned case *Levents*, the presumption of innocence was found to be violated as a judge had made public statements indicating a preconceived conception of the guilt of the accused.<sup>268</sup> A similar conclusion was reached in *Buscemi*, in which the appearance of impartiality clearly had been violated after a judge had expressed unfavourable opinions of the accused before the trial. The Court stated that judges are required to exercise maximum discretion with regard to the cases with which they deal, and that they should not make use of the press, even when provoked.<sup>269</sup> Such requirements do not only apply to the judges, but to representatives of all judicial authorities involved in the proceedings.<sup>270</sup> Most difficult is naturally the assessment of statements by prosecutors, who are not expected to be impartial, yet must take into consideration that the defendant may be acquitted and should not objectively be regarded as guilty.<sup>271</sup> In the case *Allenet de Ribemont*, the ECtHR held that the presumption of innocence can be violated not only by judges but by other public officials, and that "it suffices, even in the absence of any formal finding, that there is some

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<sup>262</sup> *Piersack v. Belgium*, *supra* note 232.

<sup>263</sup> *Ibid.*, para. 31.

<sup>264</sup> *Fey v. Austria*, 24 February 1993, ECHR, Application No. 14396/88, para. 30.

<sup>265</sup> *Hauschildt v. Denmark*, *supra* note 261, para. 52.

<sup>266</sup> T. Meron, *supra* note 121, pp. 359-360.

<sup>267</sup> P. Van Dijk *et. al.* (eds.), *supra* note 244, p. 614.

<sup>268</sup> *Lavents v. Latvia*, *supra* note 248.

<sup>269</sup> *Buscemi v. Italy*, ECHR, Judgement, 16 September 1999, Application No. 29569/95, paras. 67-69.

<sup>270</sup> *Lavents v. Latvia*, *supra* note 248, para. 125.

<sup>271</sup> S. Trechsel, *supra* note 157, p. 165.

reasoning suggesting that the court regards the suspect as guilty”.<sup>272</sup> However, statements by public officials have to be considered in the context in which they have been made.<sup>273</sup>

In an international criminal setting, the presumption of innocence and the appearance of impartiality of the judges may come to be a difficult issue, as the crimes committed, and often their perpetrators, are well known to the public. The media, NGOs and other actors run the risk of crossing the line from political condemnation to expressing a conviction of legal guilt. It is generally assumed that professional judges are aware of influence by external factors, particularly in cases with a markedly political background, and will not readily allow themselves to be influenced thereby.<sup>274</sup> Care must be taken in the process leading up to the establishment of a tribunal so that legal questions are not prematurely addressed. The same caution must be applied by other official bodies when making statements concerning prosecutions or about the judicial proceedings. An example is the UN Security Council which in 1995 strongly condemned the “violations of international humanitarian and human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica”, and in the same resolution went on to note the “indictments against the Bosnian Serb leaders Radovan Karadzic and Ratko Mladic for their direct and individual responsibilities for the atrocities committed against the Bosnian Muslim population of Srebrenica”.<sup>275</sup> The presumption of innocence can in such a statement be no more than illusory.

At the SCSL the lack of objective impartiality led to the disqualification of a judge in 2003. Judge Robertson had previous to his appointment written a book entitled “Crimes Against Humanity – The Struggle for Global Justice”, in which he expressed strong views against the Revolutionary United Front (RUF), members of which were later tried by the SCSL. While disregarding the defence motion that the judge was personally biased, the Appeals Chamber agreed that an independent bystander would reasonably have a legitimate reason to fear that Judge Robertson lacked impartiality.<sup>276</sup> The question of impartiality of an individual judge was also raised against Judge Thompson, who in a separate opinion to the CDF judgement by the Trial Chamber had expressed views on the parties to the case in question. Arguing that the accused was not guilty on the basis of necessity, Judge Thomson had stated that they had been protecting democracy and fighting

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<sup>272</sup> *Allenet de Ribemont v. France*, 10 February 1995, ECHR, Judgement, Application No. 15175/89, paras. 35-37.

<sup>273</sup> *Daktaras v. Lithuania*, 10 October 2000, ECtHR, Application no. 42095/98, para. 43.

<sup>274</sup> *Craxi v. Italy*, 5 December 2002, ECtHR, Judgement, Application No. 34896/97, para. 104.

<sup>275</sup> United Nations Security Council resolution 1034 (1995), 21 December 1995, UN Doc. S/RES/1034 (1995).

<sup>276</sup> *Prosecutor v. Sesay et. al*, 13 March 2004, SCSL, Appeals Chamber, *Decision on Defence Motion Seeking the Disqualification of Judge Robertson from the Appeals Chamber*, SCSL-2004-15, para. 15.

“rebellion, anarchy and tyranny”.<sup>277</sup> While acknowledging that opinions expressed in a separate opinion may apprehend an appearance of bias, the Trial Chamber found that the views expressed by the Judge were not such as to affect the impartiality of the judge in other cases.<sup>278</sup>

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<sup>277</sup> *Prosecutor v. Fofana and Kondewa*, 2 August 2007, SCSL, Trial Chamber, Judgement, SCSL-04-14-T, Annex C – *Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson filed Pursuant to Article 18 of the Statute*, para. 69.

<sup>278</sup> *Prosecutor v. Sesay et. al.*, 6 December 2007, SCSL, Trial Chamber, *Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Judge Bankole Thompson from the RUF case*, SCSL 2004-15-I, para. 94. See also *Prosecutor v. Sesay et. al.*, 24 January 2008, SCSL, Appeals Chamber, *Decision on Sesay, Kallon, and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal of Disqualification of Hon. Judge Bankole Thompson from the RUF Case*, SCSL 2004-15-I.

# 5 National 'Ownership' and Hybrid Courts

## 5.1 The Hybrid Alternative

International criminal tribunals do not operate in a vacuum, but are responses to horrendous acts in societies that are left with broken social, political and cultural structures. They embody, more than the enforcement of international norms, recognition of the suffering of thousands, if not hundreds of thousands of people, and are a step in a social process of dealing with the past.<sup>279</sup> Put differently, the tribunals are “expected to fulfil larger political and symbolic functions which go beyond the justice of individual prosecutions”.<sup>280</sup> It has been argued that locally based trials, which include the participation of the local population and national judiciary, have greater chances of contributing to national reconciliation and conflict prevention, and to promote respect for judicial institutions.<sup>281</sup> The UN Secretary-General has emphasized a need to avoid ‘one-size-fits-all formulas’, but to a larger degree focus on national assessments, national participation, and national needs and aspirations in post-conflict societies.<sup>282</sup> The concept of national *ownership* is commonly used to refer to the aspiration to include national actors in the judicial process, and to take into consideration national cultural, historical and political prerequisites in establishing a court or tribunal. The ownership of hybrid tribunals is hence dual; participation, decision-making and accountability being shared between the international community (embodied in the involvement of the UN) and various national actors.

A focus on national ownership stems from the failure of the ICTY and ICTR to effectively include national actors in their proceedings. While contributing greatly to the development of international criminal law, their decisions and judgements appear to have had little effect on the judiciary or society of Rwanda and the former Yugoslavia respectively.<sup>283</sup> Victims and their families are effectively denied access to the trials. A study shows that Bosnian judges in national courts are poorly informed about the proceedings

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<sup>279</sup> M. Minow, *Between Vengeance and Forgiveness Facing History after Genocide and Mass Violence*, Beacon Press, The United States (1998), p. 119.

<sup>280</sup> M. Humphrey, ‘International Intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda’, 2 *Journal of Human Rights* 4 (2003), p. 500.

<sup>281</sup> D. Cohen, ‘“Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future’, 43 *Stanford Journal of International Law* 1 (2007), p. 5.

<sup>282</sup> *The rule of law and transitional justice in conflict and post-conflict societies*, supra note 5.

<sup>283</sup> See, *inter alia*, R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’, *Journal of International Criminal Justice* 2 (2004).

of the ICTY, and often sceptical about its work.<sup>284</sup> Another study concludes that the proceedings of the ICTY may rather enforce ethnic divisions than being seen to establish individual criminal justice.<sup>285</sup> This is largely explained by the lack of effective communication between the tribunal and the Bosnian society, and the consequent dependency on information from the media and NGOs.<sup>286</sup> Measures taken by a court to ensure communication with, outreach to and participation by national actors can remedy such failures. The hope is that hybrid courts will provide the expertise and standards of international tribunals, yet interact to a larger degree with the affected societies, and hence allow for a greater sense of national ownership.

## 5.2 The Context of Transitional Justice

In 1985 the Special Rapporteur on independence and impartiality of the judiciary observed: “The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights.”<sup>287</sup> The establishment of *ad hoc* tribunals must be seen in the context of this larger picture of promoting a stable peace and democracy following mass atrocities. Transitional justice can be defined as a “conception of justice associated with political change, characterized by legal responses to confront the wrong-doings of repressive predecessor regimes”.<sup>288</sup> It does not necessarily cover only the immediate period following a change in political power. Teitel describes the current understanding of transitional justice as a ‘steady-state’ transition, that is, “what was historically viewed as a legal phenomenon associated with extraordinary post-conflict conditions now increasingly appears to be a reflection of ordinary times”.<sup>289</sup> Cambodia’s path of transition was different from many other countries’, in that the former regime was not determinedly defeated, but slowly extinguished over a longer period of time. Its transition is therefore in many ways still in process.<sup>290</sup>

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<sup>284</sup> Human Rights Center International Human Rights Law Clinic, University of California Berkeley and Center for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction An Interview Study of Bosnian Judges and Prosecutors*, (2000), available at < [www.law.berkeley.edu/files/JUDICIAL\\_REPORT\\_ENGLISH.pdf](http://www.law.berkeley.edu/files/JUDICIAL_REPORT_ENGLISH.pdf)>, p. 1.

<sup>285</sup> K. Cibelli and T. Guburek, *Justice Unknown Justice Unsatisfied? Bosnian NGOs speak about the International Criminal Tribunal for former Yugoslavia*, Education for Public Enquiry and International Citizenship at Tufts University (1999), p. 5.

<sup>286</sup> *Ibid.*, pp. 19-20.

<sup>287</sup> *Final Report by the Special Rapporteur, Mr. Singhvi*, *supra* note 113, para. 74.

<sup>288</sup> R. G. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2005), p. 69.

<sup>289</sup> R. G. Teitel (2005), *supra* note 288, p. 90.

<sup>290</sup> S. R. Ratner *et al.*, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy, Third Edition*, Oxford University Press, the United States (2009), p. 342.

Transitional justice is no doubt a broad concept and requires attention to a multitude of factors, which extend beyond the work of courts and tribunals. Nonetheless, some type of punishment of the former regime is central to the understanding of transitional justice. As pointed out by Teitel, the question of punishment poses important questions regarding individual and collective responsibility, and regarding the role of the law as retributive justice or as an expression of the rule of law.<sup>291</sup> There have essentially been two schools concerning the response to be taken to past mass atrocities. One has considered judicial proceedings as a threat to peace and reconciliation. According to this perception, the rule of law is the product of political change.<sup>292</sup> The other view considers retributive justice as a necessary element to achieve liberal change, and a prerequisite for a stable peace.<sup>293</sup> The antinomy between the two approaches accentuates the relationship between law and politics,<sup>294</sup> profoundly present at the establishment of hybrid courts. A growing consensus has developed regarding sweeping or ‘blanket’ amnesties, which no longer can be seen to be accepted by the international community.<sup>295</sup> Far from being uncontroversial, the idea that justice is a necessary element in establishing a stable peace “is nothing but a sea change in international thinking on this question”.<sup>296</sup> It is nonetheless a fundamental assumption in the discourse promoting the proliferation of international *ad hoc* tribunals.

‘Reconciliation’ is often cited as an important aspect of transitional justice, and in the Cambodian context sometimes assumed to be contrary to the interests of criminal justice. Yet, it is a vaguely defined concept with a multitude of meanings.<sup>297</sup> Three different conceptions are cited by Crocker, ranging from ‘simple co-existence’ between victims and perpetrators, to notions of mutual healing. An example is given by Youk Chang, director of the Documentation Center of Cambodia (DC-Cam),<sup>298</sup> who in 2000 wrote that former Khmer Rouge officials were “taking refuge under the umbrella of “national reconciliation”. They are all trying to hide from their victims, as well as their own legal accountability before society and history”.<sup>299</sup> Minow

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<sup>291</sup> R. G. Teitel, *Transitional Justice*, Oxford University Press, the United Kingdom (2000), p. 27.

<sup>292</sup> *Ibid.*, pp. 3-4.

<sup>293</sup> J. M. Kamatali, ‘The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR’, 16 *Leiden Journal of International Law* (2003), p. 115.

<sup>294</sup> R. G. Teitel (2000), *supra* note 291, p. 4.

<sup>295</sup> N. J. Kritiz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, 59 *Law and Contemporary Problems* 4 (1996), . 134. See also Report of the UN Secretary General, ‘*The rule of law in transitional justice in conflict and post conflict societies*’, *supra* note 282, para. 40.

<sup>296</sup> N.J. Kritiz, *ibid.*, p. 130.

<sup>297</sup> E. E. Stensrud (2009), *supra* note 315, p. 8.

<sup>298</sup> DC-Cam is an NGO which has collected large amounts of evidence against the former Khmer Rouge leaders, and has been a major advocate for the establishment of a tribunal in Cambodia.

<sup>299</sup> Y. Chang, ‘The Khmer Rouge Ideology Survives’, 13 *Cambodia – Civil Society and the Tribunal* 5, 26 July 2000, The Advocacy Project, available at <<http://www.advocacy.net.org/resource/420>>.

argues that judicial proceedings can contribute to national reconciliation, by transferring the individual's desire for revenge into a public body's act of retribution.<sup>300</sup> The promotion of national reconciliation is highly political, and can thus be used both in favour and in opposition of prosecutions.<sup>301</sup> Inherent in the notion of transitional justice is the risk that prosecutions against a former regime are considered to be 'victors' justice'. As part of a process of transitional justice, trials will always be political in that they constitute a condemnation of a former regime. Without a victor in the conflict, there would be no transitional process.<sup>302</sup> Bass finds that the idea of a victors' justice ultimately is uninformative. The question that should be asked is rather who the victors are, and what justice will be made.<sup>303</sup> The question then is not who establishes a tribunal, or even for what purposes, as long as the proceedings are conducted in accordance with international standards.

Hybrid tribunals must be considered in this wider perspective of transitional justice. Their establishment is but one of many possible mechanisms available to address past atrocities, and can arguably only play a limited role in transforming a post-conflict society. It is difficult to impose principles of accountability and the rule of law upon a society from the outside.<sup>304</sup> A process of democratic change will be perceived as more legitimate and be more likely to succeed if it involves the participation of national actors. It is nonetheless important to remember that different requirements are placed on judicial proceedings in a court of law than those placed upon the transitional process as a whole. In the conduct of trials, pragmatism must be limited to the degree that the judicial process conforms to international standards of justice.

### 5.3 Ownership and Sovereignty

The participation of the government in the negotiation process for establishing a court is an important aspect of national ownership. Through that participation, the court is not seen to be imposed by the international community upon a state, but as the result of negotiations and compromises. In the case of Cambodia, people may be particularly sensitive to the idea of an externally imposed tribunal, given its past relation to the UN. At the adoption of the ECCC Law in the National Assembly, Deputy Prime-Minister Sok An said that:

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<sup>300</sup> M. Minow, *supra* note 279, p. 26.

<sup>301</sup> See the argument made by the Cambodian prosecutor at the ECCC in opposing further indictments, discussed below in chapter 6.

<sup>302</sup> E. Stensrud, *Mixed Courts: The Cambodian Case The UN Involvement and the Prospects for a Fair Trial in Cambodia*, Thesis for degree in Cand. Polit., Oslo University, Department of Political Science (2004), written in cooperation with Oslo Peace Research Institute, available at < [www.prio.no/Research-and-Publications/Publication/?oid=58722](http://www.prio.no/Research-and-Publications/Publication/?oid=58722) > (visited on 20 May 2009), p. 77.

<sup>303</sup> G. J. Bass, *Stay the Hand of Vengeance The Politics of War Crimes Tribunals*, Princeton University Press, the United States of America (2002), p. 16. cited in E. Stensrud (2004), *supra* note 302, p. 75.

<sup>304</sup> N. J. Kritz, *supra* note 295, p. 149.

“[in the past] the majority of criminal tribunals in the world were established by foreign judges, initiated by foreign judges, and imposed into the country. As for our agreement, [...] [it] is a compromise between us, the host, the case owner, and the United Nations [...]”<sup>305</sup>.

During the negotiation process to establish the ECCC, ownership was often referred to in terms of preserving national sovereignty. While welcoming foreign assistance, the Cambodian government maintained that foreign control of the trial would violate Cambodia’s sovereignty.<sup>306</sup> A similar stance was taken by a number of delegates at the debate in the National Assembly preceding the adoption of the ECCC Law. In the above-cited statement by Sok An, he further observed:

“we are talking about national sovereignty: why do we allow foreign judges to make decisions in Cambodia. This is a sensitive point [...]. That is, we accept foreign judges because we want the support of the international community. [...] [In the negotiations] [w]e pointed out that in order to reflect the respect for Cambodian sovereignty, the trial chambers have to [have] a Cambodian majority”<sup>307</sup>.

Care should however been taken when referring to national ownership in terms of sovereignty. The ICTY and the ICTR were imposed on states by the Security Council, but were a consequence of the fatal failure of states to protect their citizens.<sup>308</sup> The legacy of Nuremberg and the growing body of international human rights law is that mass violations of human rights is a concern not only for the state in which they occur, but of the international community as a whole.<sup>309</sup> Equally, Cambodia has an international obligation to punish possible acts of genocide committed on its territory.<sup>310</sup> Thus, references to sovereignty when it comes to the establishment of a tribunal for the prosecution of such crimes must be weighed against the failure of the state to prevent them. That said, there is nothing inherently contradictory between sovereignty and the prosecution of international crimes. In fact, national trials must be considered as the primary option for the prosecution of serious crimes.<sup>311</sup> Moreover, as is the case in Cambodia, when a long time has passed since the crimes occurred, little identifies the current government with that by which atrocities were committed. An internationally imposed tribunal is unnecessary when a political will in fact exists to try those responsible.

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<sup>305</sup> Documentation Center of Cambodia, A minute of the Session of the National Assembly of the Kingdom of Cambodia, A Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 29 December 2000. Unofficial translation by Sorya Sim and Vichea Sopheap Tieng (hereinafter ‘National Assembly Minutes’). On file with the author.

<sup>306</sup> T. Hammarberg, *supra* note 47.

<sup>307</sup> Statement by Sok An, National Assembly Minutes, *supra* note 305.

<sup>308</sup> M. Humphrey, *supra* note 280, p. 495.

<sup>309</sup> B. B. Ferencz, ‘International Criminal Courts: The Legacy of Nuremberg’, 10 *Pace International Law Review* (1998), pp. 334-335.

<sup>310</sup> Genocide Convention articles 1 and 4. Cambodia acceded the Genocide Convention on 14 October 1950.

<sup>311</sup> Genocide Convention article 1 and ICC Statute article 17(1) a).

The ECCC was established through an agreement between the host state and the United Nations. Based on such an agreement, the Court cannot be said to violate state sovereignty, although a degree of sovereignty is ceded in allowing foreign participation in the national judicial system. To some extent, the prevention of sovereignty is interconnected with national ownership as it relates to the formal acceptance of the court, and the degree of national control maintained of the established institution. Nonetheless, the concepts should not be equated, and do not necessarily promote the same interests.<sup>312</sup> Ideally, the needs and wishes of the people are reflected in the position of the government, but that can obviously not be assumed to be the case. Ultimately, sovereignty refers only to the control retained by the government, which necessarily is limited once an independent tribunal has been established. Ownership, as will be shown below, refers to a broader range of participation by a number of national actors.

## 5.4 Whose Ownership?

When speaking of ownership, it is important to distinguish between different national actors that may to a higher or lesser degree claim ownership in a judicial process. Different actors will naturally play different roles in the proceedings. While acknowledging the need to involve national actors, it may in post-conflict societies be difficult to identify who those actors are.<sup>313</sup> This chapter identifies a number of actors that to a varying degree can be said to ‘own’ the process at the ECCC. Ownership is considered in a broad sense, including not only formal participants such as the national judiciary and civil parties, but seen as the overall interaction of the Court with the Cambodian society. Acceptance by the general population and NGO participation will therefore also be considered.

### 5.4.1 The National Judiciary

The perhaps most apparent form of national ownership at the ECCC is the participation of the national judiciary in the trials. Such participation serves a number of goals, including increased legitimacy, capacity building and identification with the proceedings.<sup>314</sup> Public opinion of a tribunal is likely to be more positive if it is not seen as an externally imposed, foreign element.

As suggested by Stensrud, one of the most important expectations on hybrid tribunals is the legacy that they will have domestically.<sup>315</sup> Experience from Sierra Leone show that, lacking cooperation with the national judiciary,

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<sup>312</sup> E. Stensrud (2004), *supra* note 302, p. 96.

<sup>313</sup> L. A. Dickinson, ‘The Promise of Hybrid Courts’, 97 *The American Journal of International Law* 2 (2003), p. 306.

<sup>314</sup> L. A. Dickinson, *supra* note 313, p. 302.

<sup>315</sup> E. E. Stensrud, ‘New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia’, 46 *Journal of Peace Research* 1 (2009), p. 10.

there is an overall impression that the Court is not “truly mixed”.<sup>316</sup> On the other hand, too ample involvement of the national judiciary can be counter-productive in societies in which the judiciary enjoys no or little confidence among the public. In Cambodia the judiciary enjoys little trust, which in fact is one of the reason for international involvement to begin with. Thus, participation of the national judiciary does not automatically carry with it legitimacy. The legitimate claim for national ownership must be weighed against other legitimate claims, such as the defendant’s right to a fair trial, and the confidence and credibility that international involvement (or ownership) may inspire.

In light of the above, the goal of capacity building, or ‘spill-over’ effects of the hybrid courts to the national judiciary, appears all the more important. A hybrid tribunal provides an opportunity to show national actors the rule of law being applied in practice. Practical experience and shared responsibility with international legal officers is likely to be more effective than abstract capacity-building courses.<sup>317</sup> For such spill-over effects to be realistic, it is important that the legal system applied does not differ too greatly from the domestic legal system.<sup>318</sup> A study of judges and prosecutors working in domestic Bosnian courts show that they have little knowledge of the ICTY, and are often suspicious of its motives and results. The study explains the results by the lack of participation of domestic actors, and the application of a legal framework based on common law, unfamiliar to Bosnian lawyers.<sup>319</sup> It has similarly been observed that the SCSL has amended its Rules of Procedure and Evidence (RPE), originally based on those of the ICTR, to conform to a larger degree to domestic law.<sup>320</sup> A mixed composition appears to provide a fruitful environment, as capacity building will work both ways. International lawyers may be more familiar with international law, while national lawyers are experienced in domestic law, procedure and legal traditions.

An important aspect of this shared ownership between the national and the foreign judiciary will lie in the every-day work of the judicial officers at the court. Usually being more experienced, international lawyers must be sensitive to the purposes they are to serve. Dickinson points out a risk that international lawyers in practice control the proceedings.<sup>321</sup> At the ECCC, such concerns can legitimately be raised. The number of submissions or motions originally filed in Khmer appears to be minimal, suggesting that a limited number of initiatives originate with Cambodian court officials. While capacity building is not necessarily excluded, national ownership is unconvincing if the function of the national judiciary is limited to their mere presence. A striking feature at the ECCC is its formally divided

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<sup>316</sup> *Ibid.*, p. 10.

<sup>317</sup> L. A. Dickinson, *supra* note 313, p. 307.

<sup>318</sup> H. Friman, ‘Procedural Law of Internationalized Courts’ in C. R. Romano *et. al.*, *supra* note 12, pp. 355-356.

<sup>319</sup> *Justice, Accountability and Social Reconstruction An Interview Study of Bosnian Judges and Prosecutors*, (2000), *supra* note 284, p. 42.

<sup>320</sup> H. Friman, *supra* note 318, p. 356.

<sup>321</sup> L. A. Dickinson, *supra* note 313, p. 306.

administration, all sections of the court having one international and one Cambodian side. This does not necessarily lead to a *de facto* division but does prompt an unnecessary demarcation between national and foreign staff. Despite problems in shared functions and responsibilities, the ‘mixed’ ownership in tribunals cannot be underestimated. The daily work of national and international judges and legal officers working together probably provides the best chance for a hybrid tribunal to set an example and serve as a future model for national legal professionals.

## 5.4.2 Victim Participation and Compensation

Crocker argues that any society attempting to deal with past atrocities must provide a platform for victims and their families from which they can tell their stories and through which their suffering is publicly acknowledged.<sup>322</sup> There has since the 1960s been a clear trend in both national and international law to recognize victims’ experiences and rights in criminal proceedings.<sup>323</sup> The most important purpose of victim participation is the sense of acknowledgement that victims may experience through the process of testifying and otherwise participating in the judicial proceedings.<sup>324</sup> The act of truth telling is in itself therapeutic, and helps victims regain a sense of agency.<sup>325</sup> Trumball argues that many of the arguments in favour of victim participation on a domestic level do not apply in an international context. Particularly, he observes that the large number of victims following mass atrocities will not allow for any meaningful participation for the individual victim, rendering the therapeutic aspect negligible.<sup>326</sup> He further argues that a small number of victims are given the opportunity to participate at the cost of prolonging the proceedings, making trials more expensive and possibly leading to fewer prosecutions.<sup>327</sup> As the experience at the ECCC illustrates, victim participation also creates a number of practical problems regarding courtroom management. Little empirical evidence has been presented to clarify the actual effects of participation in legal proceedings on victims. It appears that the experience is very individual, and that while some victims experience comfort and relief, others experience increased distress and suffering.<sup>328</sup> O’Connell concludes that the evidence does not suffice to justify trials against human rights violators *for the sake of the victims*.<sup>329</sup>

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<sup>322</sup> D. A. Crocker, ‘Reckoning with Past Wrongs: A Normative Framework’, *Ethics and International Affairs* 13 (1999), p. 11.

<sup>323</sup> C. P. Trumball, ‘The Victims of Victim Participation in International Criminal Proceedings’, 29 *Michigan Journal of International Law* (2007-2008), p. 780.

<sup>324</sup> *Ibid.*, p. 802.

<sup>325</sup> J. O’Connell, ‘Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?’, 46 *Harvard International Law Journal* 2 (2005), p. 330 and p. 337.

<sup>326</sup> C. P. Trumball, *supra* note 323, p. 804.

<sup>327</sup> *Ibid.*, pp. 811-812.

<sup>328</sup> J. O’Connell, *supra* note 325, p. 340.

<sup>329</sup> *Ibid.*, *supra* note 325, p. 340.

When victims do participate however, he recommends that proceedings are adapted to address their psychological needs.<sup>330</sup>

The possibility for victims to participate as civil parties in the proceedings is perhaps one of the most innovative elements of the ECCC.<sup>331</sup> While it is not explicitly provided for in the ECCC Agreement or Law, it is included in the Cambodian CPC.<sup>332</sup> According to the Internal Rules, such civil party action has the purpose of allowing victims to participate in the proceedings, and to seek moral and collective reparations.<sup>333</sup> An application form is provided by the Victims Unit, by which persons can apply to be recognized as civil parties.<sup>334</sup> The Victims Unit further maintains a list of national and international lawyers who wish to represent victims in the proceedings. Notably, the ECCC does not provide funding for the civil party lawyers. A substantial load is carried by NGOs that conduct outreach programmes, assist persons in filling out the victims form, provide psychological help, and help to provide legal representation.

While few contest the value for victims to participate in trials, the extent of such participation has been contentious throughout the ECCC proceedings. The question was first raised in a hearing on 7-8 February 2008 regarding the right of civil parties to address the court on the question of provisional detention. In its decision, the PTC recalled that “the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation”,<sup>335</sup> and that the wording of Internal Rule 23(1) was clear as to provide for participation in all stages of the proceedings. It was further recognized that arguments raised by the Civil Parties at an appeal hearing could cause an imbalance in the procedures and the right to a fair trial, had such arguments not been raised previously in the proceedings. Yet, the obligation to file written submissions before any hearing, and the possibility to respond to new arguments in writing, were considered to provide sufficient guarantees for the right to a fair trial.<sup>336</sup>

Following this initial recognition of civil parties’ rights, their possibility to participate has been limited through a number of decisions. Following observations made by the civil parties at a hearing on 30 June 2008, the PTC issued a decision in which it concluded that civil parties do not have the right to be allocated the same amount of time for their submissions as the

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<sup>330</sup> *Ibid.*, *supra* note 325, p. 341.

<sup>331</sup> While the ICC Statute allows for victim participation, victims do not acquire the status of parties, ICC Statute article 68(3).

<sup>332</sup> CPC article 137 provides “After the opening of a judicial investigation any persons who claim to be victims may, at any time, file a request to become a civil party to the investigating judge”.

<sup>333</sup> ECCC Internal Rules rule 23(1).

<sup>334</sup> ECCC Victim Form, available at

[www.eccc.gov.kh/english/cabinet/files/vu\\_participation\\_form\\_eng.pdf](http://www.eccc.gov.kh/english/cabinet/files/vu_participation_form_eng.pdf) (visited on 27 April 2009).

<sup>335</sup> *Nuon Chea*, 20 March 2008, ECCC, Pre-Trial Chamber, *Decision on Civil Party Participation in Provisional Detention Appeals*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), para. 37.

<sup>336</sup> *Ibid.*, paras. 42-43.

defence and prosecutors respectively. Further, they confirmed that civil parties may not speak personally, but must be represented by their lawyer in appeal hearings at the pre-trial stage.<sup>337</sup> The latter decision was prompted by statements made by one victim, also the director of a local NGO, following the dismissal of her lawyer, which according to the court amounted to a ‘victim statement’ rather than a submission on the legal questions at hand.<sup>338</sup>

The legal representatives of civil parties have on a number of occasions brought up the question of reparations for victims. While the CPC clearly provides for monetary reparations,<sup>339</sup> rule 23(1) (b) of the Internal Rules explicitly states that the Court can award only collective and moral reparations. In October 2008 a group of Civil Parties filed a request for reconsideration by the PTC of a decision made the previous month in which the Chamber found the Internal Rules to have supremacy over the CPC (see section 3.3 above).<sup>340</sup> This decision rules out the possibility of monetary compensation (unless the Internal Rules are revised). In March 2009 a revision of the Internal Rules was made with the effect that all legal submissions by civil parties must be done through their legal representatives.<sup>341</sup> The question of unrepresented civil parties remains unresolved.

The participation of victims in trials is an important acknowledgement of their suffering, and provides a symbolic platform for confronting their past persecutors. The specific circumstances, particularly the large number of victims, of mass atrocities, pose a number of practical problems in terms of management and the physical limitations of a courtroom. In the first case before the ECCC, almost a hundred civil parties have been recognized, and for the second case several hundred applications are pending. The large numbers make it difficult to provide all civil parties an opportunity to speak, or even attend important hearings (or the reading of the judgement). The interests of civil parties also have to be balanced against the rights of the defendant. The fact that different legal representatives take different and often contradictory stands on a number of legal issues does not make things easier.

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<sup>337</sup> *Ieng Sary*, 1 July 2008, ECCC, Pre Trial Chamber, *Decision on preliminary matters raised by the lawyers for civil parties in Ieng Sary's appeal against provisional detention*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03).

<sup>338</sup> *Nuon Chea*, 20 March 2008, ECCC, Pre-Trial Chamber, *Decision on Appeal Against Provisional Detention Order of Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01). See also S. Thomas, ‘Civil Parties’ Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC’, DC-Cam, 2 July 2008, available at <[www.genocidewatch.org/cambodia.html](http://www.genocidewatch.org/cambodia.html)> (visited on 2 May 2009).

<sup>339</sup> Code of Criminal Procedure article 14.

<sup>340</sup> *Nuon Chea*, 26 August 2008, ECCC, Pre-Trial Chamber, *Decision on Nuon Chea's appeal against order refusing request for annulment*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06).

<sup>341</sup> ECCC Internal Rules rule 23(7)(i).

### 5.4.3 The General Population

‘Legitimacy’ can be considered in terms of normative values, legal validity or empirical studies.<sup>342</sup> Both normative values and the legal validity of its establishment can contribute to the level of acceptance that a tribunal enjoys among the general public. Empirical studies have been made, albeit with methodological difficulties, to study public wish for a tribunal, and once established, knowledge of and confidence in the work of the ECCC.<sup>343</sup> The factors that affect such confidence are multiple and cannot be discussed in detail here. A note must be made of the link between popular acceptance and the objective impartiality of a court (see sections 4.4 above). A court is not considered to be impartial if “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.<sup>344</sup> In this context, it is essential that ‘justice not only be done, but also is seen to be done’.

The relevance of popular acceptance highlights the crucial work of outreach programmes in disseminating information about the Court and its work. Given the political context in which post-conflict tribunals operate, they are prone to being labelled to execute ‘victors’ justice’ or to represent foreign interests. The work of outreach programmes must therefore also take into consideration common misconceptions or misunderstandings concerning the court. The ICC defines ‘outreach’ as:

“a process of establishing sustainable, two-way communication between the court and communities affected [...] and to promote support and understanding of the judicial process [...]. Outreach aims to clarify misperceptions and misunderstandings and enable affected communities to follow trials.”<sup>345</sup>

In societies that are largely rural and have a low degree of literacy, recourse to alternative methods of communication such as town-hall meetings, public forums and radio programmes are important in ensuring the efficacy of outreach programmes.<sup>346</sup> An important task of outreach efforts is not only to promote the court but to explain the principles according to which it operates. In societies in which a large percentage of the population are victims<sup>347</sup> of a brutal regime, it may be difficult to explain why their former

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<sup>342</sup> E. E. Stensrud (2009), *supra* note 315, p. 8.

<sup>343</sup> See e.g. S. Linton, ‘*Reconciliation in Cambodia*’, Documentation Center of Cambodia, Cambodia (2004) and P. Pham *et. al.*, ‘*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, the United States (2009). Available at <[hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf](http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf)>.

<sup>344</sup> *Furundzija* Appeals Chamber, *supra* note 146, para. 189.

<sup>345</sup> See ICC homepage, <[www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach)>.

<sup>346</sup> N. H. Pentelovitch, ‘Seeing justice done: The importance of prioritizing outreach efforts at international criminal tribunals’, 39 *Georgetown Journal of International Law* 3 (2008).

<sup>347</sup> A survey made in Cambodia finds that 93 % of the respondents who were alive during the Khmer Rouge identify themselves as victims. P. Pham *et. al.*, *supra* note 343, p. 2. See also in the context of former Yugoslavia S. K. Ivkovic, ‘Justice by the International Tribunal for the Former Yugoslavia’, 37 *Stanford Journal of International Law* (2001), p. 296.

persecutors enjoy the best medical care in air-conditioned detention centres. In Cambodia, civil parties have expressed question as to why the proceedings have to take so long, and why the defendants have legal representation.<sup>348</sup> The possibility of an acquittal may seem inexplicable to many, why the task of explaining the legal process, the rule of law, and principles of a fair trial is an important means to manage expectations.

The outreach programme of the ECCC has been criticized for not adapting information to the larger Cambodian public, and for not having distinct offices for outreach and public affairs respectively.<sup>349</sup> Studies indicate that thus far efforts have not been sufficient to inform the public about the ECCC and its work. A study published in early 2009 finds that 39 % of the respondents had no knowledge of the court, and 46 % had only limited knowledge. 53 % of the respondents could accurately describe the ECCC as a mixed court, but 82 % were unable to name the five defendants before the court.<sup>350</sup> A success of the outreach programme at the ECCC has been the large number of attendants at trials, sometimes attracting substantial numbers even at pre-trial hearings.

NGOs can play an important role as a link between official court organs and the general public, through monitoring, dissemination of information and the mobilization of grassroots. It is a means to ensure that ownership regarding outreach remains local, and is adapted to local conditions.<sup>351</sup> In many ways, NGOs may be more likely to ensure that the general population enjoys a sense of ownership of the procedure, given their presence in society and the confidence they may enjoy compared to government organs. Due to a lack of funding of the outreach programme, civil society has taken an important role at the ECCC.<sup>352</sup> Over ten NGOs organize outreach activities related to the Court.<sup>353</sup> However, an over-reliance on civil society to disperse information about the court may lead to an incoherent and politicized message being sent to the public.<sup>354</sup> While it is important to involve local NGOs, and to make use of their knowledge and experience, responsibility for outreach programmes should remain with the court. NGOs also have an important role to play through monitoring and disseminating information about the progress of the trials. Although the newsletters published by Public Affairs provide an overview of court activity, they do not do this in a language adapted to the general public,<sup>355</sup> nor do they address various critiques raised regarding *e.g.* corruption at the Court.

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<sup>348</sup> See *e.g.* S. Sirik, 'Duch's Initial Hearing 17-18 February 2009 Participation of Khmer Rouge Survivors', DC-Cam (2009), available at <[www.dccam.org/Projects/Living\\_Doc/pdf/Report\\_on\\_Duch\\_Initial\\_Hearing\\_Feb\\_17-18.pdf](http://www.dccam.org/Projects/Living_Doc/pdf/Report_on_Duch_Initial_Hearing_Feb_17-18.pdf)>.

<sup>349</sup> N. H. Pentelovitch, *supra* note 346.

<sup>350</sup> P. Pham *et. al.*, *supra* note 343, p. 36.

<sup>351</sup> N. J. Kritz, *supra* note 295, p. 149.

<sup>352</sup> P. Pham, *supra* note 343, p. 19

<sup>353</sup> *Ibid.*, p. 19.

<sup>354</sup> N. H. Pentelovitch, *supra* note 346.

<sup>355</sup> *Ibid.*

A sense of ownership by the general public is important in safeguarding the Court's legitimacy, and for people to feel that justice is being made in their name.<sup>356</sup> Perhaps most importantly, advice should be sought from the general population at an early stage to become aware of perceptions of justice, expectations on a judicial process, understandings of reparations *etc.* Naturally, the level of acceptance is difficult to measure, but a locally based trial is likely to create discussion in a variety of forums, and hopefully engage the public in a number of ways.

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<sup>356</sup> P. Rapoza, 'Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?', 21 *American University International Law Review* (2005-2006), p. 525.

## 6 Independence and Impartiality of the ECCC

Following the thorough outline of international standards of independence and impartiality in chapter 4, the focus will in this chapter be placed on the ECCC and the issues that can be raised with regard to its independence and impartiality. As will be noted in the final section of this chapter, some of these issues can be attributed to its *ad hoc* establishment, others to its status as a hybrid court, and others yet are specific to the Cambodian context.

### 6.1 Safeguards in Cambodian law

As explicitly stated in the ECCC Law, the ECCC forms a part of the Cambodian legal system and is a part of its judicial structure.<sup>357</sup> A number of instruments are in force to guarantee the independence of the Cambodian judiciary. The Constitution provides: “the Judicial power shall be an independent power. The Judiciary shall uphold and guarantee impartiality and protect the freedoms and rights of citizens”.<sup>358</sup> The UNTAC Penal Code, adopted during the UN transitional authority in 1992 incorporates the UN Basic Principles into national law, and prescribes that “the judiciary must be independent of the executive and legislative authorities and of any political party”.<sup>359</sup> For years, concerns have however been expressed by local and international observers regarding the state of the Cambodian judiciary, particularly when it comes to independence from political interference.<sup>360</sup> Given its history, it is fair to say that Cambodia has in fact never known an independent judiciary. During the DK regime the judicial system was all but abolished, and very few Cambodians with education or legal training survived the regime.<sup>361</sup> The judiciary suffers from

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<sup>357</sup> ECCC Law article 2 new.

<sup>358</sup> Constitution of the Kingdom of Cambodia, adopted on 21 September 1993, available at < [www.cambodia.gov.kh/unisql1/egov/english/organ.assembly.html](http://www.cambodia.gov.kh/unisql1/egov/english/organ.assembly.html)>, article 128.

<sup>359</sup> Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, Decision of 10 September 1992, article 1.

<sup>360</sup> See *inter alia*, United Nations Economic and Social Council, Commission on Human Rights, ‘*Report of the Special Representative for Human Rights in Cambodia, Yash Ghai*’, 29 February 2008, UN Doc. A/HRC/7/42, United Nations, Office of the High Commissioner for Human Rights, Joint Public Statement, *The United Nations Special Representative for Human Rights in Cambodia the Special Rapporteur on the Independence of Judges and Lawyers express concern over judicial independence in Cambodia in light of recent judicial appointments* (hereinafter *Joint public statement*), 23 August 2007, Licadho, *Human Rights in Cambodia: The Charade of Justice*, December 2007, Licadho, Adhoc and Human Rights Watch *Impunity in Cambodia: How human rights offenders escape Justice*, June 1999, Amnesty International, *Amnesty International’s position and concerns regarding the proposed ‘Khmer Rouge’ tribunal*, Report April 2003, AI Index ASA 23/005/2003.

<sup>361</sup> J. Ramji, ‘Reclaiming Cambodian History: The Case for a Truth Commission, 24 *Fletcher Forum of World Affairs* (2000), p. 141.

understaffing, in 2007 comprising only 142 judges.<sup>362</sup> In 1999 the UN Group of Experts reported that judges were paid as little as 20 USD per month.<sup>363</sup> In 2003 salaries were increased significantly, ranging from 325 to 625 USD per month, depending on position.<sup>364</sup> This level of remuneration still remained the lowest in South-East Asia.<sup>365</sup>

The judiciary has on a number of occasions been relied upon by the government as a means to discourage political dissent.<sup>366</sup> A number of cases have been noted in which senior politicians have been convicted, only to be pardoned on a later date as part of a political deal. Following Hun Sen's coup in 1997, the former Co-Prime Minister, Prince Rinariddh, was in 1998 charged with conspiring to overthrow the government. He was tried *in absentia* and sentenced to 30 years of imprisonment and a fine of 54 million USD. When FUNCINPEC and CPP again formed a coalition in 1998, Prince Rinariddh was appointed President of the National Assembly.<sup>367</sup> Another example is deputy leader of the Sam Rainsy Party, Chean Channy, who in August 2005 was sentenced to seven years of prison for fraud and for forming an illegal armed force. The judgement has been internationally criticized, and the UN Working Group on Arbitrary Detentions found that his detention was contrary to article 14 of the ICCPR, as the military court by which he was tried lacked jurisdiction.<sup>368</sup> He was released in February 2006 following a royal pardon.<sup>369</sup> Opposition politician Sam Rainsy was arrested in 2005 after participating in a rally in Phnom-Penh on International Human Rights Day. He was sentenced *in absentia* to 18 months of imprisonment for defaming Prime-Minister Hun Sen and the President of FUNCINPEC, Prince Rinariddh. Sam Rainsy was pardoned in February 2006.<sup>370</sup>

Judges are appointed by the Supreme Council of the Magistracy, which according to a 1994 law also decides upon transfers, promotions, suspensions and disciplinary actions. Such actions are implemented by a Royal Decree.<sup>371</sup> The Council is composed of the King, the Minister of Justice, the President and Prosecutor-General of the Supreme Court and the

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<sup>362</sup> P. Pham, *supra* note 343, p. 16.

<sup>363</sup> *Report of Group of Experts*, *supra* note 52, para. 129.

<sup>364</sup> Sub-Decree on Allowance for Judges, Royal Government of Cambodia, 13 November 2002, cited in *Human Rights in Cambodia: The Charade of Justice*, *supra* note 360, p. 22.

<sup>365</sup> P. Pham *et. al.*, *supra* note 347, p. 16.

<sup>366</sup> H. D. Bowman, 'Not Worth the Wait: Hun Sen, the UN, and the Khmer Rouge Tribunal', 24 *UCLA Pacific Basin Law Journal* (2006-2007), pp. 64-65.

<sup>367</sup> *Human Rights in Cambodia: The Charade of Justice*, *supra* note 360, p. 5.

<sup>368</sup> The UN Working Group on Illegal Detention found that the Military Court had no jurisdiction over Chean Channy and that his detention had been contrary to article 14 of the ICCPR, *Chean Channy*, UN Human Rights Council, Working Group on Illegal Detention, Opinion 39/2005, adopted on 25 November 2005, in UN Doc. A/HRC/4/40/Add.1, 2 February 2007.

<sup>369</sup> Amnesty International Press Release, *Cambodia: Release of prisoner of conscience Chean Channy*, 6 February 2006, AI Index No. ASA 23/005/2006.

<sup>370</sup> 'Human Rights in Cambodia: The Charade of Justice', *supra* note 360, p. 4.

<sup>371</sup> Law on the Functioning and Organization of the Supreme Council of the Magistracy, 09/NS/94, 22 December 1994, cited in *Joint Public Statement*, *supra* note 360, p. 2.

President and Prosecutor-General of the Appeal Court. A remaining three seats are to be filled by judges elected by the judiciary itself, but elections will take place only when a Law on the Status of Judges has been passed, something which yet remains to be done.<sup>372</sup> As observed by the Special Representative of the Secretary-General for Human Rights in Cambodia, the composition of the Supreme Council of the Magistracy does not inspire confidence that judicial appointments are free from political control.<sup>373</sup> In 2007 the OHCHR and the Special Representative of the Secretary-General for human rights in Cambodia jointly issued a statement in which they expressed concern that the replacement of the President of the Court of Appeal had been made solely by a royal decree, without a decision of the Supreme Council of the Magistracy.<sup>374</sup> The appointment of four new members to the Supreme Council of the Magistracy likewise appeared to have been made by the executive, contrary to Cambodian law.<sup>375</sup> As a law on the status of judges has not been passed, there are no legal safeguards to protect the status of judges, or to prevent arbitrary disciplinary actions or dismissals.

The international judges, prosecutor and investigating judge at the ECCC are nominated by the UN Secretary-General, and appointed by the Supreme Council of the Magistracy.<sup>376</sup> National and international judges enjoy, according to the ECCC Law, “equal status and conditions of service”.<sup>377</sup> Hence, it would appear that the rules described above concerning dismissals and disciplinary actions apply both to national and international judges at the ECCC. The Cambodian regulations, and hence those at the ECCC, fall short of international standards, which require that dismissals and disciplinary actions, if not appointments, must be made independently of the executive (see section 4.3.1 above).

## 6.2 Independence from Political Influences

As has been noted above, political interference in the judiciary is not unusual in Cambodia. An often-cited<sup>378</sup> report by a Cambodian human rights organization begins:

“The Cambodian Justice System has failed. Despite the UNTAC intervention and 15 years of aid to legal and judicial reform, in 2007 the primary functions of the court continue to be to:

- Persecute political opponents and critics of the government

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<sup>372</sup> *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, supra note 360, para. 28.

<sup>373</sup> *Joint Public Statement*, supra note 360, p. 1.

<sup>374</sup> *Ibid.*

<sup>375</sup> *Report of the Special Representative of the Secretary-General for human rights in Cambodia*, supra note 360, para. 43.

<sup>376</sup> ECCC Law articles 11 new, 18 new and 26.

<sup>377</sup> ECCC Law article 12.

<sup>378</sup> Cited in *inter alia*, *Report of the Special Representative of the Secretary-General for human rights in Cambodia*, supra note 360, para. 19.

- Perpetuate impunity for state actors and their associates
- Protect the economic interests of the rich and powerful”<sup>379</sup>

Concerns have been raised that political attempts will be made to control the proceedings also at the ECCC.

Past participation of some of the ECCC judges in politicized cases may call into question their independence. In January 2008 the defence team of Nuon Chea filed a motion to disqualify Trial Chamber Judge Ney Thol based on his position as a chair of the Cambodian Military Tribunal, and as a (former) member of the CPP Central Committee.<sup>380</sup> The Judge had sat as President of the Military Tribunal in the trials against Chean Channy and Prince Rinarith, mentioned above. The same tribunal was responsible for the detention of Duch, prior to his transfer to the ECCC. The defence argued that Judge Ney’s position as a judge in the Military Tribunal, and his previous involvement in politicized cases objectively gave rise to the appearance of bias, “against Mr. Nuon and the Khmer Rouge, and in favour of the CPP”.<sup>381</sup> When questioned regarding Duch’s lengthy pre-trial detention, Judge Ney had been reported to justify an extension saying, “We have approval from the government to detain [Duch] for another year for investigations because this case is very crucial”.<sup>382</sup> In its decision of 4 February 2008, the Pre-Trial Chamber dismissed the defence’s motion.<sup>383</sup> Judge Ney had in fact resigned from his position at the CPP Central Committee upon his appointment to the ECCC. The Court found that the observations made on the Cambodian judiciary as a whole did not give evidence of any apprehension of bias in regard of Judge Ney. Finally the Court found that the defence had not shown that “opinions expressed in one case can give rise to appearance of bias in another”.<sup>384</sup> On 9 October 2008 Judge Ney however recused himself from the in the appeal of the closing order against Duch.<sup>385</sup>

As discussed in chapter 4, whether a court can be considered independent from outside pressures is conditioned on a number of factors, and in general a holistic approach must be adopted. Perhaps each one of the circumstances referred to by the defence may not suffice to call into question the independence of Judge Ney. Given the strong dependency of the judiciary,

<sup>379</sup> *Human Rights in Cambodia: The Charade of Justice*, supra note 360, p. 1.

<sup>380</sup> *Nuon Chea*, 28 January 2008, *Urgent Motion for Disqualification of Judge Ney Thol*, Case No. 002/19-09-2007-ECCC-PTC.

<sup>381</sup> *Urgent Motion for Disqualification of Judge Ney Thol*, supra note 380, para. 24.

<sup>382</sup> Reuters, *Cambodian Court Extends Khmer Rouge Detentions*, 25 February 2004

<sup>383</sup> *Nuon Chea*, 4 February 2008, *Public Decision on the on the Co-Lawyers’ Urgent Motion for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, ECCC Trial Chamber, Case No. 002/19-09-2007-ECCC-PTC.

<sup>384</sup> *Public Decision on the Co-Lawyers’ Urgent Motion for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, supra note 383, paras. 31-32.

<sup>385</sup> *Kaeng Guek Eav alias ‘Duch’*, ECCC Pre-Trial Chamber, *Public Notification of Recusal of Judge Ney Thol*, 13 October 2008, Case File No. 001/18-07-2007/ECCC/OCIJ/ (PTC02).

and the clear risk that the trials be used by the Government for political motives,<sup>386</sup> the picture as a whole is however rather bleak.

Concerns have also been raised regarding the political aspects of a current disagreement between the two Co-Prosecutors. The international prosecutor has suggested that further investigations be initiated to charge additional persons to those five currently in detention. The Cambodian prosecutor, who coincidentally is the niece of Deputy Prime-Minister Sok An, has opposed further investigations given “Cambodia’s past instability and continued need for national reconciliation” and the limited duration and budget of the Court. She has further contended that the spirit of the ECCC Law and Agreement “envisioned only a small number of trials”.<sup>387</sup> The Cambodian government has consistently put forward the same view. On 1 April 2009, Prime Minister Hun Sen stated that: “This is my absolute position... Just focus on these few people [the five charged persons presently before the ECCC]. If they try another 20 people and war erupts, who will take responsibility?”.<sup>388</sup> He added: “I would pray for this court to run out of money and for the foreign prosecutors and judges to walk out. That would allow for Cambodia to finish the trial by itself”.<sup>389</sup> Proceedings regarding further investigations are confidential, but it has been reported in the press that the investigation would concern an additional six suspects, and that none of them hold important positions in the current government.<sup>390</sup>

The reasons provided by the Cambodian Co-Prosecutor do suggest that political considerations have been made, and the fact that the Prime Minister himself joins the public debate cannot be considered but inappropriate. The situation is aggravated by the fact that the Cambodian judiciary, in lack of legal safeguards, is directly dependent on the Government. The disagreement between the Co-Prosecutors is currently before the Pre-Trial Chamber, and the decision rendered will without doubt be important in reinstall an appearance of independence.

## 6.3 Corruption

Given the weak state of the judiciary, it may not be surprising to find that corruption is widespread in Cambodia’s legal system. The country has for the last two years been ranked by Transparency International as among the twenty most corrupt countries in the world.<sup>391</sup> While difficult to measure,

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<sup>386</sup> Hammarberg writes that Hun Sen once said that the Khmer Rouge had been defeated militarily and politically, and that those achievements now would be sealed through a trial, see T. Hammarberg, *supra* note 47.

<sup>387</sup> ECCC, *Statement of the Co-Prosecutors*, 5 January 2009.

<sup>388</sup> S. Vong, ‘More suspects risks war: PM’, *The Phnom Penh Post*, 1 April 2009.

<sup>389</sup> *Ibid.*

<sup>390</sup> S. Mydans, ‘Cambodia tribunal dispute runs deeper’, *International Herald Tribune*, 27 January 2009.

<sup>391</sup> *Global Corruption Report 2008 Corruption in the Water Sector*, Transparency International, Cambridge University Press, the United Kingdom (2008), p. 302 and *Global Corruption Report 2007 Corruption in Judicial Systems*, Cambridge University Press, the United Kingdom (2008), p. 330.

the level of corruption is reflected in the general public's distrust in the judiciary. People are generally reluctant to contact the authorities.<sup>392</sup> Unfortunately, the ECCC does not appear to be immune to the corruption that is close to institutionalized in Cambodian society. One of the ECCC Trial Chamber Judges, Nil Nonn, in fact appears to have admitted to accepting bribes while working in a Provincial Court in Battambang. Speaking to an American journalist in 2002 he reportedly said: "yes, it happens to me as it does to others as well, but it is not through any efforts on my part. However, if people after a trial feel grateful to me and give me something, that's normal, I don't refuse it. I've settled the case for them and they feel grateful".<sup>393</sup> Responding to reports concerning this statement, the ECCC spokesperson said that "[Nil Nonn] denied it and this happened a long time ago. [...] It doesn't affect the tribunal. This work is extraordinary. Everything is very new".<sup>394</sup>

Since 2007, allegations have been made that Cambodian staff is forced to contribute a percentage of their salaries in exchange for their positions at the court (so-called kickbacks).<sup>395</sup> A report was made by the UNDP in 2007 concerning the human resources management and hiring procedures at the ECCC. The auditors found that allegations made regarding practices of staff employed by the Government of Cambodia fell outside the jurisdiction of UNDP. It nonetheless "took into account" the allegations made, and "found no evidence that would conclusively support the above allegations [of staff paying up to 30 % of their salaries in kickbacks]".<sup>396</sup> Additional reports on human resources management have been made, but have expressly not dealt with the issue of corruption.<sup>397</sup> The UN further initiated in 2008 a graft review regarding the actual allegations of corruption, yet its contents have been kept confidential. In October 2008 the UNAKRT Coordinator met with a delegation from the German Bundestag, and was reported to have

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<sup>392</sup> C. J. Nissen, *Living Under the Rule of Corruption An Analysis of Everyday Forms of Corrupt Practices in Cambodia Report on Qualitative Research Component*, Center for Social Development, Cambodia (2005), p. 2.

<sup>393</sup> J. Welsh and P. Chan Thul, 'Amanda Pike Filmmaker: KR Judge Said he Accepted Cash', *The Cambodia Daily*, 10-11 June 2006 and A. Pike, *Pol Pot's Shadow*, Frontline World, 22 October 2002, available at <[www.pbs.org/frontlineworld/stories/cambodia/diary04.html](http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html)> (visited on 2 May 2009) .

<sup>394</sup> *Ibid.*

<sup>395</sup> C. Barton, 'Tribunal Graft Charges Spread: German delegation exposes results of secret UN probe: staff concur', *The Phnom Penh Post*, 27 January 2009.

<sup>396</sup> *Interoffice memorandum from Salleppan Kandasamy, UN Office of Audit and Performance Review (OAPR) to UNDP-Cambodia regarding Special Audit of the Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia*, Report No. ECM0172, 4 June 2007, available at <[www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf](http://www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf)>.

<sup>397</sup> *Report to the Director of the Administration of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and to the Resident Representative of the United Nations Development Programme – Cambodia (UNDP)*, submitted by Daniel E. Conway, Human Resources Consultant, 3 August 2007 and *Report on the Special HRM Review Submitted to the Project Board of the Extraordinary Chambers in the Courts of Cambodia*, submitted by the HRM Review Team (Deloitte Touche Tohmatsu India), 25 April 2008. See also *Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, May 2008 Update*, Open Society Justice Initiative (May 2008), p. 28.

said that the Director of Administration had been found “guilty of corruption”, and that the U.N would have to withdraw its involvement if the allegations were not further investigated.<sup>398</sup> The Director of Administration has been on sick leave since November 2008. Further reports of corruption at the court were published in the press in February 2009, a former court employee stating that “you get paid in full, but when you [collect] it, you put it in an envelope and give it to the collector”, and “for the first months [of my contract] I paid 70 per cent [of my salary in kickbacks], then it went down to 10 percent”.<sup>399</sup> In May 2009 a government spokesperson declared that corruption allegations regarding kickbacks were a “foreign concept”, and that “Cambodian people give small payments at temples all the time”.<sup>400</sup> Discussions have been going on since 2008 between the UN Assistant Secretary-General for Legal Affairs and the Cambodian Deputy Prime Minister to agree on anti-corruption measures, including a mechanism through which employees can put forward complaints without fear of retaliation. Little trust remains between the two sides of the Court. In May 2009, a government spokesperson announced that corruption exists also among international staff, particularly among civil party lawyers and interns. He further claimed that the government itself had been monitoring the court, as it did not believe the report provided by the UN investigators.<sup>401</sup> Any official negotiations between the UN and the Cambodian government to address corruption do not appear to have taken place since April 2009.<sup>402</sup>

The defence team for Nuon Chea has made several attempts to address the corruption charges and to challenge the independence of the court. In January 2009 the defence filed a criminal complaint at the municipal court in Phnom-Penh claiming that their client’s right to a fair trial was violated at the ECCC.<sup>403</sup> The investigation was terminated by the Royal Prosecutor, and is currently pending an appeal with the Prosecutor-General. Following the criminal complaint, the national judges of the ECCC published a press release in which they stated that they “deeply regret” that such a complaint had been filed, and that they “absolutely reject” any accusations of kickbacks being paid at the court. The judges further declared: “if the above accusation stems from bad faith in putting the blame on the judges, we reserve the right to legal recourse against any individuals who provoked such a problem”.<sup>404</sup> Nuon Chea’s defence has moreover filed a number of requests for investigative action by the Co-Investigating Judges regarding

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<sup>398</sup> *Bericht über die Delegationsreise des Ausschusses für Menschenrechte und humanitäre Hilfe nach Kambodscha und Indonesien, 25 October – 3 November 2008*, p. 7. On file with the author.

<sup>399</sup> C. Barton, *supra* note 395.

<sup>400</sup> G. Wilkins and R. Corey-Boulet, ‘Foreigners at the ECCC Scrutinized’, *The Phnom Penh Post*, 13 May 2009.

<sup>401</sup> *Ibid.*

<sup>402</sup> See United Nations, Statement of Peter-Taksoe Jensen, Phnom Penh, 9 April 2009.

<sup>403</sup> Municipal Court of Phnom Penh Before the Office of the Royal Prosecutor, *Criminal Complaint by Michael Pestman, Victor Koppe and Andrew Ianuzzi*, 8 January 2009. On file with the author.

<sup>404</sup> ECCC Press Release, 9 January 2009.

the allegations of corruption, the latest of which was filed in March 2009.<sup>405</sup> The request was nonetheless denied on the basis that it was not within the mandate of the Co-Investigating Judges to investigate allegations of corruption at the Court.<sup>406</sup>

Sufficient reports have been made to seriously put into question the practices of court staff and to warrant a thorough investigation regarding corruption at the ECCC. The most crucial aspect of corruption allegations is that they are adequately addressed, and that mechanisms for future concerns are in place. The public must be kept informed of what steps have been taken to address allegations, in order to maintain the credibility, and the appearance of independence of the court. While some measures have been taken, none have been sufficient to guarantee that corruption does not continue to occur at the ECCC. The effects of corruption on a larger scale remain unclear. It is not necessary that lower-level corruption affects the independence of the court. As the extent of corruption remains unknown, it is difficult to assess its consequences. Nonetheless, it is not reassuring if a significant number of employees at the Court owe loyalty to others than their superiors. Negotiations between the UN and the Cambodian government regarding an ‘ethics monitoring system’ appear to have come to a stalemate. Furthermore, the question of corruption has come to accentuate the distrust between the Cambodian and UN side of the Court, and has led to a stronger demarcation between their respective powers.

## 6.4 Financing

Like the SCSL, the ECCC is entirely dependent on voluntary contributions for its operation. Budgets and contributions by donors are made public,<sup>407</sup> which is an important aspect in ensuring transparency. The inconsistency and uncertainty of voluntary contributions do however have bearing on a number of issues related to judicial independence and impartiality.

In his 2003 report on the establishment of a tribunal in Cambodia, the UN Secretary-General held that the “operation of a court should not be left to the vagaries of voluntary contributions. It could well be held that courts, as a matter of constitutional principle, should be financed by taxation, or at the international level, through the analogous mechanism of assessed contributions.”<sup>408</sup> When voluntary contributions finally were agreed upon as the source of funds, he stressed that, given the experiences from Sierra Leone, the Court should not become operational until sufficient pledges had been received for three years, and actual contributions for one year of the

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<sup>405</sup> *Nuon Chea, Eleventh Request for Investigative Action*, 27 March 2009, Case No. 002/19-09-2007-ECCC-OCIJ.

<sup>406</sup> *The Co-Investigating Judges Respond to a Request for investigative action by certain defence teams concerning allegations of corruption at the ECCC*, ECCC Press Release, 3 April 2009.

<sup>407</sup> See the ECCC homepage <[www.eccc.gov.kh/english/finances](http://www.eccc.gov.kh/english/finances)> (visited on 15 April 2009).

<sup>408</sup> *Report of the UN Secretary General on the Khmer Rouge Trials*, *supra* note 54, para. 75.

Court's operation.<sup>409</sup> In December 2004 the UN and the Cambodian government agreed upon a budget of a total 56.3 million USD for the planned three-years operation of the ECCC, of which 43 million would be raised by the UN and the remaining 13.3 million would be raised by Cambodia.<sup>410</sup> Notably, UN funds are designated to international staff, while Cambodian funds are designated to Cambodian staff. The UN budget was almost fully subscribed, principally through a contribution from Japan amounting to 50 % of the budget. A number of donors contributed to the Cambodian budget, including the Cambodian government (1.5 million USD), India (1 million USD), and the European Commission (1.3 million USD). Resources were also transferred from funds of previous UN activities in Cambodia to a UN Trust Fund (5.3 million USD). The Trust Fund, as well as funds provided by the European Commission, is managed by the UNDP office in Phnom-Penh. Despite these contributions, the ECCC was still 4,3 million USD short in March 2008. In addition, a number of gaps and shortfalls were recognized in the original budget, and a revision took place in late 2007. The revised budget, presented in July 2008, provided for an additional 44,1 million USD for the period 2005-2009.<sup>411</sup> It was further acknowledged that the Court would not complete its work in the envisaged three years, and an estimated budget of 35 million USD was added for the year of 2010.<sup>412</sup>

In August 2008, following allegations of corruption at the ECCC, the UNDP froze the payments of contributions to the Cambodian side of the Court. Donors had for some time been requested by monitoring NGOs to take greater responsibility for the manner in which contributions were being spent.<sup>413</sup> Funds managed by the UNDP continue to be withheld, at the request of donors, in the absence of satisfactory investigations concerning corruption and procedures to prevent further mismanagement. In March 2009 it was reported that the Court had run out of money, and was unsure of being able to pay salaries for Cambodian staff at the end of the month.<sup>414</sup> The situation was solved at the last moment by the Japanese government, who on 20 March contributed an additional 200,000 USD to "cover the shortfall of the Cambodian side regarding the ECCC operation cost".<sup>415</sup> The

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<sup>409</sup> UN General Assembly, *Report of the Secretary General on the Khmer Rouge trials*, 12 October 2004, UN Doc. A/59/432, para. 14 b).

<sup>410</sup> ECCC, First Quarterly Financial and Activity Progress Reports 2008, 31 March 2008, p. 2.

<sup>411</sup> ECCC, Revised Budget Estimates from 2005 to 2009, July 2008, available at <[www.unakrt-online.org/Docs/Other/2005-2009%20ECCC%20Approved%20Budget.pdf](http://www.unakrt-online.org/Docs/Other/2005-2009%20ECCC%20Approved%20Budget.pdf)> (visited on 15 April 2009), para. 15.

<sup>412</sup> *Ibid.*, para. 22.

<sup>413</sup> See e.g. J. A. Goldstone, 'An Extraordinary Experiment in Transitional Justice', in *The Extraordinary Chambers*, Open Society Justice Initiative (Spring 2006), p. 4.

<sup>414</sup> P. Neth and G. Wilkins, 'Judges should focus on current KR suspects: gvt', *The Phnom Penh Post*, 12 March 2009.

<sup>415</sup> Press Release, Embassy of Japan in the Kingdom of Cambodia, *Japanese Assistance for the Project to Enhance Judicial Process of the Extraordinary Chambers in the Courts of Cambodia*, 20 March 2009, available at <[www.eccc.gov.kh/english/cabinet/press/103/Press-Release-En.pdf](http://www.eccc.gov.kh/english/cabinet/press/103/Press-Release-En.pdf)> (visited on 2 May 2009).

same situation was repeated at the end of April 2009, after which Japan donated 4 million USD, which should keep the Cambodian side operative until the end of 2009.<sup>416</sup> Funding for the international side appears to have been resolved until the end of 2010, following donations by the United States of America (1.8 million USD), Germany (4.3 million USD)<sup>417</sup> and, significantly, Japan (21 million USD).<sup>418</sup>

As held by the UN Secretary-General in 2003, voluntary contributions do not “provide for a secure basis for the conduct of investigations, prosecutions and trials.”<sup>419</sup> As discussed in chapter 4, the structural independence of a court may be affected if it is too dependent on outside institutions for its functioning. A court that lacks sufficient resources will clearly have difficulties to provide a fair and impartial trial. A difficult question is the degree to which contributions by states can and should be conditioned. On the one hand, the freezing of assets pending appropriate measures against corruption is an important means by which to put pressure on the Cambodian government. On the other hand, demands by donors that are too specific may come to encroach upon the appearance of independence of the court. Even the theoretical possibility that a donor could withdraw funds following particular decisions or judgements makes the reliance on voluntary contributions awkward. An aggravating aspect is the fact members of staff who are unsure whether they will be paid or not at the end of the month are rather more susceptible to corruption than less so.

## 6.5 Impartiality

Although the DK were removed from power three decades ago, the events of its regime remain a trauma for most of Cambodian society. As put by Cambodian scholar Craig Etcheson:

“Everyone’s lives are connected in some way, usually in many ways, to the Khmer Rouge. Every individual in the country had members of his or her family murdered [...] Virtually every member of the elite class has been variously subject of, a member of, allied to, and/or at war with the Khmer Rouge for more than three decades. [...] Consequently, the matter of genocide justice in Cambodia is not merely a legal or political question – it is personal”.<sup>420</sup>

This is of course true also for the judges at the ECCC. It is difficult to imagine that any judge, national or international, will arrive at the ECCC

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<sup>416</sup> S. Cheang, ‘Japan Donates \$ 4 million to Khmer Rouge Tribunal’, *Associated Press*, 1 May 2009, available at <[http://hosted.ap.org/dynamic/stories/A/AS\\_CAMBODIA\\_GENOCIDE\\_TRIAL?SITE=ND&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/A/AS_CAMBODIA_GENOCIDE_TRIAL?SITE=ND&SECTION=HOME&TEMPLATE=DEFAULT)> (visited on 6 May 2009).

<sup>417</sup> *Recent Developments in the Extraordinary Chambers in the Courts of Cambodia October 2008 Update*, Open Society Justice Initiative, October 2008, available at <[http://www.justiceinitiative.org/db/resource2?res\\_id=103899](http://www.justiceinitiative.org/db/resource2?res_id=103899)> (visited on 2 May 2009), p. 4.

<sup>418</sup> *Recent Developments in the Extraordinary Chambers in the Courts of Cambodia February 2009 Update*, Open Society Justice Initiative, February 2009, p. 3.

<sup>419</sup> *Report by the Secretary General on Khmer Rouge Trials (2003)*, *supra* note 54, para. 74.

<sup>420</sup> C. Etcheson, ‘The Politics of Genocide Justice in Cambodia’, in C. Romano *et. al.*, *supra* note 12, p. 181.

completely without “any preconceptions about the matter put before them”.<sup>421</sup> For decades the events that took place in Cambodia have been labelled as constituting genocide. A ‘Genocide Museum’ is located at the site of the former S-21 prison in Phnom-Penh. The USA has adopted legislation stating that the persecution under the DK regime constitutes “one of the clearest examples of genocide in recent history”.<sup>422</sup> In Cambodia, they “day of hate” or “day of anger” marks the remembrance of the end of the DK era.<sup>423</sup> The requirement of impartiality cannot be brought to the verge of absurdity, where judges are expected to know nothing and have no opinion of what happened in Cambodia, or of who governed the country between 1975 and 1979. Judges will to some extent “straddle the line between impartiality and prejudgement”.<sup>424</sup> For various reasons, as scholars of international law, as victims or as human rights advocates, they may be in favour of the establishment of a tribunal, and the prosecution of former Khmer Rouge leaders. Yet, in relation to the individual defendants before the court, strongly identified with the DK regime, they must remain impartial. As discussed in section 4.4.1 above, judges are expected to have the training and experience to disassociate themselves from irrelevant impressions, and to focus on the legal issues at hand. This requires the judges to keep an open mind and maintaining a strong professionalism, which may be a particular challenge to Cambodian judges.<sup>425</sup>

As referred to above, the defence for Nuon Chea attempted to disqualify Judge Ney Thol for lacking independence and impartiality (see section 6.2 above) in early 2008.<sup>426</sup> It was pointed out that he for a long time had been a high-ranking member of the Cambodian army that for over two decades had fought against the Khmer Rouge. This, considered together with the political control exercised over the Military Tribunal over which Judge Ney later presided, was according to the defence enough to call into question the objective impartiality of the Judge.<sup>427</sup> The Court was however not convinced by these arguments, stating in its decision that the conclusions drawn by the defence did not “reach the high threshold of evidence required to rebut the presumption of impartiality”.<sup>428</sup> Given the importance of upholding an appearance of impartiality to inspire confidence in a court, and the difficulty to prove actual bias or lack of independence, upholding a too high a threshold may be inappropriate. According to the court, the defence had submitted “observations upon the alleged competence and motivation of

<sup>421</sup> *Karttunen v. Finland*, *supra* note 112, para. 7.2. See section 4.4 above.

<sup>422</sup> United States Foreign Relations Act, Fiscal years 1988 and 1989, Pub. L No. 100-204, art. 906, cited in W. A. Schabas, ‘Problems of International Codification: Were the Atrocities in Kosovo and Cambodia Genocide?’, 35 *New England Law Review* (2000-2001), p. 292.

<sup>423</sup> S. Linton, ‘Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers’, *Journal of International Criminal Justice* 4 (2006), p. 339.

<sup>424</sup> J. K. Cogan, *supra* note 214, p. 133.

<sup>425</sup> S. Linton, *supra* note 423, p. 339.

<sup>426</sup> *Nuon Chea*, *Urgent Motion for Disqualification of Judge Ney Thol*, *supra* note 380.

<sup>427</sup> *Ibid.*, para. 25.

<sup>428</sup> *Nuon Chea*, *Public Decision on the on the Co-Lawyers’ Urgent Motion for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea*, *supra* note 383, para. 19.

the Cambodian judiciary as a whole [...] [that] are no evidence in respect of an apprehension of bias by Judge Ney Thol in this case against Nuon Chea”.<sup>429</sup> While this may be the case, the fact that judges not only lived under the DK regime but also for decades have been part of an establishment fighting, militarily and politically, against the remaining Khmer Rouge leaders would, to an objective bystander, call into question their impartiality.

## 6.6 *Ad Hoc* Establishment

While the *ad hoc* establishment of a tribunal does not in itself infringe on the principle of non-retroactivity,<sup>430</sup> the fact that a court is established for a range of particular crimes committed during a particular period of time does pose a number of questions as regard the perceived independence and impartiality of the court. As demonstrated in chapter 2, the process leading to the establishment of the ECCC was intrinsically a political one, and the decisions regarding personal and temporal jurisdiction, composition and structure of the court, and the resources provided for its operation are the results of political compromises. Being created by political and not judicial bodies, that is an unavoidable aspect of *ad hoc* tribunals. Yet, the choices made at this stage may affect the perceived independence and impartiality of the court throughout the proceedings. Failures to solve certain questions during the negotiations will leave them to be decided during the proceedings. This may lead to problems with regard to predictability for the parties and the separation of powers.

The temporal jurisdiction of the ECCC is limited to the period in which the Khmer Rouge was in power, which does seem like a natural limitation. During the negotiations, propositions were made on a number of occasions by the Cambodian government to extend the jurisdiction to include other crimes committed before and after the DK era.<sup>431</sup> An extension further back in time would include crimes committed during the American bombings, and an extension to the period after the DK would include possible war crimes committed by the Vietnamese. Such proposals show a willingness to use trials for political purposes.

The perhaps most sensitive question during the negotiations was that of personal jurisdiction. For the sake of maintaining national stability, people had to remain convinced that any large-scale purges of former Khmer Rouge cadres would not take place. Negotiations were infected by the fact that Prime-Minister Hun Sen was commonly referred to in international

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<sup>429</sup> *Ibid.*, para. 32.

<sup>430</sup> The principle of non-retroactivity has consistently been held to cover only the substantive law concerning the potential crimes committed, not the forum in which they are prosecuted, see *e.g.* W. A. Schabas, *supra* note 2, p. 61 ff. There is however, at least on domestic level, a requirement that tribunals be ‘established by law’ (ICCPR article 14), see further section 4.2.2 above.

<sup>431</sup> T. Hammarberg, *supra* note 47, and T. Fawthrop and H. Jarvis, *supra* note 31, p. 165.

press as a former Khmer Rouge leader,<sup>432</sup> and named by the U.S. Congress as one of the leaders of the Cambodian genocide.<sup>433</sup> At the adoption of the ECCC Law in the National Assembly in 2001, one speaker stated:

“We request and appeal to civil servants, military officials, soldiers, who used to live and serve the Democratic Kampuchea Regime [...], do not worry. Because so far as a parliamentarian, I notice that there has been disturbance among brotherly people who used to be involved in the Democratic Kampuchea regime”.<sup>434</sup>

Another speaker observed:

“The law will try a small targeted group who committed [the most] wrong things [...] we find that the targeted group is not widespread; the concept is to define the targeted group distinctly and obviously to the smallest number”.<sup>435</sup>

Naturally, it was important to control fears that large sections of Cambodian society may face prosecutions, as this was never the aim of the trials. At the same time, once a tribunal has been established, prosecutorial independence must allow for investigations of all persons falling within the jurisdiction of the court. By the time the ECCC was established, three of the five suspects today before the court were already in detention or house arrest by Cambodian authorities. The line of the government has consistently been to limit the number of prosecutions to four or five persons.<sup>436</sup> The Cambodian Co-Prosecutor echoes this view when she argues against further prosecutions because the spirit of the ECCC Law and Agreement “envisioned only a small number of trials”.<sup>437</sup> While it is necessary to limit the personal jurisdiction to those most responsible of serious crimes, the court should not be seen to have further limitations upon it than those prescribed by its statute. It will be an important task by the Pre-Trial Chamber to show that such limitations have not been taken into account when it resolves the dispute between the Co-Prosecutors regarding further prosecutions.

A criticism that has been put forward against *ad hoc* criminal tribunals in general, is that they by definition are inherently biased against the defendants.<sup>438</sup> While the same to some extent can be said about all criminal proceedings, *ad hoc* tribunals are different because they are set up with the specific purpose of prosecuting specific crimes. Given the context in which they operate, such tribunals “carry a high symbolic and political load”.<sup>439</sup> Because of their selectivity, a few persons are made to represent an entire regime and the crimes committed by it,<sup>440</sup> and their possible acquittal will

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<sup>432</sup> See e.g. S. Mydans, ‘Under Prodding, 2 Apologize for Cambodian Anguish’, *The New York Times*, 30 December 1998, cited in T. Fawthrop and H. Jarvis, *supra* note 31, p. 151.

<sup>433</sup> United States House of Representatives, resolution 533, 10 October 1998.

<sup>434</sup> Statement by Chean Yieb, National Assembly Minutes, *supra* note 305.

<sup>435</sup> Statement by Nhean Vanda, National Assembly Minutes, *supra* note 305.

<sup>436</sup> See e.g. S. Vong, *supra* note 388. Statement by Prime-Minister Hun Sen cited in section 6.2.

<sup>437</sup> ECCC, *Statement of the Co-Prosecutors*, 5 January 2009.

<sup>438</sup> J. K. Cogan, *supra* note 214, p. 133.

<sup>439</sup> M. Humphrey, *supra* note 280, p. 499.

<sup>440</sup> *Ibid.*, p. 500.

undoubtedly carry an equally symbolic weight. This is particularly the case when the number of defendants is very low, as is the case at the ECCC. Should one or more defendants be acquitted, questions will certainly be asked concerning the usefulness of a tribunal. As put by Cogan “it is not too difficult to imagine that these courts have an institutional bias against defendants because their continued existence depends on producing convictions”.<sup>441</sup> The symbolic function of trials, in providing a sense of justice to victims and as a way for society to address its past, is in many ways their *raison d’être*. However, too much focus on those symbolic purposes may be problematic, as they disregard the legal requirements on a trial, including the presumption of innocence. An important task of the court, particularly its outreach sections, lies in managing expectations and emphasizing the principles according to which the court, albeit its extraordinary circumstances, operate.

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<sup>441</sup> J. K. Cogan, *supra* note 214, p. 133.

## 7 Concluding Remarks

The question of dual ownership touches on the core of what the purposes of hybrid courts are, and what they ought to accomplish. The aim of the ECCC is foremost to bring to justice a number of persons who have committed crimes. However, its goals extend far beyond that, and include bringing long-lasting influences to the Cambodian society. If the sole purpose of a tribunal were to try certain persons in accordance with the best of international standards, an international tribunal in line with those established for the former Yugoslavia and Rwanda would probably have been the best option.<sup>442</sup> Apart from providing justice at a cheaper price, a number of legitimate reasons can be presented in favour of a locally based tribunal, and for including the participation of various national actors. Hybrid tribunals are more likely to instil a sense of national ownership of the judicial proceedings. Trials may as a consequence be more likely to be accepted, whatever their outcome. The proceedings can function as an example in capacity building efforts. Victims will experience a greater sense of justice.

The ECCC faces a number of serious challenges with regard to its independence and impartiality. The safeguards provided in Cambodian law to protect judicial independence and impartiality are inadequate, which *per se* affects the appearance of independence. The allegations of corruption are a critical risk to the ECCC, as adequate measures have not been taken to ensure that corruption does not continue to occur. To ‘own’ a process also entails accountability for it. The question of corruption has caused a division, if not open conflict, between the two administrations of the Court. The dual ownership of the Court has allowed for the Cambodian government to block proposals of effective anti-corruption measures. The fact that the UN does not consider itself to have jurisdiction to investigate mismanagement of the court underlines a profound problem, and emphasizes that a *shared* ownership may lead to an overall *lack* of ownership, or responsibility.<sup>443</sup>

The question of funding for *ad hoc* tribunals will remain problematic if it is to be dependent on voluntary contributions. The situation has been aggravated at the ECCC as funds have been frozen pending a response to allegations of corruption. The circumstances underline important questions that must be raised regarding the conditions that donors can place on their contributions. It is further important to recognize that the decisions taken at the negotiating stage regarding the jurisdiction and structure of a court will have long lasting effects on its appearance of independence. It is at this point important to be aware of public attitudes towards a trial, and to counteract possible perceptions of a trial as ‘victors’ justice’ or a political instrument. The choices made regarding temporal, personal and substantive

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<sup>442</sup> S. R. Ratner *et al.* (2009), *supra* note 290, p. 349.

<sup>443</sup> P. Rapoza, *supra* note 356, p. 539.

jurisdiction will affect the appearance of independence during its future operation.

Some of these problems pose a significant challenge to the ECCC in the remainder of the proceedings. The corruption charges, concerns regarding political influences, and the insecurity of funds must be addressed in order for the Court to fully live up to international standards. Other aspects, such as the lack of legal safeguards can hardly be remedied at this stage in the proceedings. Nonetheless, they can be mitigated if the Court is seen to operate independently and professionally. In light of statements made by the Cambodian government, and the apparent ‘thug of war’ between the two sides of the administration, that can unfortunately hardly be said to be the case.

A hybrid ownership of a judicial process runs the risk of generating an awkward trade-off between national participation and international standards of justice. The positive influence that trials may have on victims, the symbolic value they represent for society as a whole, and the example they may set for the rule of law are in many ways the *raison d’être* of a hybrid court. Yet, too much focus on these goals may deprive the Court of its legitimacy if they are promoted at the cost of judicial independence and impartiality. It must further be avoided that the trials becomes a “hostage of national politics”.<sup>444</sup> Failures to live up to international standards of justice will jeopardize not only the credibility of the court, but also that of the UN’s involvement.

Although beyond the scope of this thesis, attention should be paid to alternative or complementary mechanisms that may promote similar values without the rigid constraints of a legal procedure. Rather than lower the standard of a trial, a higher level of participation may be possible through open discussions, truth commissions, or other mechanisms of reconciliation. Such mechanisms can provide a compliment to prosecutions, and to a larger extent “overcome the inherent limitations of criminal justice processes – to do the things that courts do not do or do not do well”.<sup>445</sup>

What the legacy of the ECCC will be remains to be seen. At the moment, it is in the focus of attention on both a national and international level due to many of its innovative features. What will be its impact on international law, and more specifically, the future of hybrid courts? As has been the case with its predecessors, valuable conclusions will be drawn from the experience of the Extraordinary Chambers. It has in a number of ways set a positive example, and new lessons will be learnt from the problems it has faced. Despite the establishment of a permanent criminal court, there is a continued focus on finding nationally based solutions following mass atrocities. Suggestions have been made that hybrid courts may be suitable

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<sup>444</sup> E. Stensrud (2009), p. 12.

<sup>445</sup> *Report of the Secretary General on Khmer Rouge Trials* (2004), *supra* note 282, para. 47.

responses to situations in, *inter alia*, Kenya,<sup>446</sup> Afghanistan and Columbia.<sup>447</sup> Prosecutions should be considered as only one of many measures to be taken during a period of transitional justice. The possibility of a tribunal should be examined within the context of peace negotiations, democratic elections, and truth commissions.<sup>448</sup> A more holistic approach will contribute to managing the expectations on tribunals, and allow for wider participation, and ownership, in a number of forums. As the example of the ECCC has shown, it is however important for the UN to retain a degree of control over the proceedings. Its presence should not be limited to capacity building and a letterhead on court documents. To legitimize its involvement, the UN must ensure, and have the means to do so throughout the process, that international standards of justice are adhered to.

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<sup>446</sup> Y. Ghai, 'The Khmer Rouge Tribunal: Lessons for Kenya?', *The Standard*, 8 February 2009, available at <[www.eastandard.net/InsidePage.php?id=1144006125&cid=4&ttl=The%20Khmer%20Rouge%20tribunal:%20Lessons%20for%20Kenya](http://www.eastandard.net/InsidePage.php?id=1144006125&cid=4&ttl=The%20Khmer%20Rouge%20tribunal:%20Lessons%20for%20Kenya)> (visited on 28 April 2009).

<sup>447</sup> A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in C.P. R. Romano, *supra* note 12, p. 10.

<sup>448</sup> M. Humphrey, *supra* note 280, p. 496.

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