

Beyond Justice, Towards Legacy

A case study on legacy at the Extraordinary Chambers in the Courts of Cambodia

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Abstract: Due to their novel structure, hybrid courts have raised high expectations that go beyond delivering justice. One of these expectations is their potential to leave a long-lasting legacy for the rule of law in a particular society. This thesis focuses on the potential positive legacy of a hybrid court for the domestic legal and judicial system and in particular for fair trial rights. The author conducts a critical case study on legacy work done at The Extraordinary Chambers in the Courts of Cambodia on the basis of a literature study and fieldwork conducted in Phnom Penh. The author takes into account the hybrid structure of the Court that can enhance legacy work, the challenges and limitations for legacy initiatives and the work done by different stakeholders. Lastly, general conclusions and recommendations based on this case study are made, which are not only applicable to the Court in Cambodia, but to hybrid courts in general.

Keywords: Legacy, transitional justice, The Extraordinary Chambers in the Courts of Cambodia, fair trial rights, human rights, hybrid courts, model court, demonstration effect

I. Introduction

A. Background

Hybrid courts are courts of mixed composition and jurisdiction, incorporating both national and international aspects, and usually operating within the jurisdiction where the crimes occurred. High expectations have been placed on hybrid courts due to their novel structure. Hybrid courts have, for example, been considered as being capable of bringing justice, reconciliation and providing capacity building of the judiciary.

Legacy is one of the expectations placed on hybrid courts. With 'legacy' is understood that hybrid courts could have a "lasting impact on bolstering the rule of law in a particular country, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the hybrid court is complete."¹

Hybrid courts are targeted international interventions that can leave behind more than just justice. These interventions create a unique window of opportunity due to the international community's attention, resources and effort, and as such this window of opportunity should be maximised.² Through legacy work that focuses on strengthening the domestic legal system, a hybrid court can make a sustainable and permanent contribution.

In order for legacy work to be successful, different issues should be taken into account, such as adopting a legacy strategy, the necessity of planning legacy from the beginning of the establishment of a hybrid court and the importance of coordination and leadership. Hybrid courts also face various challenges and are subjected to limitations, such as their proneness to political interference and lack of resources, all of which should be tackled and taken into account.

¹ United Nations, Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post Conflict Societies States: Maximizing the Legacy of Hybrid Courts (2008) 4-5.

² *ibid* 1.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is one of the six hybrid courts established jointly by the UN and governments in order to try alleged perpetrators of gross human rights violations.³ Its hybrid structure, which includes, for instance, in-country location, mix of Cambodian and international staff and the application of Cambodian law, offers a great opportunity to positively impact the national legal system and in particular to leave a long-lasting legacy for fair trial rights. However, in order to successfully leave this legacy, the Court has to face numerous challenges and limitations.

B. Research questions and objectives

The author intends to conduct a case study on the possible legacy of the ECCC for the Cambodian domestic legal system and in particular for fair trial rights. The focus will not be on specific legacy initiatives but rather on making an overall assessment of the legacy work done in Cambodia. On the basis of this case study, the author will make in the final chapter general conclusions and recommendations which do not only apply to the ECCC, but also to legacy work at hybrid courts in general. The author decided to focus on fair trial rights as this is one of the major challenges on the domestic level and as there is a great potential for the ECCC to positively impact fair trial rights, ultimately leaving a lasting legacy in this regard.

The author intends to conduct her research by addressing the following research questions:

Main research questions:

- How is the potential legacy of the ECCC for the Cambodian domestic legal system, in particular for fair trial rights, dealt with?
- Can a current positive impact on the Cambodian domestic legal system and in particular on fair trial rights be noted?
- Which conclusions and recommendations can be made on the basis of the ECCC's legacy case study for legacy work at the ECCC and at hybrid courts in general?

Subsidiary research questions:

- Which features of the ECCC can positively impact the Cambodian legal system and leave a lasting legacy?
- What are the limitations and the deficiencies that challenge the ECCC's legacy?
- How can legacy projects be improved and which issues should be taken into account when conducting a legacy project?

C. Methodology

The research is based on literature review and fieldwork in Phnom Penh, Cambodia.

This research thesis draws on fieldwork conducted in May 2015 in Phnom Penh, Cambodia. The methods of fieldwork include semi-structured interviews and informal conversations with court staff, both from the international and national side. The author also attended court hearings at the Court of Appeal in Phnom Penh with the trial monitoring team of the Cambodian Center for Human Rights, as well as court hearings at the ECCC. The author was able to meet with representatives of the Defence Support Section, Trial Chamber, Cambodian Center for Human Rights, The Documentation Center of Cambodia, Legal Aid of Cambodia, the United Nations Office of the High Commissioner for Human Rights (UN OHCHR) and a legal consultant based in Cambodia who has, i.a., experience with the Civil Party Lead Co-lawyers Section and working as Human Rights Advisor for the Cambodian Human Rights Action Committee (CHRAC). The author was also in contact through e-mail with representatives of the Open Society Justice Initiative. However, due to time constraints the author was not able to

³ United Nations, Office of the High Commissioner for Human Rights, International Justice and Human Rights: Supporting the Legacy of Cambodia's Extraordinary Chambers, <http://cambodia.ohchr.org/EN/PagesFiles/ECCC_legacy_program.htm> accessed 24 June 2015.

conduct interviews with other relevant stakeholders, such as the court's Office of Administration and the Legacy Secretariat. As a result, this research thesis does not provide a comprehensive critical analysis of the legacy work done in Cambodia. However, it can be considered as a starting point for further exploring and analysis.

The methods for evaluating the impact and legacy for the domestic legal system are sparse. It is difficult to evaluate exactly whether the Court has currently impacted the domestic legal system successfully and whether the Court will be able to do so in the future. The success of legacy initiatives will most likely only be seen in the coming years, as it takes time to implement them. The domestic system is also not ready yet to accept some of the legacy initiatives, as such it will take a longer time to implement them. Regardless of this limitation to the research, the author has tried to make a critical and comprehensive analysis of the legacy work done in Cambodia. It should be stressed that the fieldwork conducted in Cambodia adds a significant value to the research, as the collection of first-hand information can provide new insights into the issue.

II. Definition of terms

A. The legacy of a hybrid court

1. Definition of a 'hybrid court'

During the late 1990s and 2000s, a third generation of international criminal tribunals, so-called hybrid courts, emerged following the second generation of ad hoc tribunals, with the Ad Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Ad Hoc International Criminal Tribunal for Rwanda (ICTR).⁴ These second generation of ad hoc tribunals did not provide a definitive and sufficient institutional model for the implementation of international justice. The international community became aware of the disadvantages of this institutional model, which made it clear that these tribunals could not be used as models for future ad hoc international criminal courts. In the light of this, the United Nations (UN) developed a new kind of tribunals, the so-called 'hybrid tribunal/court', in the hope that they would better accommodate legitimacy and sovereignty concerns, promote ownership, build government capacity, etc.⁵ However, hybrid tribunals have their own disadvantages, such as being very prone to domestic political interference, especially in a country like Cambodia which has weak records of judicial independence.⁶

These tribunals are called 'hybrid' or 'mixed' because they are not purely international or national courts. On the contrary, they are composed of heterogeneous elements. Hybrid courts are a combined effort of the international community and the national institutions of the country where the crimes were committed. Typically, the tribunal employs both national and international staff and applies a mixture of domestic and international law.⁷ It usually operates within the jurisdiction where the crimes occurred. In general, hybrid courts are organised in such a way that only a limited number of accused will be tried before them on allegations of serious crimes.⁸ Hybrid courts have emerged in post-conflict societies when insufficient local capacity existed to deal with mass atrocity.⁹

⁴ Ethel Higonnet, 'Reconstructing Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2005) Yale Law School Student Scholarship Papers 2005 (Paper 6) 4-5.

⁵ David Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future' (2007) 43(1) *Stan J Int'l L* 1.

⁶ John D. Ciorciari & Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2013) *Michigan Journal of International Law* 3.

⁷ Cohen (n 5) 2.

⁸ UN OHCHR (n 1) 1.

⁹ Higonnet (n 4) 5.

a. The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia is one of the six hybrid courts established jointly by the UN and governments to try alleged perpetrators of gross human rights violations.¹⁰ Even though the ECCC is an extraordinary chamber within the existing Cambodian court structure, it is considered as being a hybrid court because of some specific features. First, it has both Cambodian and international staff. It is the first UN-supported hybrid court with the majority of the staff being nationals. The Court applies a parallel management system, i.e. separate lines of responsibility for the international and the national side of the Court for certain aspects of the administration, such as finance, procurement and staffing.¹¹ Second, the ECCC applies Cambodian procedural law except where there are gaps in the law or it conflicts with international law, in which case international law and principles are applied.¹² Third, differently from the ICTY and the ICTR, the ECCC is located in the country where the crimes were committed. This was seen as being the best way to provide full national involvement in the trials and, at the same time, to ensure that international standards are met.¹³ Fourth, like the ICTY and the ICTR, the ECCC is temporary in nature. Once its mandate is completed the court will cease to exist.¹⁴ Finally, the financing is also hybrid as it is based on partly voluntary contributions and funds delivered by the Cambodian Government.¹⁵

The ECCC was created through an agreement between the UN and the Royal Government of Cambodia (RGC).¹⁶ The Court was established in order to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for grave breaches of national and international law committed between 17 April 1975 and 6 January 1979.¹⁷ During this period of time, it is believed that under the Khmer Rouge regime at least 1.7 million people died from starvation, torture, arbitrary killings and forced labour. In 1997, the RGC requested the UN to assist in the establishment of the ECCC. The negotiations between the UN and the Cambodian government over an agreement to create the ECCC took many years. The Cambodian government explicitly rejected the creation of the ECCC as a fully international tribunal, as was suggested by the international community.¹⁸ During the negotiations, the UN had expressed its "concern with 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."¹⁹ Consequently, the UN proposed mechanisms to remedy the weaknesses in the Cambodian system, such as having a majority of international judges. As the UN Secretary-General stated, these adjustments were necessary to "ensure that the impartiality and independence of the Extraordinary Chambers and the integrity and accessibility of the proceedings were fully protected."²⁰ However, the government rejected these proposals, as it preferred a domestic court to an international or internationally controlled court.²¹ An agreement with the UN was finally reached in 2003.²² The ECCC was established as a hybrid tribunal with international and, a majority of, Cambodian judges, balanced by a complex super-majority

¹⁰ UN OHCHR (n 3).

¹¹ UN OHCHR (n 1) 14.

¹² Article 2-8 Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006 (October 27 2004); ECCC, 'Is the ECCC a Cambodian or an International Court?' <<http://www.eccc.gov.kh/en/faq/eccc-cambodian-or-international-court>> accessed 24 June 2015.

¹³ ECCC, 'Why was this Model chosen for the ECCC?' <<http://www.eccc.gov.kh/en/faq/why-was-model-chosen-eccc>> accessed 24 June 2015.

¹⁴ John Coughlan, Sana Ghouse & Richard Smith, 'The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System' (2012) 4(2) Amsterdam LF 21.

¹⁵ Higonnet (n 4) 6.

¹⁶ UN OHCHR (n 1) 3.

¹⁷ Article 1 Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006 (October 27 2004).

¹⁸ United Nations, General Assembly, Khmer Rouge Trials: Report of the Secretary-General UN Doc A/57/769 (31 March 2003) para 6.

¹⁹ *ibid* para 13.

²⁰ *ibid* 16.

²¹ Cohen (n 5) 27.

²² ECCC, 'Introduction to the ECCC' <<http://www.eccc.gov.kh/en/about-eccc/introduction>> accessed 24 June 2015.

voting requirement²³ and other provisions to protect against political interference.²⁴ It is a hybrid *sui generis* court within the domestic court system bound by the Cambodian Constitution, other Cambodian laws and international law.²⁵ The court is also hybrid in its organisational structure as the ECCC's sections are divided between nationals and internationals. There are, for example, two Co-Prosecutors, one of which is Cambodian while the other is an international staff member. There are also two Co-Investigating Judges and two Civil Party Lead Co-lawyers. Two co-heads also carry out most of the major administrative functions of the Court. In 2006, the judges and Co-Prosecutors were sworn in and the first staff members took up their duties.²⁶

At this time of writing, the ECCC is dealing with four cases. Case 001 was held against Kaing Guek Eav (alias Duch), the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh (known as S-21 or Tuol Sleng). This case has been concluded. The Trial Chamber found Duch guilty in 2010 for crimes against humanity and grave breaches of the Geneva Conventions. An estimated 17.000 people were tortured at S-21, and most of them were murdered at the killing fields of Choeung Ek. The trial is regarded as generally fair and in accordance with international standards of due process.²⁷

Case 002 is more significant due to the fact that the accused are alleged to be the most senior surviving leaders of Democratic Kampuchea. Initially, the case was against four defendants. However, Case 002 against Ieng Sary, former Deputy Prime Minister for Foreign Affairs, was been terminated as he died in 2013. Ieng Thirith, allegedly appointed Minister of Social Affairs, was found unfit to stand trial and thus the Trial Chamber stayed the proceedings against her. She was released from provisional detention on 16 September 2012.²⁸ Consequently, the case was only continued against Khieu Samphan, former Head of State, and Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea. Case 002 is split up in two separated cases, Case 002/01 and 002/02, which includes additional charges from the Closing Order in Case 002/01. In August 2014, in Case 002/01 Khieu Samphan and Nuon Chea were found guilty of crimes against humanity and sentenced both to life imprisonment.²⁹ Later that year Case 002/02 commenced.³⁰

In 2009, the international Co-Prosecutor requested the Co-Investigating Judges to initiate investigations of five additional suspected persons. These cases are known as Cases 003 and 004.³¹ However, due to the unwillingness of the RGC to proceed after Case 002 it is still unclear whether these cases will be handled by the ECCC. On March 3rd 2015, the court announced that the International Investigating Judge issued charges against Meas Muth, the former Khmer Rouge naval commander accused of, i.a., torture and killing of Vietnamese, Thais and other foreigners captured at sea or on disputed island territory, and Im Chaem, a senior regional commander heading a Khmer Rouge security centre in the northwest where an estimated 40.000 people died.³²

²³ The super-majority voting requirement entails that in order to make a positive judgement judges must reach a super-majority, *i.e.* majority plus one. Consequently, it is not possible for the national judges to override concerns of the international judges and *vice versa*. As such, a balance must be struck between the national and international judges.

²⁴ Coughlan, Ghouse & Smith (n 14) 17-18; Open Society Foundations, 'Political Interference at the Extraordinary Chambers in the Court of Cambodia' (July 2010) <www.opensocietyfoundations.org/reports/political-interference-extraordinary-chambers-courts-cambodia> accessed 25 June 2015, 5-7.

²⁵ Michael G. Karnavas, 'Bringing Domestic Cases into Compliance with International Standards' (2014) 3 *Cambodian Law and Policy Journal* 49-51.

²⁶ ECCC, 'Key Events' <<http://www.eccc.gov.kh/en/keyevents>> accessed 24 June 2015.

²⁷ Kirsten Ainley, 'Transitional Justice in Cambodia: the Coincidence of Power and Principle' in Renee Jeffrey (ed.), *Transitional Justice in the Asia-Pacific* (Cambridge University Press 2014) 6; KRT Trial Monitor, 'Lessons Learned from the 'Duch' Trial' (December 2009) <<http://krtmonitor.org/2009/12/31/krt-trial-monitor-c001-lessons-learned-from-the-duch-trial/>> accessed 25 June 2015, 6.

²⁸ ECCC, 'Ieng Thirith: Biography' <www.eccc.gov.kh/en/indicted-person/ieng-thirith> accessed 24 June 2015.

²⁹ ECCC (n 22).

³⁰ Ainley (n 27) 6; ECCC (n 26).

³¹ Ainley (n 27) 6-7; ECCC, 'Case 003' <<http://www.eccc.gov.kh/en/case/topic/286>> accessed 24 June 2015.

³² Jonathan Birchall, 'Cambodia Must Cooperate with New Khmer Rouge Prosecution Process' (3 March 2015) *International Justice Monitor* (Open Society Justice Initiative) <www.ijmonitor.org/2015/03/cambodia-must-cooperate-with-new-khmer-rouge-prosecution-process/> accessed 25 June 2015.

2. Definition of 'legacy'

The UN OHCHR defines the legacy of a hybrid court as, "a hybrid court's lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the hybrid court is complete."³³ The International Center for Transitional Justice described legacy in the sense that it "should also lay the groundwork for future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice."³⁴ As such, the issue of legacy tries to narrow the gap between prosecuting those responsible for a number of serious crimes through a hybrid court and the frequent lack of investment in the local judicial system. Hybrid courts should in this regard not be seen as one solution that will fix all. On the contrary, it should be seen as a part of a multifaceted intervention in tackling the challenges and restoring domestic justice systems in a post-conflict context. Legacy processes and policies are, for example, stimulating judicial and legal reform, training local legal professionals, raising awareness of the role of courts as independent and well-functioning institutions operating on the basis of human rights standards and the rule of law.³⁵ The Secretary-General stated that "it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned."³⁶ As such, it is crucial that, in order to conduct legacy work successfully, legacy should be, i.a., addressed from the beginning of the establishment of the court, that a legacy strategy should be created which takes into account issues such as coordination and leadership, and that legacy should also be part of the exit strategy of the court.

The concept of legacy has gained prominence with the establishment of hybrid courts due to their novel structure. Even though the concept of legacy itself is not particularly contested, the successes achieved so far have been few.³⁷ As will be discussed, the ECCC faces various challenges and deficiencies, which have a negative effect on its potential impact and legacy, such as alleged political interference and corruption. This is problematic, because if a hybrid court fails in delivering on its core mandate, for example, by failing to exercise independent jurisdiction, its legacy will necessarily diminish.³⁸ It is also important to take into account that reforming a dysfunctional judicial system is a long-term goal, which needs a strategy and will not happen on its own. Therefore, it is important to have realistic expectations and to keep in mind that hybrid courts are targeted interventions, with limited temporal jurisdiction and time frames and under pressure to confine and finish. Moreover, a hybrid court cannot implement a legacy strategy on its own. It necessarily involves national legal reforms that are domestically owned and driven.³⁹

3. The importance of the ECCC's legacy

Due to the novel structure of the ECCC, the Court has the possibility to positively impact the domestic legal system, especially with regard to fair trial rights, and as such to go beyond delivering justice. By focusing on leaving a long-lasting legacy for the domestic legal system there is the possibility that, if this is done successfully, the solutions offered by the ECCC will not vanish when it ceases to exist. Contrary to this, it can help create a culture of justice and accountability in Cambodia and improve the national justice system, which was swept away under the Khmer Rouge regime and has been rebuilding itself ever since. The old adage, "Don't

³³ UN OHCHR (n 1) 4-5.

³⁴ Caitlin Reiger, International Center for Transitional Justice, Briefing Paper, 'Where to From Here for International Tribunals? Considering Legacy and Residual Issues' (September 2009) <www.ictj.org/sites/default/files/ICTJ-Global-Legacy-Tribunal-2009-English.pdf> accessed 25 June 2015, 1.

³⁵ UN OHCHR (n 1) 1-2.

³⁶ United Nations, Security Council, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General UN Doc S/2004/616 (23 August 2004) para 46.

³⁷ UN OHCHR (n 1) 5.

³⁸ *ibid* 6.

³⁹ *ibid* 5-6.

give people fish – teach them how to fish,” springs to mind.⁴⁰ The ECCC as an in-country hybrid court that is part of the domestic judicial system has the exceptional opportunity to impact and leave a legacy for the domestic legal system, more specifically in terms of fair trial rights in ways that international tribunals do not.⁴¹

B. The right to a fair trial

1. The right to a fair trial as a human right

The right to a fair trial ensures that anyone who is charged with a criminal offence is treated fairly and equally. It protects the rights of the accused and the victim and ensures that the administration of justice is done properly. The right to a fair trial is an overarching human right that consists of different individual rights, which apply during the entire legal process from the initial arrest of the person until the final appeal.⁴²

The right to a fair trial in criminal proceedings is a fundamental human right that every human being enjoys. It is an important component of the rule of law and a universally recognized human right. It can be found in the basic human rights instruments. In 1948 it was, for example, affirmed by the Universal Declaration of Human Rights⁴³ (UDHR) and later it was also included in the Covenant on Civil and Political Rights⁴⁴ (ICCPR) and in important regional human rights instruments, such as the European Convention on Human Rights⁴⁵.⁴⁶ Fair trial rights are also guaranteed in the Constitution of the Kingdom of Cambodia⁴⁷ and in various provisions of domestic laws.⁴⁸

2. The right to a fair trial under international law

It is beyond dispute that the right of an accused to a fair trial reflects customary international law. There is widespread state practice support by opinion juris to warrant this conclusion. However, whether the right to a fair trial has achieved the status of a peremptory norm, *jus cogens*, may be open to question.⁴⁹

The right to a fair trial is protected and guaranteed by the most important and fundamental international human rights instruments. Article 10 of the UDHR ensures the right to a fair and public hearing by an independent and impartial tribunal. Article 14(1) of the ICCPR elaborates further on the right to a fair trial. Article 14(2) ICCPR ensures the presumption of innocence and Article 14(3) ICCPR lists minimum guarantees that everyone is entitled to when charged with a criminal offence. Some of these minimum guarantees are the right to be tried without undue delay, the right to understand the nature and cause of the charge and the right to have adequate time and facilities to prepare a defence. Finally, Article 15 ICCPR sets out important principles with regard to the right to a fair trial.

3. The right to a fair trial under Cambodian law

Article 31 of the Cambodian Constitution states that “[t]he Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human Rights and all the

⁴⁰ Higonnet (n 4) 9-10.

⁴¹ *ibid* 12.

⁴² Cambodian Center for Human Rights, 'Fair Trial Rights in Cambodia. Monitoring at the Court of Appeal' (June 2014) <www.cchrcambodia.org/index_old.php?url=project_page/project_page.php&p=report_detail.php&reid=107&id=3> accessed 25 June 2015, 1.

⁴³ Article 10 Universal Declaration of Human Rights.

⁴⁴ Article 14 International Covenant on Civil and Political Rights.

⁴⁵ Article 6 European Convention on Human Rights.

⁴⁶ David Harris, 'Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16(2) *Int'l & Comp LQ* 352-353.

⁴⁷ The Constitution of the Kingdom of Cambodia (21 September 1993).

⁴⁸ Cambodian Center for Human Rights (n 42) 1.

⁴⁹ Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 *Berkeley JL Int'l L Publicist* 5-6.

treaties and conventions related to human rights, women's rights and children's rights." This provision makes international human rights norms directly applicable in the Cambodian legal system. This was confirmed by a decision of the Constitutional Council in 2007.⁵⁰ During the United Nations Transitional Authority in Cambodia period, Cambodia acceded to most of the major international human rights instruments, such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights.⁵¹

The Cambodian Constitution provides the basic framework for the right to a fair trial in Cambodian courts. Additionally, there are general and specific provisions set out in a number of instruments that deal with the right to a fair trial. Article 38 of the Cambodian Constitution grants the right to a fair trial to every Khmer citizen. The provision lists different individual rights, such as the prohibition of the use of physical torture or mental pressure in order to obtain a confession, the presumption of innocence and the right to a defence. Articles 51, 128, 130 and 132 of the Cambodian Constitution ensure the separation of powers and an independent judiciary. The Code of Criminal Procedure of the Kingdom of Cambodia of 2007 sets out how suspects should be treated and the roles and responsibilities of the different actors involved from the initiation of the investigation until the final appeal. The Criminal Code, which came into force in December 2010, sets out the different offences and the principles of criminal responsibility and sentencing.⁵² Article 33 of The Law on the Establishment of the ECCC determines that the Court shall follow the fair trial standards established by Article 14 and 15 of the ICCPR. Rule 21 of the Internal Rules of the ECCC also sets out the fundamental principles of the procedure before the ECCC. These fundamental principles include the protection of fair trial standards.

Finally, in 2003 the RGC adopted the Legal and Judicial Reform Strategy.⁵³ The Council for Legal and Judicial Reform was established in June 2002 with the mission to initiate and encourage the process of legal and judicial reform. Since mid 2005, the Council has been carrying out its comprehensive action plan to implement the Legal and Judicial Reform Strategy. According to this reform strategy four principles derived from the Cambodian Constitution should guide this legal and judicial reform, i.e. the rights of individuals, liberal democracy, the separation of powers and the rule of law. Additionally, seven strategic objectives were set out by the reform strategy, which later formed the basis of the Legal and Judicial Reform Action Plan of 2005.⁵⁴ The strengthening of judicial services, the provision of better access to legal and judicial information are two examples of these strategic objectives.⁵⁵ Even though progress has been made according to these reports, their work is faced by many challenges, such as budget constraints, shortage of infrastructure and shortage of qualified special judges.⁵⁶

4. Fair trial standards before the ECCC

The ECCC is governed by Cambodian fair trial principles and rules of procedure. However, the ECCC may also take into account procedural rules established at the international level if there is a lacuna in the Cambodian rules. The interplay between Cambodian and international law is mirrored in the Cambodian Constitution, which, as the supreme law of Cambodia governs as well legal proceedings before the ECCC. As stated above, the Constitution explicitly incorporates, in Article 31, international human rights standards into the domestic

⁵⁰ The Constitutional Council of the Kingdom of Cambodia, Decision No 092/003/2007 (10 July 2007); Cambodian Center for Human Rights (n 42) 2.

⁵¹ Amnesty International, 'Kingdom of Cambodia: Urgent Need for Judicial Reform' (19 June 2002) ASA 23/004/2002, 2.

⁵² Cambodian Center for Human Rights (n 42) 2.

⁵³ Council for Legal and Judicial Reform, Legal and Judicial Reform Strategy, adopted by the RGC at the Plenary Session on 20 June 2003.

⁵⁴ Council for Legal and Judicial Reform, Plan of Action for implementing the Legal and Judicial Reform Strategy, adopted by the RGC at the Plenary Session on 29 April 2005; Cambodian Center for Human Rights (n 42) 2-3.

⁵⁵ The Royal Government of Cambodia, National Strategic Development Plan Update 2009-2013 <www.gafspfund.org/sites/gafspfund.org/files/Documents/Cambodia_6_of_16_STRATEGY_National_Strategic_Development_Plan.NSDP__0.pdf> accessed 25 June 2015, 13-14.

⁵⁶ The Royal Government of Cambodia, National Strategic Development Plan 2014-2018 <http://cdc-crdb.gov.kh/cdc/documents/NSDP_2014-2018.pdf> accessed 25 June 2015, 9-12.

legal framework. Cambodia has ratified the major international human rights conventions, including the ICCPR. As the ECCC is a part of the Cambodian court system, the laws and instruments governing the ECCC are also subject to the Cambodian Constitution and the human rights protections enumerated in it, as such the ECCC judges are constitutionally obligated to consider international human rights conventions and fair trial rights.⁵⁷

The ECCC is also governed by the 2003 Agreement between the United Nations and the RGC concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, which states in Article 12 that Cambodian law primarily applies but guidance may also be sought in procedural rules established at the international level when there is uncertainty or deficiency in Cambodian law or when Cambodian law is inconsistent with international standards. Article 12(2) provides that the ECCC has to exercise its jurisdiction in accordance with the international standards listed in Articles 14 and 15 of the ICCPR. The Agreement must be implemented through the Establishment Law.⁵⁸ Article 33 of the Establishment Law states as the Agreement that the ECCC shall exercise its jurisdiction in accordance with Articles 14 and 15 ICCPR.⁵⁹

Finally, the Internal Rules set out the procedure before the ECCC. The Internal Rules are mostly based on Cambodian procedural law and incorporate international fair trial rights, standards and principles set out in the Constitution. The Pre-Trial Chamber held that reference should be made to the Internal Rules as the primary instrument when there is a difference between the Internal Rules and the Cambodian Criminal Procedure Code. As such, the Cambodian Criminal Procedure Code should only apply where an issue arises which is not addressed by the Internal Rules.⁶⁰

III. The Cambodian legal and judicial system

A. The impact of the Khmer Rouge on the Cambodian legal and judicial system

When the Khmer Rouge regime was in power, between April 1975 and January 1979, an estimated 1.7 million Cambodians, approximately one fourth of the population, were executed or died from starvation and disease. The Khmer Rouge attempted to install a complete agrarian communist state. In doing so they carefully planned and executed policies to exterminate the country's intellectuals.⁶¹ This had a devastating impact on the Cambodian judicial system, as by 1979, when the Khmer Rouge fell due to a Vietnamese intervention, only ten qualified lawyers were left in the country. The Cambodian judicial system has still not recovered from these events. Some of the current pressing concerns are the adequate protection of fair trial rights and the continuing political interferences in especially human rights and politically sensitive cases.⁶²

The ECCC was established in 2003 in order to prosecute the senior leaders of Democratic Kampuchea and those believed to be most responsible for grave violations of national and international law. The ECCC was hailed as a model court for the domestic judicial system, which could leave a lasting impact and legacy for the Cambodian domestic legal and judicial system. However, the ECCC is plagued by its own deficiencies, which threaten the potential that the ECCC can have in positively impacting the domestic judicial and legal system and leaving a long lasting legacy for it.⁶³

B. Introduction to the Cambodian legal and judicial system

⁵⁷ Karnavas (n 25) 51-52 and 54.

⁵⁸ Article 12(2) 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 (6 June 2003) <<http://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio>> accessed 25 June 2015.

⁵⁹ Karnavas (n 25) 56.

⁶⁰ *ibid* 57-59.

⁶¹ Higonet (n 4) 36.

⁶² Coughlan, Ghose & Smith (n 14) 16.

⁶³ *ibid* 17.

The Cambodian judiciary is governed by the Cambodian Constitution, which stipulates that the judiciary functions independently from the executive.⁶⁴ The judiciary is organised in a hierarchical way with First Instance Courts, an Appellate Court and a Supreme Court. If a judicial decision of the First Instance Courts is appealed, the case comes before the Appellate Court in Phnom Penh. The Appellate Court has the power to examine appeals based on matters of law and matters of fact, both for civil and criminal cases throughout the country. Appeals can also be taken to the Supreme Court, which is the chief court of appeal. It primarily deals with matters of law. There are two additional and separate judicial streams, i.e. the Military Court and the ECCC.⁶⁵ There is also a Supreme Council of Magistracy, which is the judicial organ ensuring the independence of the judiciary in Cambodia.⁶⁶

C. Deficiencies in the Cambodian legal and judicial system

The Cambodian judicial system is slowly recovering from the devastating impact of the Khmer Rouge regime that resulted in only ten qualified lawyers being left in the country by 1979. Because of these devastating events, Cambodia lacks an established and experienced judiciary. The RGC has pledged to reform the courts

and has placed legal and judicial reform as top priority.⁶⁷ However, progress has been slow and there is a widening gap between the constitutional guarantees for the judiciary and the way the judiciary functions in practice, which is problematic as it makes the judiciary, for example, an easy tool to silence opposition and to make criticism and debate impossible.⁶⁸ The judiciary continues to be heavily influenced by the executive. Consequently, it is not independent and impartial. The Cambodian judiciary has been controlled by the ruling Cambodian People's Party (CPP) since 1979. In Cambodia there exists a so-called system of patronage, which blurs the separation of powers between the judicial and the executive branch, and as such makes the judiciary prone to political interference, which affects the judicial independence of judges.⁶⁹ Within the system of patronage, judges align themselves closely to politicians in order to benefit from their power to influence judicial appointments and thus ensure the necessary support for their career advancement. Consequently, judges and prosecutors do not operate according to the law, but in accordance to what their patron dictates them, otherwise they risk losing their position or not being promoted. As a result, a majority of the judges and prosecutors are members of the ruling CPP.⁷⁰ The judiciary is part of the hierarchical political system that exists in Cambodia. This system of patronage severely affects the proper workings of the rule of law and fair trial rights. The system of patronage and the problematic issue of political interference were some of the major concerns of the UN when negotiating the workings of the ECCC with the RGC.⁷¹ Eventually, this led to the establishment of the ECCC as a hybrid tribunal with international and, a majority of, Cambodian judges balanced by a complex su-

⁶⁴ Article 128 Constitution of the Kingdom of Cambodia.

⁶⁵ Transparency International, National Integrity System Assessment, 'Corruption and Cambodia's Governance System: The Need for Reform' (2014) 53.

⁶⁶ Kong Phallack, 'Overview of the Cambodian Legal and Judicial System' in Hor Peng, Kong Phallack & Jörg Menzel (eds.), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung 2012) 11-12.

⁶⁷ The Royal Government of Cambodia, Samdech Techo Hun Sen, Rectangular Strategy - Phase III (2013) <www.cambodiainvestment.gov.kh/content/uploads/2013/11/2013-Rectangular-Strategy-III-En8.pdf> accessed 25 June 2015 13; Transparency International (n 65) 52-53.

⁶⁸ The Royal Government of Cambodia (n 56); Cambodian Center for Human Rights, 'CCHR Briefing Note – February 2013. Judicial Reform' (February 2013) <www.cchrcambodia.org/admin/media/analysis/analysis/english/2013-02-18-CCHR%20Briefing%20Note%20-%20Judicial%20Reform_en.pdf> accessed 25 June 2015, 2.

⁶⁹ Joint Civil Society Report with The Centre for Civil and Political Rights, 'Cambodia: Civil Society Report on the Implementation of the ICCPR: To be Submitted for the Review of the Second Periodic Report of Cambodia at the 113th Session of the Human Rights Committee (March 2015)' (20 February 2015) 50; Transparency International (n 65) iv.

⁷⁰ Transparency International (n 65) 56.

⁷¹ United Nations, Human Rights Committee, Concluding Observations: Cambodia UN Doc CCPR/C/79/Add.108 (27 July 1999) para 8, 2.

per-majority voting requirement and other provisions to protect against political interference.⁷² The question of judicial independence was also a returning issue during the 2014 Universal Periodic Review of Cambodia.⁷³

Political interference constitutes a crucial limitation on the check and balances that should be in place to limit the reach of the executive power.⁷⁴ Politically motivated cases have been brought against opposition politicians and human rights defenders.⁷⁵ Even though there have been improvements, these cases remain problematic.⁷⁶ On the other hand, those with government connections have enjoyed impunity.⁷⁷ This does not only undermine the rights to a fair trial but poses also a serious threat to the values of a liberal democracy.⁷⁸ A 2010 report of the UN Special Rapporteur on the situation of human rights in Cambodia stated that, "in spite of the Constitutional guarantees and the existence of various institutions to enhance and safeguard its independence, the Special Rapporteur is of the view that the judiciary has not been working as effectively, independently and impartially as possible."⁷⁹

In 2002, the RGC demonstrated some degree of commitment to legal and judicial reform when they established the Council for Legal and Judicial Reform and subsequently adopted in 2003 a legal and judicial reform strategy. However, so far no fundamental action has been taken in these reforms on the part of the RGC.⁸⁰ In 2014, within the context of judicial reform, three long-awaited fundamental laws on the judiciary were tabled before Parliament, on the organization of the courts, on the status of judges and prosecutors, and on the Supreme Council of the Magistracy. Two of the three laws were already envisaged in the 1993 Constitution. There was no prior public release of the draft laws and no consultations were held with relevant stakeholders. Despite repeated calls from civil society and from the UN Special Rapporteur on Cambodia, they were not shared until the day before the National Assembly started examining them.⁸¹ In May and June 2014, the three draft laws were adopted in quick succession with little debate. On the 16th of July 2014, only two weeks and a half later, the texts were promulgated into law.⁸² The main purpose of the three laws is to protect and promote the independence of the judiciary. However, the UN Special Rapporteur on Cambodia in his latest report in 2014 expressed concerns that the laws contain provisions that negatively affect the principle of separation of powers, as the laws give the Ministry of Justice undue influence over the judiciary. The Minister of Justice remains, for example, a member of the Supreme Council of Magistracy and has the power to appoint another member of the Council. The Supreme Council of Magistracy decides on all issues with regard to the appointment, promotion and transfer of judges and receives complaints and can take disciplinary actions against judges. The Supreme Council of Magistracy is the guardian of the independence of the judiciary and the fact that the executive is involved in the Council constitutes a clear breach of the separation of powers and a clear conflict of interests.⁸³ Another issue highlighted by the UN Special Rapporteur, and which he had already addressed in his previous report⁸⁴, is the recommendation that judges and prosecutors should not be active members of political parties.

⁷² Coughlan, Ghouse & Smith (n 14) 17-18; Open Society Foundations (n 24) 5-7.

⁷³ United Nations, General Assembly, Report of the Working Group on the Universal Periodic Review: Cambodia UN Doc A/HRC/26/16 (27 March 2014), see for example para 26, 30 and 55.

⁷⁴ Transparency International (n 65) 61.

⁷⁵ See for example the Sonando Case discussed in Section 3.3; Cambodian Center for Human Rights (n 68) 4.

⁷⁶ Interview with Billy Chia-Lung Tia; Interview with Suon Bunthoeun.

⁷⁷ Cambodian Center for Human Rights (n 68) 2.

⁷⁸ *ibid* 5.

⁷⁹ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia UN Doc A/HRC/15/46 (16 September 2010) para 30.

⁸⁰ Cambodian Center for Human Rights, 'Cambodian Center for Human Rights Submissions to the Human Rights Committee' (April 2014)

<http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KHM/INT_CCPR_NGO_KHM_17008_E.pdf> accessed 25 June 2015, 8.

⁸¹ Interview with Suon Bunthoeun.

⁸² United Nations, General Assembly, Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in assisting the Government and People of Cambodia in the promotion and protection of Human Rights: Report of the Secretary-General UN Doc A/HRC/27/43 (15 August 2014) 7.

⁸³ Articles. 51, 128, 130 and 132 Constitution of the Kingdom of Cambodia.

⁸⁴ UN SR (n 79) para 67, 16.

However, the new law on the status of judges and prosecutors does not explicitly spell this requirement out in the way the Special Rapporteur had hoped for.⁸⁵

Additionally, the Cambodian judicial system suffers from highly inadequate financial⁸⁶, human and infra-structural resources, low salaries, poor training, and a lack of awareness of relevant human rights and fair trial standards.⁸⁷ This results in high levels of corruption and inefficiency.⁸⁸ Transparency International's Global Corruption Barometer for 2013 indicated that 65 per cent of the respondents who had been in contact with judicial officers were asked to pay a bribe in the last 12 months.⁸⁹ The National Integrity Assessment of Transparency International gives a score of 0 of 100 regarding the accountability of members of the judiciary in reporting and being answerable for their actions in practice, meaning that accountability of members of the judiciary is almost non-existent. The majority of judgements are influenced by politics rather than objective legal deliberation.⁹⁰ Corruption is a serious issue that is endemic to the Cambodian judicial system. It is so widespread that it can be considered the norm. According to the 2014 Corruption Perceptions Index, Cambodia is listed among the twenty most corrupt countries in the world. It got a score of 21 of 100, with 0 being highly corrupted and 100 very clean. The score indicates the perceived level of public sector corruption.⁹¹

Due to issues such as perceived corruption, the Cambodian population lacks trust and confidence in the judiciary.⁹² According to the Transparency International's Global Corruption Barometer for 2013, the Cambodian judiciary was perceived as being the most corrupt institution out of 12 public institutions reviewed.⁹³ There is also a lack of awareness among citizens with regard to their legal rights and how to exercise them.⁹⁴

A final problem is the judiciary's poor record in protecting fair trial rights.⁹⁵ Even though local judges are constitutionally obligated to consider international human rights conventions and fair trial standards and rights when applying and interpreting domestic law, these international legal principles have rarely been applied in practice.⁹⁶ Areas of major concern in domestic criminal proceedings are, i.a., limited legal arguments in the courtroom, excessive reliance on confessions extracted in police custody and often under duress, lengthy detention without charge and the lack of trust by the public that the courts will deliver impartial justice.⁹⁷ The Trial Monitoring Project conducted by the Cambodian Center for Human Rights (CCHR)⁹⁸ has recorded a number of deficiencies with regard to fair trial rights in domestic courts since 2009. Even though there has been improvement in the level of adherence to fair trial standards since the beginning of the Trial Monitoring Project in 2009, many problems still remain.⁹⁹ In its most recent report (June 2014), the CCHR collected and analysed data from the monitoring of 204 criminal trials at the Court of Appeal between 1 March 2013 and 31 January 2014. According to this report, there have been steady improvements with regard to some of the procedures that underpin fair trial rights. However, many concerns remain. Some of the major issues are the impact of the previ-

⁸⁵ UN GA (n 82) 10-11; Joint Civil Society Report with The Centre for Civil and Political Rights (n 69) 50-51.

⁸⁶ Open Society Foundations, 'Funding Crisis Threatens to Shutter Cambodia's Khmer Rouge Court' (2013) <www.opensocietyfoundations.org/press-releases/funding-crisis-threatens-shutter-cambodia-s-khmer-rouge-court> accessed 25 June 2015.

⁸⁷ Cambodian Center for Human Rights (n 68) 2.

⁸⁸ Transparency International (n 65) 53-54.

⁸⁹ Transparency International, 'Global Corruption Barometer Data 2013 – Cambodia' (2013) <<http://www.transparency.org/gcb2013/country/?country=cambodia>> accessed 24 June 2015.

⁹⁰ Transparency International (n 65) 58-59.

⁹¹ Transparency International, '2014 Corruption Perceptions Index' (2014) <www.transparency.org/cpi2014/results> accessed 24 June 2015.

⁹² UN GA (n 82) 10-11; Cambodian Center for Human Rights (n 68) 2.

⁹³ Transparency International (n 89).

⁹⁴ Cambodian Center for Human Rights (n 68) 2.

⁹⁵ Coughlan, Ghouse & Smith (n 14) 20.

⁹⁶ Karnavas (n 25) 54.

⁹⁷ Joint Civil Society Report with The Centre for Civil and Political Rights (n 69) 47-49 and 52-54; Karnavas (n 25) 54-55.

⁹⁸ The author accompanied the trial monitoring team of the CCHR to the Court of Appeal on the 29th of May 2015.

⁹⁹ Cambodian Center for Human Rights (n 68) 2.

ously discussed lack of separation of powers, the influence of the executive power on the judiciary and the lack of independence of the judiciary.¹⁰⁰ According to the report of the CCHR, rights related to a public hearing, to understanding the nature of the charge, to legal representation and to be present at a trial, the presumption of innocence, the right to a public and reasoned judgment, independence, impartiality and professionalism of the judge and trials involving juveniles are rights that are not guaranteed and/or implemented in a fully satisfactory manner, and this threatens an individual's right to a fair trial. Additionally, the quality of the evidence presented in hearings is often very poor, which negatively affects the right to be convicted beyond reasonable doubt.¹⁰¹ The right to be tried by an independent and impartial tribunal is a cornerstone of fair trial rights and is described by the UN Human Rights Committee as "an absolute right that may suffer no exception."¹⁰² This makes sense because if a court is affected in its independence then it is not longer capable of upholding its duty to ensure fair trials.¹⁰³ According to the data, fair trial rights that were upheld and well respected were the right to adequate time and facilities to prepare a defence, to not be compelled to confess guilt, the prohibition against double jeopardy and the prohibition against retroactive application of criminal law.¹⁰⁴

Between January and June 2012, the CCHR monitored 354 trials involving 719 individuals accused of criminal offences at different courts of first instance and analysed the data obtained in its 2013 Sixth Bi-Annual Report "Fair Trial Rights in Cambodia". Positive factors were monitored, such as the absence at any of the monitored courts of any statements by judges regarding the innocence or guilt of an accused before the verdict was delivered. The data revealed various areas of concern with regard to a number of fair trial standards. Little or no progress was made with regard to these rights since the fifth reporting period. For example, no single judge in any of the trials that were monitored explained to the defendant his/her right to remain silent and 71% of defendants were detained prior to their trial hearings.¹⁰⁵

In 2012 there was a controversy surrounding a judgement delivered by the Phnom Penh Municipal Court that imposed a 20-year jail term to the independent radio station owner Mam Sonando for allegedly inciting insurrection activities in Kratie's Broma village.¹⁰⁶ The case has been described as "one of the most blatantly politically motivated trials in recent years."¹⁰⁷ Human rights groups claimed that the Government had fabricated the alleged plot in order to silence the owner of one of the few independent radio stations in Cambodia and to cover up its eviction of 600 Broma villagers who were involved in a land dispute with a rubber plantation.¹⁰⁸ As such, this trial exposed many of the discussed deficiencies in the Cambodian judicial system.

¹⁰⁰ Cambodian Center for Human Rights (n 42) iv.

¹⁰¹ *ibid* 7-21.

¹⁰² United Nations, Human Rights Committee, *González del Río v. Peru* Communication No 263/1987 UN Doc CCPR/C/46/D/263/1987 (28 October 1992) para 5.2.

¹⁰³ Cambodian Center for Human Rights (n 42) 17.

¹⁰⁴ *ibid* 21-24.

¹⁰⁵ Cambodian Center for Human Rights, 'Sixth Bi-annual Report. Fair Trial Rights in Cambodia' (December 2013)

<www.cchrcambodia.org/admin/media/report/report/english/CCHR%20Sixth%20Bi%20annual%20Reports%20on%20FTRs%20December%202013%20ENG.pdf> accessed 25 June 2015, 4-5 and 18.

¹⁰⁶ Criminal Case no 206 (18 May 2012).

¹⁰⁷ Peter Zsombor, 'Sonando Verdict a Tough Test for KRT Legacy' *The Cambodia Daily* (Phnom Penh, 4 October 2012) <www.opendevelopmentcambodia.net/news/sonando-verdict-a-tough-test-for-krt-legacy/> accessed 25 June 2015.

¹⁰⁸ Karnavas (n 25) 55; Peter Zsombor, 'Donors Criticize Sonando Sentence' *The Cambodia Daily* (Phnom Penh, 3 October 2012) <www.cambodiadaily.com/archives/donors-criticize-sonando-sentence-3220/> accessed 25 June 2015.

Legacy at the ECCC

A. Introduction

In this chapter, the ECCC's potential for positively impacting the domestic legal system and leaving a positive legacy will be discussed. First, the fact that the ECCC was hailed as a model court for the local judiciary and that it was believed that it could have 'a demonstration effect', by, for example, demonstrating the domestic judiciary how to apply and interpret fair trial rights, will be discussed. Second, the aspects of the ECCC's hybrid structure that can positively contribute to its legacy, such as in-country location and the mixture of international and local staff at the ECCC, will be addressed. Finally, examples will be given of lessons learned from Cases 001 and 002/01, more specifically with regard to how the ECCC dealt with certain fair trial issues. These lessons provide the domestic judiciary with valuable information on how to deal with certain fair trial issues and can stimulate positive change.

The second part of this chapter will focus on the challenges and limitations for legacy work at the ECCC. First, attention will be brought on the lack of explicit legacy mandate and the negative consequences that flow from this. Second, the negative aspects of the ECCC's hybrid structure and its workings for legacy work will be discussed.

B. The potential for legacy

1. The ECCC as a model court and its potential demonstration effect

The ECCC, at its establishment in 2003, was hailed as a model court, which could have a lasting positive legacy and impact on the national judicial system.¹⁰⁹ The ECCC would establish and demonstrate best practices to the local judiciary and allow for the transfer of knowledge and expertise of the international community to the local Cambodian system, as such it would function as a model for the domestic judiciary.¹¹⁰ Former UN Secretary-General Kofi Annan stated that the ECCC should have "considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel."¹¹¹ Additionally, the UN Special Rapporteur on the situation of human rights in Cambodia repeatedly acknowledged the importance of the ECCC as a model court stating that, "[t]he Court's activities in this regard continue to set an important example for the national sector of the administration of justice in accordance with international fair trial standards."¹¹² Likewise, The Trial Chamber has acknowledged the significance of the ECCC as a model court, stating, "[i]t may, as a model court, [...] serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity."¹¹³ Government officials also have identified the ECCC as a model court.¹¹⁴

The ECCC as a model court has the ability to contribute to the strengthening of the Cambodian judicial system, which on a long-term basis could strengthen democracy and human rights obedience in the country. Consequently, the tribunal should aspire to and apply the highest standards of independence, impartiality, due

¹⁰⁹ International Center for Transitional Justice, Victims Unit of the ECCC and CHRAC, 'Leaving a Lasting Legacy for Victims: Practical Workshop for ECCC Victims' Representatives' (Workshop) (2009) <<https://www.ictj.org/sites/default/files/ICTJ-ECCC-Cambodia-Victims-Workshop-2009-English.pdf>> accessed 25 June 2015, 7.

¹¹⁰ Karnavas (n 25) 61.

¹¹¹ United Nations, General Assembly, Khmer Rouge Trials: Report of the Secretary General UN Doc A/59/432 (12 October 2012) para 27, 7.

¹¹² Report of the Special Rapporteur on the Situation of Human Rights in Cambodia UN Doc A/HRC/18/46 (2 August 2011) para 34.

¹¹³ ECCC, Trial Chamber, *Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests*, Case File No 002/19-09-2007-ECCC/TC (28 January 2011) para 14.

¹¹⁴ For example: Deputy Prime Minister H.E. Sok An, 'Remarks at the Reception following the swearing in of National and International Judicial Officers for the Extraordinary Chambers in the Courts of Cambodia' (3 July 2006) <http://www.eccc.gov.kh/sites/default/files/media/Sok_An_speech_for_reception_3_July_2006.pdf> accessed 24 June 2015: "We earnestly hope and expect that the ECCC will be a model court for Cambodia"; Karnavas (n 25) 61-62.

process and human rights standards. The fact that proceedings at the ECCC are conducted in a transparent public manner and are open to scrutiny by the press and civil society contributes to this demonstration effect. The court has, for example, one of the largest galleries of any internationalized tribunal and has been well attended by the Cambodian people.¹¹⁵ The ECCC can have an important demonstration effect by showing the public that those who have committed the gravest crimes can be held accountable. Additionally, and more importantly for this research thesis, the Court can have an important demonstration effect with regard to fair trial rights for the domestic judicial system. As such, it can show the local judiciary through best practices based on the legal proceedings before the ECCC, how courts should best interpret and deal with fair trial rights. This can be done by, for example, trainings and workshops provided to Cambodian legal professionals outside the Court, as well as by transferring skills and knowledge on fair trial issues to Cambodian staff members at the Court. Additionally, the ECCC can contribute to a positive shift in terms of trust in the domestic judicial system with regard to dealing with future human rights violations, fostering respect for human rights by showcasing these values at the ECCC, and promoting due process, impartiality and independence.¹¹⁶ This shows that the impact that the ECCC can have in terms of legacy can go further than tangible measures, such as legal and judicial reform and physical infrastructure. The aspired outcome would be that the Court's operations contribute to the further positive development of the Cambodian judiciary by raising the standards and restoring the public confidence in the legal system.¹¹⁷

2. Positive aspects of the ECCC's hybrid structure for its legacy

The ECCC is a genuine hybrid court, as the mixed character of the court is fully extended in its functioning and organisation. Due to its novel hybrid structure, the ECCC can have a greater impact and legacy for the domestic judicial system than an international tribunal could have.

First, contrary to international tribunals, such as the ICTY and the ICTR, the ECCC is located in the country where the crimes occurred. Consequently, there is no disconnection from the country and population that is trying to heal from the atrocities that happened in the past. On the contrary, this proximity can make it easier for the ECCC to have a significant impact on the Cambodian judicial and legal system through, for example, educational programs for law students and legal professionals. The in-country location can also contribute to the ability of the ECCC to stimulate legal and judicial reform. Additionally, its location can also contribute to cooperate and coordinate with other relevant stakeholders, such as local civil society, in order to improve legacy work. The ECCC's proximity to these local stakeholders can, for example, make it easier to gain their trust. Second, many of the activities at the ECCC are conducted in English as well as in the domestic language, Khmer, and a Khmer translation of all proceedings is broadcasted in the public gallery. Because of this, universities, for example, can more easily use the ECCC as a study object, learn how the ECCC deals with fair trial issues and extract best practices from this. Third, the fact that the ECCC is part of the domestic court system, rather than a stand-alone tribunal, and that it has a mix of international and national staff can also have a positive impact on the domestic judiciary. The international and local staff can learn from each other by working together and sharing skills, knowledge and best practices. The ECCC holds also different trainings and workshops for national staff. This contributes to further developing their skills and knowledge, which they afterwards can bring back to the normal domestic courts.¹¹⁸ Some of the local staff also continues to work on the local level, which reinforces the transfer of skills and knowledge. Important to note here is that putting international

¹¹⁵ Jennifer Holligan & Mahdev Mohan, 'ECCC's Legacy for the Rule of Law in Cambodia. Workshop Report: Implementation of the ECCC Legacies for Domestic Legal and Judicial Reforms' (2013) Asian Business & Rule of Law Initiative <http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1018&context=sol_aprl> accessed 25 June 2015, 11.

¹¹⁶ Tessa Bialek, 'Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview' (2013) Yale Law School/DC-Cam 2; UN OHCHR (n 1) 6 and 17-18.

¹¹⁷ Coughlan, Ghouse & Smith (n 14) 21.

¹¹⁸ See for example the activities of the Defence Support Section at the ECCC, available at www.eccc.gov.kh/en/dss/defence-support-section-dss (accessed 24 June 2015).

and national staff together will not automatically and organically lead to successful capacity building. A positive legacy must be carefully designed and produced and is not a self-fulfilling prophecy.¹¹⁹ However, locating an international tribunal outside the concerned country and only employing international staff can also have positive aspects. It limits, for example, the possibility of political interference, to which an in-country court is more vulnerable and which was the UN's concern when negotiating the establishment of the ECCC with the RGC. Recent events with regard to Cases 003 and 004, for example, have demonstrated how political interference is a challenge for the ECCC and how it can negatively affect its workings.¹²⁰ Fourth, the laws used at the ECCC are hybrid, in the sense that a mix of Cambodian law and international law is applied. The ECCC's Internal Rules are based on the Cambodian Criminal Procedure Code. This makes the ECCC's interpretation of the Internal Rules uniquely relevant to domestic law and practice and thus well positioned to impact the national judicial system.¹²¹ The ECCC uses mostly Cambodian law and therefore civil law. It is only when Cambodian law does not cover the issue sufficiently that international law is relied upon. The civil law system entails that the Co-Investigating Judges, rather than the Office of the Prosecutor, conduct the investigations for the cases and that many more people can be civil parties to the trials in contrast to common law systems.¹²² Ideally, the way in which the ECCC interprets and applies Cambodian law should be transmitted to the domestic level. This could consequently contribute to the application of these laws by the domestic judiciary in accordance with international standards and thus could offer the opportunity for the judiciary to evolve further and to get more familiar with international law.¹²³ However, a limitation in this regard can be that the ECCC and the normal domestic courts are not identical. They for example deal with different kinds of cases, are differently structured and have different goals. However, general conclusions, principles and practices from the ECCC's case law can still be drawn and absorbed by the Cambodian judiciary.

3. Lessons learned from Cases 001 and 002/1 in light of fair trial standards

The way in which the ECCC deals with fair trial rights can have a significant impact on the Cambodian judiciary and leave an important legacy behind. It can set an example of how to interpret fair trial rights and how to properly deal with these rights. The right to silence is, for example, listed in Rule 21(d) of the Internal Rules of the ECCC,¹²⁴ but it is not explicitly protected under Cambodian law. However, the right against self-incrimination is incorporated in Cambodian law through the ICCPR¹²⁵ due to Article 38 of the Cambodian Constitution. By explicitly protecting the right to silence in the ECCC's Internal Rules, the ECCC acknowledges its importance. This can stimulate the Cambodian judiciary to attach a greater protection to the right to silence. This is important because the report of the CCHR on fair trial rights, based on trial monitoring at the Court of Appeal, shows, for example, that the use of confessions as evidence is very common. Therefore, it is crucial to ensure the quality of the evidence used in court hearings in order to protect fair trial rights and to ensure that an accused is not forced to confess but can rely on its right to silence if the accused wishes to.¹²⁶

In this section some examples will be given of fair trial issues that arose before the ECCC during the concluded Cases 001 and 002/01. These examples provide the domestic judiciary with valuable information on how to deal with certain fair trial issues, and thus can function as lessons learned. From the concluded trial against Kaing Guek Eav *alias* 'Duch', Case 001, and the subsequent Case 002/01 much can be learned, not only by the Cambodian legal system with regard to fair trial standards but also by the ECCC for subsequent cases.

¹¹⁹ Higonnet (n 4) 12-14.

¹²⁰ Ainley (n 27) 4.

¹²¹ Higonnet E R, 'Reconstructing Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23(2) *Arizona Journal of International & Comparative Law* 7.

¹²² ECCC, 'The Co-Investigating Judges' <www.eccc.gov.kh/en/ocij/about> accessed 24 June 2015.

¹²³ Ainley (n 27) 5.

¹²⁴ ECCC, Internal Rules (Rev 9) as revised on 16 January 2015 <www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf> accessed 25 June 2015.

¹²⁵ Article 14(g) International Covenant on Civil and Political Rights.

¹²⁶ Cambodian Center for Human Rights (n 42) 15; Coughlan, Ghouse & Smith (n 14) 23.

The Khmer Rouge Trial Monitor (KRT Trial Monitor) report on “The Lessons Learned from the ‘Duch’ Trial” identifies provisional detention, the application of the principle of equality of arms, and the admissibility of evidence and disclosure throughout the trial generally and the use of torture evidence specifically as having the greatest potential for impacting the accused person’s right to a fair trial in a negative way, but providing as well the most important lessons learned for both the ECCC’s on-going cases and the national judicial system.¹²⁷

A first fair trial issue that arose with regard to the Duch trial, Case 001, concerned the provisional detention of the Accused, Duch. The Trial Chamber found that Duch was illegally detained by the Cambodian Military Court from 1999 until 2007, when he was transferred to the ECCC. Consequently, the Chamber concluded that the Military Tribunal had infringed the rights of the Accused.¹²⁸ It further stated that in the event of an acquittal, Duch was entitled to seek remedies for the time spent in detention of the Military Court and for the violation of his rights.¹²⁹ In the event of conviction, Duch was entitled to have a reduction of his sentence on the basis of the time spent in detention under the authority of the Military Court and for the time served in detention under the authority the ECCC since 2007. Duch was found guilty and sentenced to a 35-year prison sentence.¹³⁰ However, he was granted a five-year reduction to his sentence for the violation of his rights due to his illegal detention and a further 11-year reduction of his sentence for time already served. This issue was an important test for the ECCC’s willingness to criticise a human rights violation on the part of the Cambodian government.¹³¹ The Cambodian Constitution and the Cambodian Code of Criminal Procedure provide protection to the right of the accused against unwarranted and excessive provisional detention. However, unlawful periods of pre-trial detention in the Cambodian judiciary have been widely reported and keep on being a problem.¹³² The Trial Chamber’s ruling on the issue of the illegality of Duch’s detention is an important precedent for the Cambodian judicial system, which can learn from it how to properly deal with these kinds of issues.¹³³ The judgement of the Trial Chamber reinforces the right of the Accused to be tried within reasonable time and the entitlement to remedies should this right be violated.¹³⁴ Cambodian lawyers could utilize this judgement as a precedent in order to claim a right to a decreased sentence for their client in the event their client was held in custody in violation of the time limits set by the Cambodian Code of Criminal Procedure.¹³⁵ However, in a 2012 ruling by the Supreme Court Chamber, by majority decision on appeal, the Chamber found that the Trial Chamber did not have the authority to order the reduction in Duch’s sentence for unlawful detention by the Military Tribunal.¹³⁶ The decision to overturn was unexpected, as the Prosecution had not challenged the sentence reduction. International monitors perceived the outcome as a political decision in order to please the Cambodian people. Rupert Abbott of Amnesty International, for example, stated, “The decision to overturn the legal remedy for Duch’s unlawful detention and to provide no alternative may be perceived as a case of public opinion trumping human rights.”¹³⁷ This is troubling because, as was mentioned, lengthy detention without trial and provisional detention are prob-

¹²⁷ KRT Trial Monitor (n 27) 19.

¹²⁸ ECCC, Trial Chamber, *Decision on Request for Release*, Case File No. 001/18-07-2007/ECCC/TC (15 June 2009).

¹²⁹ *ibid*, Dispositive.

¹³⁰ ECCC, Trial Chamber, *Judgement*, Case File No. Case No. 001/18-07-2007/ECCC/TC (26 July 2010) 189 and 215-216.

¹³¹ Ciorciari & Heindel (n 6) 15.

¹³² Articles 193-194 Code of Criminal Procedure of the Kingdom of Cambodia; United Nations, Human Rights Council, Technical Assistance and Capacity Building: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia UN Doc A/HRC/7/42 (29 February 2008) 20; Cambodian Center for Human Rights, (n 105) 5-6; Interview with Suon Bunthoeun.

¹³³ Coughlan, Ghouse & Smith (n 14) 24.

¹³⁴ KRT Trial Monitor (n 27) 20-21.

¹³⁵ *ibid* 26.

¹³⁶ ECCC, Supreme Court Chamber, *Appeal Judgement in Case 001*, Case File No 001/18-07-2007-ECCC/SC (3 February 2012) para. 395: The Supreme Court Chamber increased the prison sentence of 35 years, which was imposed by the Trial Chamber, to a sentence of life imprisonment.

¹³⁷ Amnesty International, ‘Cambodia: Khmer Rouge Judgement Welcome, But Raises Human Rights Concerns’ (Press Release) (8 February 2012) <www.amnesty.org/en/articles/news/2012/02/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns/> accessed 25 June 2015; Ciorciari and Heindel (n 6) 16.

lematic issues in Cambodia. Also the President of the Trial Chamber expressively acknowledged this.¹³⁸ According to the Open Society Justice Initiative, this sends "a message to the Cambodian justice system, and the Cambodian citizens who are subject to inappropriate and excessive pre-trial detention by the national court system, that due process and human rights standards can be ignored."¹³⁹ Michael Karnavas, former international co-counsel for Ieng Sary in Case 002 and current international co-counsel in Case 003, notes in this regard that decisions and practices of the ECCC, even if they have been passed by the Supreme Court Chamber, should not be necessarily applied without criticism or applied recklessly by the domestic courts. As such, it is always necessary to identify contrived and unfair decisions and legal practices from the ECCC and reject them.¹⁴⁰ To conclude, the Trial Chamber decision made a substantial legacy contribution in promoting fair trial rights within the domestic judiciary. However, the Supreme Court Chamber supermajority reversal of that decision was deleterious to the Court's legacy for domestic judicial reform.¹⁴¹

A second fair trial issue that arose in the context of the Duch trial is the principle of equality of arms, which is one of the essential elements for a fair trial. It refers to the reasonably equivalent resources and procedural equality between the prosecution and the defence.¹⁴² During trials where mass atrocity cases are being tried, such as before the ECCC, it is especially important to uphold this principle as extensive pressure is put on the court and on the prosecution. At the ECCC, the application of this principle is further complicated by the extensive participation of Civil Parties in the proceedings. In light of this principle, it is crucial to create and maintain a fair balance between all parties. According to Rule 23(1) of the Internal Rules of the ECCC, the purpose of the Civil Parties is to ensure victim participation by supporting the prosecution and to seek collective and moral reparations. However, during the Duch case the Defence opposed the way in which the Civil Parties exercised their role as they were acting, according to the Defence, as 'second prosecutors' rather than merely supporting the prosecution.¹⁴³ This showed the need for a definitive interpretation of the role of Civil Parties in the proceedings. On 9 October 2009, the Trial Chamber ruled that in fair trial proceedings the accused has the right to face only one prosecuting party. For this reason, the Civil Parties can support or assist the prosecution but they cannot take its place or transform themselves into additional prosecutors.¹⁴⁴ However, the Trial Chamber did not elaborate on how this role should be defined, nor did it provide clear criteria for Civil Parties' involvement. Consequently, it is likely that this issue will come up again in Case 002, where a large number of Civil Parties are participating.¹⁴⁵

A third fair trial issue that arose during the Duch trial was the admissibility and disclosure of evidence, in particular with regard to the admittance of evidence obtained under torture, as part of the materials in Duch's case file constituted confessions by S-21 prisoners who were obtained under conditions of torture. The Trial Chamber determined that the content of a document could only be used when it is sure that no violation of the UN Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁴⁶ (CAT) occurred or if the evidence is only used to show that a statement was made and not for the truth of their con-

¹³⁸ Alex Bates, ATLAS Project/British Institute of International and Comparative Law, 'Transitional Justice in Cambodia: Analytical Report' (October 2010) <http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf> accessed 25 June 2015, 51.

¹³⁹ Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers of the Courts of Cambodia' (February 2012) <www.opensocietyfoundations.org/reports/recent-developments-extraordinary-chambers-courts-cambodia-0> accessed 25 June 2015, 12.

¹⁴⁰ Karnavas (n 25) 62-63.

¹⁴¹ Ciorciari and Heindel (n 6) 17.

¹⁴² ICTY, *Prosecutor v. Delalic*, Case No. IT-96-21 (4 February 1998) para 49.

¹⁴³ KRT Trial Monitor, Report Issue 7 (week ending 31 May 2009); KRT Trial Monitor, Report Issue 9 (week ending 21 June 2009); KRT Trial Monitor, Report Issue 21 (week ending 20 September 2009).

¹⁴⁴ ECCC, Trial Chamber, *Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character*, Case File No 001/18-07-2007/ECCC/TC (9 October 2009).

¹⁴⁵ KRT Trial Monitor (n 27) 22; ECCC, 'Statistics: Civil Party applicants per Case File' <<http://www.eccc.gov.kh/en/statistics-civil-party-applicants-case-file>> accessed 24 June 2015.

¹⁴⁶ Article 15 Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment.

tents.¹⁴⁷ This issue arose also in Case 002, when the Office of the Co-Investigating Judges ruled that Article 15 CAT prohibits the use of statements made under torture as evidence against the victims, but not entirely against those who are implicated for torture in so far as its content is not used as truth but as investigative leads to other sources of information.¹⁴⁸ The Defence filed an appeal against this order before the Pre-Trial Chamber. However, the appeal was dismissed as the Pre-Trial Chamber argued that Rule 21 of the Internal Rules provides sufficient safeguards with regard to fair trial rights.¹⁴⁹ Even though the Trial Chamber in Case 001 and the Office of the Co-Investigating Judges in Case 002 made statements that the confessions will not be used for the truth of their contents but only as evidence of their existence or as investigative leads as mentioned above, the KRT Trial Monitor cautions in its report that the ECCC may find itself on a slippery slope. The reason for this is that Article 21(3) of the Internal Rules is the only provision that operates as an exclusionary rule on this issue and only applies to information culled by organs of the ECCC and not by the Communist Party of Kampuchea. The employment of torture and cruel, inhuman degrading treatment or punishment is a grave concern in Cambodia.¹⁵⁰ The Cambodian judiciary and police give considerable weight to confessions in order to secure convictions. For these reasons it is very important to ensure that the ECCC's position and argumentation on the use of confessions is not abused or misused on the domestic level.¹⁵¹

Some of the fair trial issues that arose with regard to Case 002/01 were the right to be present, Ieng Sary's amnesty, the fitness to stand trial, the right to a reasoned judgment and the right to remain silent.

A first fair trial issue that arose during Case 002/01 was the right to be present.¹⁵² This right entails the right of the accused to be tried in its own presence and to defend himself/herself in person or with the assistance of a lawyer. It was a recurrent issue during Case 002/01 where the Accused, Nuon Chea and Ieng Sary, were physically present in the courtroom during proceedings only for a limited number of days. On the domestic level, the right to be present is a problematic issue, as the accused are often not present in the courtroom.¹⁵³

A second fair trial issue relates to the amnesty from prosecution granted to Ieng Sary for his 1979 sentence. The ECCC was granted the explicit authority to determine the scope of previously given amnesties. The ECCC reversed the amnesty on the sole basis of the obligations of the Cambodian State to prosecute serious crimes. This decision sends a strong message to the domestic courts that they have the obligation to prosecute and punish all those responsible for serious crimes. Or, in the words of justice advocate Youk Chhang, "[t]he arrest of the most politically untouchable of the Khmer Rouge leaders is a powerful message to the people of Cambodia [...]."¹⁵⁴

A third fair trial issue that arose with regard to Case 002/01 related to the fitness to stand trial. A number of separate hearings were held with regard to Ieng Thirith and Ieng Sary's fitness to stand trial.¹⁵⁵ Ieng Thirith

¹⁴⁷ ECCC, Trial Chamber, *Decision on Parties Request to Put Certain Materials Before the Chamber pursuant to Internal Rule 87(2)*, Case File No 001/18-07-2007/ECCC/TC (28 October 2009) para 8; KRT Trial Monitor (31 May 2009).

¹⁴⁸ ECCC, Office of the Co-Investigating Judges, *Order on Use of Statements which were or may have been obtained by Torture*, Case File No 002/19-09-2007-ECCC-OCIJ (28 July 2009) para 21-22 and 27.

¹⁴⁹ ECCC, Pre-Trial Chamber, *Decision on Admissibility of the Appeal against Co-Investigating Judges' Order on Use of Statements which were or may have been obtained by Torture*, Case File No 002/19-09-2007-ECCC/OCIJ (27 January 2010) Dispositive.

¹⁵⁰ United Nations, Committee against Torture, *Concluding Observations of the Committee against Torture: Cambodia UN Doc CAT/C/KHM/CO/2* (20 January 2011) 5-6.

¹⁵¹ KRT Trial Monitor (n 27) 23-25.

¹⁵² Rule 81(1) Internal Rules; Article 14(3) International Covenant on Civil and Political Rights; Article 35(d) Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea.

¹⁵³ Informal conversation with Sman Ourmoet.

¹⁵⁴ Youk Chhang, 'Arrest of Ieng Sary is an Important Victory for Victims' *The Cambodia Daily* (Phnom Penh, 15 November 2007); Ciorciari & Heindel (n 6) 17-20.

¹⁵⁵ Rule 32 Internal Rules.

was found unfit to stand trial due to her mental condition.¹⁵⁶ Ieng Sary passed away on 14th of March 2013 before the issue concerning him could be solved. This shows that nobody can stand trial when not able to defend him/ herself adequately, a fact that would also affect the fundamental fair trial principle of equality of arms between parties.

A fourth fair trial issue was the right to a reasoned judgement.¹⁵⁷ The parties struggled with the absence of a reasoned judgement by the Trial Chamber, who rather opted for case-by-case rulings.¹⁵⁸ However, the requirement for the judges at the ECCC to produce reasoned decisions is an important precedent for domestic courts, where this procedure is often lacking or deficient.

A final fair trial issue that arose was the right for the accused to remain silent when questioned.¹⁵⁹ Despite answering questions at first, the Accused Khieu Samphan and Nuon Chea decided to exercise their right to remain silent because of their lack of confidence in the Court's ability to respect fair trial principles. The Office of the Co-Prosecutors requested the Chamber to draw conclusions from the silence against the Accused. This was strongly contested by the Defence teams as they argued that this would render void the right to remain silent.¹⁶⁰

Other important fair trial issues have risen before the ECCC and can serve as valuable jurisprudence for the domestic courts. First, the Cambodian criminal justice system continues to rely on incarceration as the default for the accused awaiting trial. Applications for release on bail are rarely made and granted. Thus, bail hearings at the ECCC provide useful examples for the national courts.¹⁶¹ Second, the ECCC has produced some valuable jurisprudence on the conditions under which an accused may be detained and the right of the accused to access material of the case file.¹⁶² The latter issue is very important as the Criminal Procedure Code prohibits lawyers to provide their clients with copies of the case file,¹⁶³ which raises serious concerns with regard to the right of the accused to a fair trial. Finally, the extensive way in which the ECCC, in its decisions, has interpreted fair trial rights under the ICCPR with reference to international jurisprudence is also instructive for domestic courts.¹⁶⁴

¹⁵⁶ ECCC, Trial Chamber, *Decision on Ieng Thirith's Fitness to Stand Trial*, Case File No 002/19-09-2007/ECCC/TC (7 November 2011); ECCC, Trial Chamber, *Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011*, Case File No 002/19-09-2007/ECCC/TC (13 September 2012); ECCC, Supreme Court Chamber, *Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith*, Case File No. 002/19-09-2007-ECCC-TC/SC(16) (16 September 2012).

¹⁵⁷ Article 14(3) International Covenant on Civil and Political Right.

¹⁵⁸ Andrew Grant, Khmer Rouge Trial Monitor, 'Right to Reasoned Judgment' (15 October 2013) <<http://krtmonitor.org/2013/10/15/case-00201-highlights-right-to-reasoned-judgment/>> accessed 24 June 2015.

¹⁵⁹ Article 14(3) ICCPR; Rule 21(d) Internal Rules.

¹⁶⁰ KRT Trial Monitor, 'Fair Trial Rights at the ECCC Case 002/01' <<https://krttrialmonitor.files.wordpress.com/2014/03/aiji-fairtrialrights-eccc.pdf>> accessed 25 June 2015.

¹⁶¹ See for example: ECCC, Pre-Trial Chamber, *Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch"*, Case File No 001/18-07-2007/PTC (3 December 2007) para 57. The Pre-Trial found that the provisional detention by the Office of the Co-Investigating Judges was a necessary measure in order to prevent the Accused from intimidating witnesses (para 34), there was a fear that the Accused would disappear (para 39), etc.

¹⁶² See for example: ECCC, Office of the Co-Investigating Judges, *Order on Access to the Case File by Detainees*, Case File No 001/18-07-2007-ECCC-OCIJ (23 January 2009). The Office of Co-Investigating Judges applied jurisprudence of the European Court of Human Rights (para 11) in granting the Defence's request. By doing so it set out a general principle allowing the Accused to access documents of the case file based on the right of satisfactory access to the case file, while taking into account the practical constraints of the detention facility (para 15).

¹⁶³ See for example: Article 48 and 145 Code of Criminal Procedure of the Kingdom of Cambodia.

¹⁶⁴ See for example: ECCC, Pre-Trial Chamber, *Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meeting with IENG Sary at the Detention Facility*, Case File No 002/19-09-2007/ECCC/OCIJ (11 June 2010). The Pre-Trial Chamber held that an order of the OCIJ, which refused the Defence request for audio-visual recording of meetings between the Accused and his lawyer at the detention facility, violated his fair trial rights. The Chamber relied upon the jurisprudence of the European Court of Human Rights to interpret broadly Article 14 of the ICCPR; Karnavas (n 25) 67-71.

In conclusion, the fair trial issues discussed with regard to Cases 001 and 002/01 show the lengths the ECCC must go to meet international fair trial standards and to set important precedents for the Cambodian judiciary. The Duch trial, for example, shows that, regardless of the severity of the alleged crimes, every person has the right to remedies for violations of their rights. It demonstrates that fair trial rights are a separate issue from innocence and guilt. Another example is the issue of Ieng Thirith's fitness to stand trial, which shows that nobody can stand on trial when being able to defend him/herself adequately. Hopefully the ECCC's rationale with regard to fair trial issues will have a positive impact on the Cambodian judiciary and affect positively the perceptions of the fair trial rights of the defence.¹⁶⁵

C. Challenges and limitations

1. Lack of explicit legacy mandate

To what extent a court should have an explicit legacy mandate in its constituting document is a controversial issue. Some assert that legacy can be sustained even if there is no explicit legacy mandate. This was the case in Kosovo, Timor-Leste and Sierra Leone. The reasoning behind this position is that the primary focus of a hybrid court should be on successful investigations and prosecutions, convictions or acquittals and finally the enforcement of sentences. These would constitute the markers of success on the international and domestic level. However, without an explicit mandate the way legacy is interpreted is left upon the discretion of individual actors. An additional problem is that their approach will not necessarily be systematic and will probably lack political and budgetary support. Others assert that an explicit legacy mandate is key, as there is an inherent link between delivering justice and building the necessary sustainable capacity for the domestic judiciary to address such crimes on its own in the future. This view considers these two goals as concurrent and mutually reinforcing. In order to reach this goal of legacy and capacity building, political support is crucial. Some assert that the mandate should be defined as narrow as possible in order to limit the possibility of political interference. It is also important all laws are synchronised with the legacy mandate and that unrealistic time limits are avoided.¹⁶⁶ According to the OHCHR, international experience shows that when legacy is an integral part of policy planning from the moment a hybrid court is conceived, its potential impact is much greater.¹⁶⁷

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, the Agreement between the UN and the RGC concerning the Prosecution under Cambodian Law of Crime Committed during the Period of Democratic Kampuchea and the Internal Rules of the ECCC do not include a specific legacy mandate.¹⁶⁸ However, Rule 11(2) k of the Internal Rules concerning the Defence Support Section (DSS) of the ECCC provides for the training of lawyers and thus mentions legacy in an indirect way.¹⁶⁹ Additionally, there is a section on the website of the ECCC that deals specifically with legacy under the DSS. It states that, "[t]he ECCC presents an excellent opportunity to bolster the understanding of the criminal trial process within Cambodia and, in particular, the right to a fair trial and an effective defence. The DSS takes this responsibility seriously and has established a vigorous outreach and capacity-building programme."¹⁷⁰ The Victims Outreach Support Section also refers to the concept of legacy in their mission statement with regard to their vision, "[i]t is to also have the Court's legacy benefit future position developments in Cambodia."¹⁷¹ Besides this, the ECCC does not

¹⁶⁵ Coughlan, Ghouse & Smith (n 14) 25.

¹⁶⁶ UN OHCHR (n 1) 7-8.

¹⁶⁷ *ibid* 16.

¹⁶⁸ Bates (n 138) 74.

¹⁶⁹ Rule 11(2)(k) Internal Rules; Bialek (n 116) 5; Coughlan, Ghouse & Smith (n 14) 21-22.

¹⁷⁰ ECCC, 'Legacy' <<http://www.eccc.gov.kh/en/dss/legacy>> accessed 27 June 2015.

¹⁷¹ ECCC, 'VSS Structure: VSS's Mission Statement' <<http://www.eccc.gov.kh/en/victims-support/vss-structure>> accessed 24 June 2015.

appear to have any cohesive public presence with respect to legacy. In contrast to the ECCC, the website of the Special Court for Sierra Leone, for example, describes a wide range of legacy projects.¹⁷²

A major negative consequence of the lack of explicit legacy mandate at the ECCC, is that the administration does not consider legacy as one of its main tasks, but considers it rather as a national responsibility.¹⁷³ Consequently, no legacy strategy was adopted at the ECCC and legacy was not included in its exit strategy.¹⁷⁴ This contributes to a lack of coordination and leadership with regard to legacy work in Cambodia. However, the Office of Administration did establish in 2010 the Legacy Advisory Group and a Legacy Secretariat in order to address and discuss the Court's legacy.¹⁷⁵ In Chapter 5, the author will deal more specifically with this issue.

2. Negative aspects of the ECCC's hybrid structure and workings for its legacy

In this section some aspects inherent to the ECCC's hybrid structure and some issues that flow from its workings will be discussed in as far they can have a negative impact on its legacy.

Some have argued that hybrid courts can result in a reverse or negative legacy, for example, by draining the domestic capacity as local professionals try to move to the hybrid court and by diverting the focus away from investment in the necessary domestic legal reforms and consequently leading to a competition for resources.¹⁷⁶ Indeed, a short-term drainage of local professionals would be a normal consequence during the lifetime of a hybrid court. This can evolve into a long-term problem if national staff would use their experience at a hybrid court to seek, for example, jobs abroad and thus not return to the domestic system. However, one report suggests that national staff working at hybrid courts still retain their bonds with the other members of the domestic judiciary and is likely to return to the domestic level. Nevertheless, the report still cautions that their return is not guaranteed.¹⁷⁷ In this regard the ECCC may be unique, as most of the ECCC's national judges continue to work on the domestic level.¹⁷⁸ This contributes to the chance that when returning to the domestic judiciary they will share their new skills and knowledge with national personnel.¹⁷⁹ A way of avoiding this drainage could be to provide personnel policies and professional development programmes in order to built sustainable domestic judicial capacity.¹⁸⁰ As mentioned, reverse legacy could also result in diverting the focus from domestic legal reforms and investment, causing the government to deflect attention from the domestic system's problems. Contrary to this, others suggest that national and international attention surrounding the ECCC create a unique opportunity to advocate for domestic legal reform.¹⁸¹ Also the issue of competition for resources has been raised with respect to the ECCC.¹⁸² However, this criticism does not necessarily mean that less should be spend on hybrid courts, but rather that more attention and resources should be given to post-conflict national judicial systems.¹⁸³ The ECCC spent over \$200 million to trial three people. One could pose the question why Nuon Chea and Khieu Samphan, who were found guilty in Case 002/01, should be tried again in Case 002/02 for a new set of crimes. Heather Ryan of the Open Society Justice Initiative states correctly that "[t]he answer lies in the quest for accountability, historical reckoning, reconciliation, and the need to provide justice

¹⁷² Bialek (n 116) 2-3.

¹⁷³ Interview with Doreen Chen; Interview with Michelle Staggs Kelsall.

¹⁷⁴ ECCC, 'Extraordinary Chambers in the Courts of Cambodia: Completion Plan - Revision 4' (31 March 2015), <www.eccc.gov.kh/sites/default/files/Completion%20plan%20Rev%204%20Final.pdf> accessed 24 June 2015.

¹⁷⁵ Bialek (n 116) 11.

¹⁷⁶ *ibid* 8; UN OHCHR (1) 15.

¹⁷⁷ Higonet (n 121) 368.

¹⁷⁸ Interview with Claudia Fenz; Interview with Michelle Staggs Kelsall.

¹⁷⁹ Bialek (n 116) 6.

¹⁸⁰ UN OHCHR (1) 40.

¹⁸¹ Bialek (n 116) 9.

¹⁸² Douglas Gillison, 'Sihanouk Says He Opposes KR Tribunal' *The Cambodia Daily* (Phnom Penh, 10 July 2006) <<http://ki-media.blogspot.co.at/2006/07/sihanouk-says-he-opposes-kr-tribunal.html>> accessed 25 June 2015.

¹⁸³ UN OHCHR (1) 15.

for victims and survivors of the Khmer Rouge.¹⁸⁴ However, the allegations of corruption and political interference, and the inefficiency of the court in bringing the cases to trial have led to problems with obtaining sufficient funds to continue its work. In January 2012, the Cambodian budget was exhausted, as donors pledged no new funds.¹⁸⁵ The Court is not only short in funds, but is also running substantially over budget. Initially, the court was expected to cost around \$60 million in total, \$20 million a year, and have completed legal proceedings in three years. However, the court has spent already at least \$70 million convicting only one suspect, Duch in Case 001.¹⁸⁶ The funding for the ECCC is structured in a hybrid way, as it is split into a national and an international component. The total budget for 2015 is \$33.8 million of which \$27.1 million is the international component and \$6.7 million the national one. Both components are funded on the basis of voluntary contributions.¹⁸⁷ The website of the ECCC states, “[t]here is still an urgent need for funding in order to continue the work of the court. We are hoping to receive on-going funding from donor countries as well as concerned organisations, companies, foundations and individuals.”¹⁸⁸ According to Kirsten Ainley, it is hard to justify the continuation of spending such large sums of money on such imperfect justice considering the corruption at the court, its lack of efficiency and low level of public support for spending such money.¹⁸⁹ In a 2008 survey conducted by the Human Rights Center of the University of Berkeley, 52.6% of the interviewed Cambodians would rather spend money on something else than the ECCC. 76.3% felt that the government should focus on contemporary issues and problems rather than addressing crimes committed by the Khmer Rouge.¹⁹⁰ However, 39.4% found that the Khmer Rouge top leaders must be punished.¹⁹¹ 90.5% found that it is important to hold accountable those responsible for what happened during the Khmer Rouge regime.¹⁹²

An important limitation due to the ECCC’s hybrid structure is its proneness to political interference.¹⁹³ Controversy over perceived political interference and lack of impartiality of the judicial members of the court has plagued the ECCC.¹⁹⁴ In 1999, the Group of Experts for Cambodia, appointed by the UN Secretary General with the task of exploring the legal options for bringing the Khmer Rouge leaders to justice, recommended that an international criminal tribunal should be established because the Cambodian legal system lacked independence, skilled practitioners and the capacity to conduct trials with due process. They also had the concern that the Khmer Rouge connections of some to those in power would lead to too much political interference.¹⁹⁵ However, Prime Minister Hun Sen refused this in order to keep some level of control over the justice process and because of his deep distrust of the UN. Eventually, they reached the compromise of establishing a hybrid court. Nevertheless, as mentioned, this makes the Court more prone to political interference than an international tribunal would have been.¹⁹⁶ The Cambodian government’s interferences in the legal proceeding before the ECCC are

¹⁸⁴ Heather Ryan, 'Why Try Khmer Rouge Leaders Twice?' (International Justice Monitor, Open Society Justice Initiative) (17 October 2014) <www.ijmonitor.org/2014/10/why-try-khmer-rouge-leaders-twice/> accessed 25 June 2015.

¹⁸⁵ Bridget Di Certo, 'KRT Pay Freeze Will Linger' *Phnom Penh Post* (Phnom Penh, 30 January 2012).

¹⁸⁶ Peter Maguire, 'Cambodia's Troubled Tribunal' *New York Times* (28 July 2010) <www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html?_r=0> accessed 25 June 2015.

¹⁸⁷ ECCC, 'Revised Budget for 2014-2015' (31 March 2015) <<http://www.eccc.gov.kh/en/about-eccc/finances/eccc-revised-budget-2014-2015>> accessed 3 January 2016; ECCC, 'The Court Report' (April 2015 Issue 84)

<<http://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20issue%2084%20on%20APRIL%202015%20FINAL.pdf>> accessed 25 June 2015, 2.

¹⁸⁸ ECCC, 'How is the court financed?' <www.eccc.gov.kh/en/faq/how-court-financed> accessed 24 June 2015.

¹⁸⁹ Ainley (n 27) 12.

¹⁹⁰ The Human Rights Center, University of California, Berkeley School of Law, 'So We Will Never Forget: A Population-based Survey on Attitudes about Social Reconstruction and The Extraordinary Chambers in the Courts of Cambodia' (January 2009) 35.

¹⁹¹ *ibid* 30.

¹⁹² *ibid* 31.

¹⁹³ Higonnet (n 4) 45-46.

¹⁹⁴ Joint Civil Society Report with The Centre for Civil and Political Rights (n 69) 46.

¹⁹⁵ Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 UN Doc A/53/850-S/1999/231 (18 February 1999).

¹⁹⁶ Ainley (n 27) 19.

very well documented.¹⁹⁷ An example is the political interference by the RGC in order to prevent Cases 003 and 004 from coming before the ECCC. As many members of the former Khmer Rouge regime are still high in office or have connections to individuals currently high in office, the opposition of the RGC to Cases 003 and 004 is likely based, according to some, on its concern that these cases would implicate these people or raise embarrassing facts about them.¹⁹⁸ By the RGC strong and public opposition to the continuation of Cases 003 and 004 in 2009, claiming that the pursuit of these cases would be inappropriate and dangerous to the peace in Cambodia, the RGC has negatively affected the workings of the ECCC and intimidated the national staff at the ECCC.¹⁹⁹ On 26 February 2015, Prime Minister Hun Sen repeated his objections against Cases 003 and 004 at an international summit on the UN's anti-genocide initiative "Responsibility to Protect".²⁰⁰ These past events led to a breakdown between national and international staff at the court. One of the consequences is that solely the International Co-Investigating Judge and Prosecutor have undertaken investigations in Cases 003 and 004, which have been formally under investigation since August 2009, without the cooperation of the Cambodian counter sides. The national Co-Investigating Judge, You Bunleng, even issued a statement in September 2011 stating that the Office of the Co-Investigative Judges had concluded the investigation of Case 003.²⁰¹ This statement was heavily criticised by international and local observers, as it was perceived as a clear sign of "failure to conduct genuine, impartial and effective investigations into ECCC cases 003 and 004."²⁰² Since October 2012 to date, March 2015, after a series of problems which include the resignation of two prior international investigating judges, who claimed that political interference prevented them from doing their job, International Co-Investigating Judge Mark Harmon has been working on the cases without the cooperation of the Cambodian Co-Investigating Judge, who continues to assert the validity of his 2011 statement with regard to the conclusion of investigation. This makes it unlikely that he would accept new investigations conducted by the International Judge. The rules of the Court allow that if the prosecutors or investigating judges disagree on whether or how to proceed with an investigation, one prosecutor or investigating judge can proceed on his/her own so long as the other does not seek a ruling from the Pre-Trial Chamber to stop the investigation.²⁰³ In order for the Pre-Trial Chamber to reach an affirmative decision on this issue it must reach a super-majority, *i.e.* four out of five judges must agree. In Cases 003 and 004, the Cambodian Co-Prosecutor brought the issue before the Pre-Trial Chamber. However, no super-majority was reached. Consequently, both cases proceeded to the Co-Investigating Judges for judicial investigation. The same rules apply when the Co-Investigating Judges disagree on whether or how to continue with an investigation. So far (March 2015), the Cambodian Co-Investigating

¹⁹⁷ See for instance for Cases 003 and 004: Human Rights Watch, 'Cambodia: Stop Blocking Justice for Khmer Rouge Crimes' (23 March 2015) <www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes> accessed 25 June 2015; Open Society Justice Initiative, 'The Future of Cases 003 and 004 at the Extraordinary Chambers in the Courts of Cambodia' (October 2012) <www.opensocietyfoundations.org/publications/future-cases-003-and-004-extraordinary-chambers-courts-cambodia> accessed 25 June 2015.

¹⁹⁸ Open Society Justice Initiative, 'Briefing Paper. Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (March 2015) <www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf> accessed 25 June 2015, 5.

¹⁹⁹ Ian MacKinnon, 'Prosecutor Wants to Indict Five more Khmer Rouge', *Financial Times* (8 September 2009) <www.ft.com/cms/s/0/e6dc489e-9b98-11de-b214-00144feabdc0.html#axzz3aCudXj84> accessed 25 June 2015; Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (November 2011) <<http://www.opensocietyfoundations.org/reports/recent-developments-extraordinary-chambers-courts-cambodia-november-2011>> accessed 25 June 2015, 1; Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (December 2010 Update) <www.opensocietyfoundations.org/sites/default/files/cambodia-khmer-rouge-report-20101207.pdf> accessed 25 June 2015; Georgia Wilkins, 'Government Rejects Charges of Political Manipulation at ECCC', *The Phnom Penh Post* (Phnom Penh, 29 May 2009) <www.phnompenhpost.com/national/government-rejects-charges-political-manipulation-eccc> accessed 25 June 2015.

²⁰⁰ Open Society Justice Initiative, 'Briefing Paper. Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (March 2015) <www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf> accessed 25 June 2015, 5.

²⁰¹ ECCC, Office of the Co-Investigating Judges, *Notice of Conclusion of Judicial Investigation*, Case File No 003/07-09-2009-ECCC-OCIJ (29 April 2011).

²⁰² Human Rights Watch, 'Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign' (3 October 2011) <<http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>> accessed 25 June 2015.

²⁰³ Rule 72 Internal Rules.

Judge has refused to pursue investigations in Cases 003 and 004. However, the Cambodian Co-Investigating Judge has not brought the issue before the Pre-Trial Chamber for resolution. Consequently, the International Co-Investigating Judge is allowed to proceed with the investigation of both cases on his own. It is likely that as the Pre-Trial Chamber couldn't reach a super-majority the previous time, it will also not reach it this time if the issue would be raised before the Pre-Trial Chamber by the Cambodian Co-Investigating Judge.²⁰⁴

On the 3rd of March 2015, International Investigating Judge Harmon charged Im Chaem *in absentia* in Case 004, as well as Maes Muth in Case 003.²⁰⁵ Charging suspects *in absentia* has not previously been used at the Court and is also not provided for in the ECCC rules. In the Cambodian domestic courts it is often practiced in highly political cases. Normally, the *in absentia* procedure is applied when it is impossible to arrest an accused because he or she, for example, fled the jurisdiction. However, in this case the Accused are readily available for arrest, they have even been giving interviews to the press. The police, who are under the direct control of the Cambodian government, refuse to execute the Court order to arrest them. This is a direct violation by the RGC of the Agreement between the government of Cambodia and the UN, as the Agreement states in Article 25 that the "Government of Cambodia shall comply without undue delay with any request for assistance by the Co-Investigating Judges [...] or an order issued by any of them, including, but not limited to [...] service of documents; arrest or detention of persons."²⁰⁶ The Cambodian government, who opposes Cases 003 and 004, might seek to improperly end these cases in this way. It is troubling that the UN and other international actors are not able or willing to address or even fully acknowledge the political interference in Cases 003 and 004. This raises the concern of whether they are able to enforce the Agreement. They have the responsibility to ensure that international fair trial standards are met and that the Court is protected from political interference. However, the UN and international officials are failing in this regard by silently accommodating the Cambodian government's refusal to cooperate. According to Brad Adam, Asian director at Human Rights Watch, "[t]he Cambodian government's refusal to cooperate in bringing Khmer Rouge leaders before the UN-backed tribunal would be the last straw after years of obstruction, delay, and corruption. If the government fails to act quickly on the judge's charges, then it's time the UN end its participation and for donors to stop funding the tribunal. Further support would just make a mockery of justice for millions of victims and their families."²⁰⁷ This is damaging the ECCC as an institution and makes a mockery of it. It negatively affects the impact and legacy of the ECCC for the domestic judiciary, as it provides a vivid demonstration to the Cambodian domestic courts of caving in to political interference while it also deepens the Cambodians' cynicism about the prospect of rule of law and judicial reform in Cambodia.²⁰⁸

The interferences in Cases 003 and 004 reflect the ECCC's potential for a negative legacy of the ECCC. Allegations of political interference also arose during the investigative phase of Case 002 as it became apparent that the ECCC was unable, or unwilling, to call certain senior Cambodian officials to testify at the Court.²⁰⁹ If the ECCC, with its vast international support and presence, is not able to exercise judicial independence, it is to be expected that Cambodian citizens question how regular Cambodian courts would be able to do so. Thus, it is extremely important that the ECCC embodies the values of fair trial rights and judicial independence. When failing to do so, its legacy for the domestic judicial system will be rather negative than positive.²¹⁰

²⁰⁴ Joint Civil Society Report with The Centre for Civil and Political Rights (n 69) 46-47; Open Society Justice Initiative (n 200) 3-4.

²⁰⁵ ECCC, 'The International Co-Investigating Judge Charges Meas Muth in absentia in Case 003' (3 March 2015) <www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-meas-muth-absentia-case-003> accessed 24 June 2015; ECCC, 'The International Co-Investigating Judge Charges Im Chaem in absentia in Case 004' (3 March 2015) <<http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004>> accessed 24 June 2015.

²⁰⁶ Agreement between the United Nations and the Royal Government of Cambodia (n 58).

²⁰⁷ Human Rights Watch (n 197).

²⁰⁸ Open Society Justice Initiative (n 200) 5-7.

²⁰⁹ Ciorciari & Heindel (n 6) 27.

²¹⁰ Bialek (n 116) 8.

As mentioned above, the ECCC employs a mix of Cambodian and international staff. The international staff is constituted by UN employees with UN protection, rights, responsibilities and pay, which may breed resentment. The Cambodian national staff has to rely on the funds made available by the Cambodian government rather than by the UN. Allegations of Government corruption have been raised. For example, in 2007 there were allegations that Cambodian staff had to pay part of their salaries to government officials who gave them their jobs. Andrew Lanuzzi, a legal consultant for Nuon Chea's defence team, claimed that it seemed that some UN officials were involved in covering up the court's corrupt practices. The UN tried to improve the anti-corruption mechanisms at the tribunal. However, these planned safeguards were immediately criticized as being inadequate by tribunal watchdog the Open Society Initiative.²¹¹ These corruption allegations can negatively affect the ECCC's legacy as they damage its status of model court.

According to Kirsten Ainley, the Cambodian case shows that findings of recent studies stating that "prosecutions may deter human rights violations by increasing the perception of the possibility of cost of repression for individual state officials" and that "transitional justice overall has a positive effect on the change in human rights and democracy measures" are not correct.²¹² Contrary to this, the Cambodia's human rights record seems to be regressing and instead is more likely to be bolstering the power of the Cambodian government.²¹³

As discussed in Section 4.2.1, the ways in which the ECCC deals with fair trial issues during legal proceedings can be used as valuable examples and lessons learned for the domestic judiciary for dealing with similar issues. At the same time, deficiencies during legal proceedings before the ECCC should also be acknowledged and not be transported to the domestic judicial system. In the following some examples of such deficiencies will be given. Michael Karnavas, former international co-counsel for Ieng Sary in Case 002 and current international co-counsel in Case 003, cautions against applying decisions and practices of the ECCC recklessly and without criticism, even if they have been passed by the scrutiny of the Supreme Court Chamber. He notes that it is always necessary to identify contrived and unfair decisions and legal practices on the part of the ECCC and then reject them. He gives the example, discussed in Section 4.2.3, of the majority decision made by the Supreme Court Chamber on appeal in Case 001, in which it determined that the ECCC did not have authority to order the reduction in Duch's sentence. According to Michael Karnavas, this sends the message to the Cambodian judicial system and the Cambodian people that with regard to lengthy, inappropriate and excessive pre-trial detention, which is a problematic issue in Cambodia, due process and human rights standards can be ignored.²¹⁴ The Office of the Co-Investigation Judges has also been criticised by some as being the ECCC's principal structural flaw, for fairness concerns (investigating judges have enormous discretionary power to take investigative action or not, a fact that carries an inherent bias toward the prosecution's case, as the prosecutors provide for a large amount of the information in the initial submission), for their lack of transparency and their methodological failures.²¹⁵ Finally, an alleged deficiency is the occasional different treatment of the parties by the Trial Chamber. This would negatively affect the commitment to uphold fair trial standards by the ECCC, in particular the rights of the accused. This affects, *i.a.*, the equality of arms, the right to a fair trial and the requirement of impartiality by the judges and the tribunal as such.²¹⁶

²¹¹ Ciorciari & Heindel (n 6) 46-50; Elena Lesley, 'Court Staffers confirm Corruption at Tribunal' *The Phnom Penh Post* (Phnom Penh, 27 February 2009) <www.phnompenhpost.com/krt-talk/court-staffers-confirm-corruption-tribunal> accessed 25 June 2015; Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (February 2009 Update) <www.opensocietyfoundations.org/sites/default/files/eccc_20090212.pdf> accessed 25 June 2015, 2-3.

²¹² Tricia Olsen, Leigh Payne & Andrew G Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32(4) *Human Rights Quarterly* 995-996; Kathryn Sikkink, *The Justice Cascade: How Human Rights are Changing World Politics* (W W Norton & Company 2011) 258.

²¹³ Ainley (n 27) 24-26; Human Rights Watch, 'Cambodia: A Year of Worsening Rights' (29 January 2015) <www.hrw.org/news/2015/01/29/cambodia-year-worsening-rights> accessed 24 June 2015.

²¹⁴ Karnavas (n 25) 62-63; Open Society Justice Initiative (n 139) 12.

²¹⁵ Ciorciari & Heindel (n 6) 20-24.

²¹⁶ United Nations, Human Rights Committee, General Comment No 32 UN Doc CCPR/C/GC/32 (23 August 2007) para 13 and 21; Karnavas (n 25) 63-66.

IV. Evaluation of the impact and legacy of the ECCC

A. Introduction

In the previous chapters the deficiencies in the Cambodian legal system were discussed, followed by the features of the ECCC that can positively impact the domestic system and leave a lasting legacy, concluding with the limitations and deficiencies of the ECCC that counterbalance these positive aspects. In this chapter, these different aspects will be brought together and a comprehensive and critical evaluation will be made, which includes information gathered through fieldwork in Cambodia.

B. Legacy at the ECCC

High expectations were placed on hybrid courts due to their novel structure. These included bringing justice, reconciliation, restoring trust in the judicial system and capacity building of the domestic judiciary. Hybrid courts fell short of these initial hopes, including the ECCC.²¹⁷ Holding such high expectations was bound to lead to disappointment, as the standards set cannot possibly be met.²¹⁸ Hybrid courts are targeted interventions, with limited temporal jurisdiction and time frames, and under pressure to successfully bring those responsible to justice. Therefore, it is important to manage expectations with regard to legacy.²¹⁹ Nevertheless, the expectation that the ECCC could strengthen the domestic legal system and the rule of law in Cambodia can be considered as a reachable goal. This does not mean that the ECCC can bring the legal system and judiciary to perfection on a short-term basis, but that it has the capabilities of leaving a legacy, due to its specific and exceptional aspects, such as in-country location, mixed staff and application of Cambodian law. One of the arguments to establish an in-country court in Cambodia was the fact that it could leave a legacy for the domestic system.²²⁰ Fundamentally reforming dysfunctional judicial systems and developing a culture based on the rule of law are long-term goals to which the ECCC can contribute.²²¹ Contrary to these aspirations, the ECCC has neglected extensively its role in legacy, while it could have had a much bigger impact than it has had so far.²²² It can be considered as a missed chance for the international community as they will not have this window of opportunity again after the closure of the ECCC.²²³

The primary reasons for the ECCC's failure in the field of legacy are the lack of focus on legacy from the beginning of the establishment of the Court, and the lack of an explicit legacy mandate, with the exception of the DSS that, however, is not conducting any legacy projects at the moment. The lack of an explicit legacy mandate makes it more difficult to build budgetary and political support for legacy, while these are crucial factors for legacy to succeed.²²⁴ Due to the absence of an explicit legacy mandate, it is not clear which entity carries the primary responsibility in leading legacy initiatives, with a lack of leadership and coordination as consequence. Planning from the outset is crucial in order to develop an effective legacy strategy, but no legacy strategy was created, and legacy is not part of the completion strategy of the Court.²²⁵ Additionally, it is problematic that the ECCC's administration does not consider legacy as one of its main tasks, but considers it rather as a national responsibility.²²⁶ Contrary to this, others argue that legacy work is implicit in the mandate of the

²¹⁷ Pdraig McAuliffe, 'Hybrid Tribunals at Ten. How International Criminal Justice's Golden Child became an Ophan', (2011) 7 *Journal of International Law and International Relations* 2.

²¹⁸ Interview with Claudia Fenz.

²¹⁹ UN OHCHR (n 1) 5-6.

²²⁰ Bialek (n 116) 6; Interview with Claudia Fenz.

²²¹ UN OHCHR (n 1) 5.

²²² Interview with Human Rights Officer, UN OHCHR.

²²³ Interview with Claudia Fenz.

²²⁴ UN OHCHR (n 1) 7.

²²⁵ ECCC (n 174); Bialek (n 116) 2-3; UN OHCHR (n 1) 9 and 16.

²²⁶ Interview with Doreen Chen; Interview with Michelle Staggs Kelsall.

Court.²²⁷ Other important factors are the constant lack of funds at the Court and the fact that the criminal proceedings leave the Court officials with little time to focus on legacy initiatives.²²⁸

These different factors make it difficult for ECCC staff members to initiate legacy initiatives, except in their spare time and without pay, and to coordinate these initiatives between the different sections of the Court.²²⁹ Nevertheless, the DSS, under the direction of Rupert Abbott, was doing good work with regard to legacy.²³⁰ Unfortunately, it seems that legacy initiatives at the court mostly depend on the will and interest of staff members.²³¹ This is problematic as well, because without an explicit legacy mandate that defines what is understood under legacy, the interpretation of legacy is left to a large extent to the discretion of these individual actors. Moreover, these legacy initiatives are conducted in an uncoordinated way, which can negatively lead to, for example, duplication. It is very unfortunate that the ECCC's administration does not see legacy as one of its tasks, as the ECCC is in the best position to be the central point for legacy coordination as it has both an authoritative role and all the necessary contacts. Instead, the UN OHCHR has taken up this role under its Legacy Program, even though it had anticipated a facilitating role.²³² Since 2010, the UN OHCHR has been organising, for example, ECCC Legacy Update Meetings. These meetings offer the opportunity to NGO's, government institutions working in the field of legal and judicial reform and the ECCC to meet, give an update about their legacy activities, share experiences and discuss how they can work together to strengthen the ECCC's legacy.²³³

Although it is correct to argue that the primary role of the Court is to trial those most responsible for the atrocities committed under the Khmer Rouge regime, it is also important to be aware of the capabilities of the ECCC with regard to strengthening the domestic legal system and the exceptional window of opportunity for the international community in doing so. Though, it is important to bring justice to the Cambodian people, however, the issue of sustainability is equally important, which means that the international intervention through the ECCC should be maximized and should make a permanent and sustainable contribution to the capacity of the domestic judiciary to deal with systematic crimes in the future.²³⁴ Legacy should be considered as being compatible and complementary to the core mandate of the Court.

Despite the administration's attitude towards legacy, the Office of Administration did establish in early 2010 the Legacy Advisory Group and a Legacy Secretariat in order to address and discuss the Court's legacy. However, this body has not been active since its establishment and it is not clear if it is still in function.²³⁵ Some claim this is due to lack of funds and lack of time as it consists of members of staff, others claim this is due to lack of interest.²³⁶

C. The ECCC as a model court and its demonstration effect

The ECCC can play an important role as a model court by setting an example for the domestic judiciary of how a court should deal with fair trial issues. This is facilitated by its proximity to the domestic system, due to its in-country location, its being part of the national judiciary, the employment of local staff and the application of Cambodian law.

²²⁷ Interview with Doreen Chen.

²²⁸ Bialek (n 116) 12; Coughlan, Ghouse & Smith (n 14) 27.

²²⁹ Interview with Doreen Chen.

²³⁰ Bialek (n 116) 11.

²³¹ Interview with Michelle Staggs Kelsall.

²³² Interview with Doreen Chen; Interview with Michelle Staggs Kelsall; Interview with Human Rights Officer, UN OHCHR.

²³³ Interview with Human Rights Officer, UN OHCHR.

²³⁴ UN OHCHR (n 1) 40.

²³⁵ Bialek (n 116) 11; E-mail from Heather Ryan to author; Interview with Michelle Staggs Kelsall; Interview with Human Rights Officer, UN OHCHR.

²³⁶ Ciorciari & Heindel (n 6) 66-67; Interview with Claudia Fenz; Interview with Legal Consultant; Interview with Michelle Staggs Kelsall; Interview with Human Rights Officer, UN OHCHR.

The norms and practices that came up during legal proceedings before the ECCC have the potential of being absorbed by the domestic judiciary as lessons learned/best practices and thus to have an educational effect.²³⁷ This is true especially with regard to those fair trial issues that are problematic on the domestic level.²³⁸ As such, the ECCC has drawn the attention to a number of fair trial issues, such as the equality of arms and pre-trial detention.²³⁹

However, Cambodian legal professionals and civil society have expressed their doubts on the role of the ECCC as a model court. They acknowledge that the ECCC could have an impact and function as a model due to its high standard of fair trial rights, but only to some extent. Some consider the ECCC as an international entity separate from the domestic judiciary and are consequently reluctant to include practices from the ECCC. In this regard some stress the distinction between the old and new generation, the old generation is more reluctant to change the habits and practices that have been in use for the past 30 years.²⁴⁰ Contrary to this, the new generation is seen as being more willing and capable of incorporating higher standards of fair trial rights within the domestic judiciary because of improved education, legal training and workshops.²⁴¹

There also seems to be a lack of understanding from the Cambodian side of which aspects of the ECCC can be transposed to the domestic level. A recurrent example is the exceptional length of criminal proceedings before the ECCC, from which it is concluded that the ECCC's practices cannot be transposed to the domestic level, as the latter is not capable of conducting criminal proceedings for multiple years.²⁴² This shows a lack of ability on the part of the Cambodians to distinguish between those aspects of the ECCC's criminal proceedings that should be taken as best practices and those aspects that are inherent to proceedings before a hybrid court and are consequently not expected, but also not able, to be transposed to the national judiciary.²⁴³ But it is also seems to show that the international side presumes that it is evident which practices should be absorbed and which not. Additionally and more importantly, the fact that the Cambodian legal professionals don't perceive the Court as a model court, or only to a certain extent, diminishes the ECCC's potential role as a model court. It is correct to argue that the ECCC and the domestic criminal courts differ, in the sense that they, *i.a.*, are structured differently, have different goals (for example, in contrast to the domestic courts the ECCC focuses only on a few accused), have different time frames and financial resources, *etc.* However, in essence all criminal courts are the same, in the sense that, even though courts apply different laws or are structured in a different way, the basic and fundamental legal rights and principles that they apply remain the same. One of these sets of basic rights are fair trial rights. As such, the domestic judiciary can learn from the ECCC how to interpret and apply these rights. Other aspects from which the domestic judiciary can learn from the ECCC, such as case management, are outside the scope of this thesis.

To conclude, outreach and guidance are crucial in order to inform national actors of legacy initiatives, inform them of the workings of the ECCC and offer them guidance on how to best implement the ECCC's practices. Partnership with civil society will also play a crucial role, and therefore it is necessary to include local civil society directly in the legacy work of the Court.²⁴⁴

As a model court, the ECCC can have a demonstration effect by setting fair trial standards which may contribute to a culture shift and demand for change or increased accountability through increased rights awareness. The strong approach of the Court to, for example, issues of fair trial and equality of arms have lead to the

²³⁷ Bates (n 138) 73-74.

²³⁸ Ciorciari & Heindel (n 6) 67-68.

²³⁹ See Section 4.2.3 for more examples.

²⁴⁰ Interview with Billy Chia-Lung Tia; Interview with Terith Chy.

²⁴¹ Interview with Suon Bunthoeun; Interview with Terith Chy.

²⁴² Interview with Run Saray.

²⁴³ Interview with Claudia Fenz; Interview with Suon Bunthoeun.

²⁴⁴ UN OHCHR (1) 20.

recognition of the important role of the defence.²⁴⁵ Demonstrating the supremacy of the law and its political independence play a crucial role in ensuring a demonstration effect.²⁴⁶ Outreach will also play a crucial role.²⁴⁷ However, the alleged political interference, corruption and current internal problems at the Court with regard to Cases 003 and 004²⁴⁸ can negatively affect this.

D. The transfer of skills and knowledge

One of the aspects of the ECCC that can facilitate capacity building of the domestic judicial system and more specifically its legacy, is the fact that a mixture of national and international staff, with a majority being national staff, staffs the ECCC. The international environment at the Court offers the possibility for national staff to gain skills and knowledge by working together with international staff. The ECCC also conducts workshops and trainings for national and international staff at the Court. However, the ECCC has done less to train Cambodian legal professionals outside of the Court due to their workloads. The ECCC is not the only entity that organises trainings and workshops. The UN OHCHR, for example, also conducts trainings and workshops for legal professionals and students.²⁴⁹

A general recurrent problem with trainings is that international experts neglect to take the background knowledge of the recipients sufficiently into account. It is preferable to start from the basic legal concepts, such as fair trial rights, in order to ensure that the student can built up his/her legal knowledge from a solid basis. Engaging Cambodian judges in trainings could also be beneficial as they have experience on the ground and might have more authority among local legal professionals and students than international experts. Another issue is the lack of coherent approach to trainings. The international experts who come to teach are from different systems, and therefore have different approaches. Without coordination this can be contra-productive, as legal professionals and students get more confused instead of expanding their knowledge. It has happened, for example, that experts from common law countries held trainings without taking into account that Cambodia has a civil law system.²⁵⁰

One may hope that the ECCC national staff, once they go back to work on the national level, will bring with them the skills and knowledge gained so that their colleagues can learn from their experiences. According to some, the most direct legacy impact will be through the transfer of skills and knowledge.²⁵¹ It is correct to sustain that training and education, especially of the new generation, is crucial when rebuilding and improving a legal system that is based on the rule of law. However, some question the extent of transfer of skills and knowledge within the ECCC, arguing that in some sections the international staff seems to be doing most of the work.²⁵² The reason for this could be the parallel management system at the Court.²⁵³ Others, though, attribute this state of affairs to the combination of very qualified international staff members and extreme time pressure.²⁵⁴ Some also believe that the improvements the national staff will make will have more effect on the personal than on the institutional level, because it is difficult to assess how people will deal with what they have learned, whether they will transfer it to others, and considering also the afore-mentioned reluctance and disbelief on the Cambodian side to incorporate the ECCC's practices.²⁵⁵ On this topic, some hold that the national staff will return to a system that is symptomatically affected by issues such as corruption and the patronage system. In order for them to function within this system, they will have to adapt to it again and thus fall back

²⁴⁵ Interview with Billy Chia-Lung Tia; *ibid* 17.

²⁴⁶ UN OHCHR, 2008, 17.

²⁴⁷ *ibid* 18-20.

²⁴⁸ See Section 4.3.2.

²⁴⁹ Interview with Michelle Staggs Kelsall.

²⁵⁰ Interview with Billy Chia-Lung Tia; Interview with Claudia Fenz.

²⁵¹ Interview with Claudia Fenz.

²⁵² Interview with Billy Chia-Lung Tia.

²⁵³ UN OHCHR (n 1) 14-15.

²⁵⁴ Interview with Claudia Fenz.

²⁵⁵ Interview with Terith Chy.

into its practices. Consequently, they will not be able to work in the same way as they did at the ECCC. Others, though, are more optimistic and see, for example, the fact that Cambodian judges work simultaneously at the ECCC and on the national level as a positive factor as they are often high in rank at the court and, as such, have the power to implement the practices they have learned.²⁵⁶ During informal conversations with Cambodian staff members, they expressed their gratitude for having had the opportunity to work at the ECCC, as they believe they wouldn't have gained these skills and knowledge staying on the national level.

E. Impact on the Cambodian legal and judicial system

Little evidence can be found that the ECCC has so far profoundly impacted the national judicial system with regard to fair trial rights and that it will catalyse fundamental judicial and legal reform in Cambodia. Although the domestic judiciary has slightly improved over the years, political and human rights cases remain problematic.²⁵⁷ It is difficult to measure in how far the ECCC has contributed to these improvements. However, it is correct that the ECCC is only one of the many elements that can exercise influence and have an impact.²⁵⁸ Therefore, the ECCC should not be viewed in isolation but rather as part of a multifaceted intervention in tackling the immense challenges of building and restoring the Cambodian justice system.²⁵⁹

Currently, provisional detention is one of the major problematic issues in Cambodia. Because of this, the UN OHCHR devised guidelines on provisional detention on the basis of the ECCC's practice of well-reasoned decisions. These guidelines are now being used by judges and are accompanied by a form that the judges have to complete by giving actual reasons for detention orders. This is a positive example of how small practices at the ECCC can be a catalyst for broader rule of law reform and how this can have an impact on Cambodian judges and the Ministry of Justice.²⁶⁰

The ECCC has in some sense stimulated legal and judicial reform. The Council for Legal and Judicial Reform for example, has considered a legacy strategy, together with the Danish Institute of Human Rights,²⁶¹ aimed at incorporating some of the practices of the ECCC in the government's legal and judicial reform strategy.²⁶² However, the reforms made in 2014, discussed in Section 3.3, are questionable.²⁶³ Admittedly, demanding that a temporary hybrid court would have a significant impact on the national judiciary and leave a long-lasting legacy for fair trial rights is a great deal to ask given the limited resources, the limited time, the different types of legal cases they are hearing, the issues of perceived corruption and political interference, *etc.* Additionally, it is important to keep in mind that the systematic change of any legal and judicial system, and especially the Cambodian judiciary which is highly flawed, is a generational project and will not occur without a fundamental shift in the government's commitment to legal and judicial reform in order to enhance in particular the obedience to fair trial rights within the domestic judicial system.²⁶⁴ Even though reform has been slow, civil society seems to be positive and considers even the smallest improvement as an important step forward.²⁶⁵ Local actors also correctly believe that change and reform should come in the first place from the government and that the ECCC

²⁵⁶ Bialek (n 116) 6; Interview with Michelle Staggs Kelsall; Interview with Human Rights Officer, UN OHCHR.

²⁵⁷ Interview with Billy Chia-Lung Tia; Interview with Suon Bunthoeun.

²⁵⁸ Interview with Suon Bunthoeun; Interview with Terith Chy.

²⁵⁹ UN OHCHR (n 1) 2.

²⁶⁰ Interview with Michelle Staggs Kelsall. Currently, the UN OHCHR is conducting a survey in order to assess, *i.a.*, whether the forms are being used and how they are being used.

²⁶¹ Karin Buhmann & Francesco Castellani, 'Evaluation of Danish Institute for Human Rights's (DIHR'S) Partnership Programme with the General Secretariat – Council of Legal and Judicial Reform (GS-CLJR): Implementation of Legal and Judicial Reform in Cambodia' (September 2012)

<<http://www.humanrights.dk/files/media/billeder/udgivelser/cambodia-620k.pdf>> accessed 26 June 2015, 67.

²⁶² ECCC & CHRAC, 'Hybrid Perspectives on Legacies of the Extraordinary Chambers in the Courts of Cambodia' (Conference Report and Recommendations) (December 2012) <www.chrac.org/eng/CHRAC%20Documents/Conference%20Report%20on%20Legacies%20of%20the%20ECC_C_English_FINAL.pdf> accessed 24 June 2015, 17-18.

²⁶³ Interview with Run Saray; Interview with Suon Bunthoeun.

²⁶⁴ Ciorciari & Heindel (n 6) 70-71.

²⁶⁵ Interview with Terith Chy.

only plays a small role in this regard.²⁶⁶ However, the envisaged role for the ECCC was never to be the primary actor in legal and judicial reform. The ECCC must not be viewed as a driver, but rather as a catalyst for motivating change and reform.²⁶⁷ However, as mentioned, there is a lack of political will and commitment for legal reform, which poses an enormous challenge for the legacy at the ECCC.²⁶⁸ On top of that, the Cambodian legal and judicial sector suffers from severe lack of resources. This also challenges the promotion and implementation of legacy projects.²⁶⁹

F. Limitations on the ECCC's legacy

As discussed, the ECCC has not lived up to its potential and aspirational role for the domestic legal and judicial system. First of all, the limitations mentioned in Section 5.3 affect its potential role as a model court. Many of its substantive and procedural decisions have also been negatively criticised. Besides this, allegations of corruption, political interference and the lack of independence negatively affect the potential legacy of the ECCC.²⁷⁰ The lack of a strong stand by the UN reinforces this.²⁷¹ Most importantly, the discussed reluctance of the ECCC's administration to engage in legacy work and the lack of focus on legacy from the very beginning limits the ECCC's potential legacy from its very core.

The ECCC could potentially result in a reverse/negative legacy, by, for example, draining capacity from the domestic system to the hybrid court and diverting focus away from the poor state of the domestic criminal justice system. Kirsten Ainley argues that, for example, the Cambodian case shows that the transitional justice process is not positively affecting change in human rights and democracy measures and deterring human rights violations due to prosecutions. Contrary to this, Cambodia seems to be regressing in its human rights record and is more likely to bolster the power of the Cambodian government.²⁷² The ECCC could also result in a negative legacy due to recent controversies regarding Cases 003 and 004, which have the potential of diminishing confidence in the international and possibly also the national legal system.²⁷³ According to the UN OHCHR report named *Rule-of-Law Tools for Post-Conflict Societies States: Maximizing the Legacy of Hybrid Courts* (UN OHCHR Legacy Report), there are three crucial ways in which reverse legacy may be prevented. First, by avoiding a mere replacement of local with international resources or the creation of parallel systems. Second, pursuing a hybrid court within a general framework that advocates strengthening the domestic legal system. Third, instituting a rigorous plan for handover.²⁷⁴

The constant lack of resources is also an important limitation for legacy work at the ECCC.²⁷⁵ It is one of the arguments used by the administration for not extensively engaging in legacy work. Concerns about resources need to be addressed. However, as the UN OHCHR Legacy Report states, addressing these concerns should not come at the cost of abandoning legacy work. Even a commitment to using and building up national capacity where possible, combined with a modest percentage of the total budget (such as 5 to 10 per cent), can go a

²⁶⁶ Interview with Suon Bunthoeun; Interview with Terith Chy.

²⁶⁷ UN OHCHR (n 1) 6.

²⁶⁸ Bialek (n 116) 22.

²⁶⁹ CHRAC & the Bar Association of the Kingdom of Cambodia, 'Implementation of the ECCC Legacies for Domestic Legal and Judicial reform' (Workshop Report) (March 2013) <www.kas.de/wf/doc/kas_34774-1522-1-30.pdf?130620053322> accessed 24 June 2015, 18.

²⁷⁰ UN OHCHR (n 1) 6.

²⁷¹ Interview with Billy Chia-Lung Tia.

²⁷² Ainley (n 27) 24-26.

²⁷³ For the discussion on reverse legacy see Section 4.3.2; Bialek (n 116) 8-9.

²⁷⁴ UN OHCHR (n 1) 16.

²⁷⁵ Open Society Foundations (n 86).

long way.²⁷⁶ Currently, legacy is not included in the revised budget for 2014-2015.²⁷⁷ Funding issues appear endemic to legacy initiatives at international and hybrid courts.²⁷⁸

According to some, the term 'legacy' has a negative connotation because it is seen as an international interference in the domestic system. This is reinforced by negative experiences with legacy work, as not all legacy projects had positive results. If this is the case, it might be better in the future to speak of 'strengthening the rule of law', as it in the end it comes down to the same.²⁷⁹

To conclude, the lack of political will and commitment to domestic legal reform poses enormous limits and challenges to legacy at the ECCC. Some observers note, for example, that the national side of the Court should seek to lead the Court's legacy initiatives. However, domestic political pressure to avoid substantive domestic legal reform prevents legacy efforts in this area. Moreover, although the national government's Council on Legal and Judicial Reform has expressed a desire to take ownership over legacy initiatives, it is not clear that they have the political will to catalyse rule of law sector improvements. Some suggest that a strong, independent judiciary is not in the current government's interest. Others have similarly asserted that the Council's lack of political will derives from its desire to maintain their control over the judiciary.²⁸⁰ An extra challenge to legacy work is the fact that the Cambodian judicial system suffers from highly inadequate financial, human and infrastructural resources, low salaries, poor trainings, etc., which result in high levels of corruption and inefficiency.²⁸¹ Consequently, according to some it is not realistic to expect that ECCC's best practices will be transferred to the Cambodian court system, as the ECCC is seen as a foreign-implemented system, as mentioned in Section 5.3, that utilizes human, intellectual and financial resources that are very far beyond the reach of the Cambodian realities and will.²⁸²

G. Civil society and the UN OHCHR

Due to the lack of legacy coordination on the part of the ECCC, the UN OHCHR has taken up this role under its Legacy Program.²⁸³ This program focuses on the ECCC's legacy for legal and judicial reform and thus on improving the rule of law in Cambodia. Their work started in 2010 and is based on the UN OHCHR Legacy Report.²⁸⁴ The UN OHCHR constitutes an important platform to bring different stakeholders together, such as civil society, the ECCC, the RGC and the Cambodian Bar Association. It has a good collaboration with the government, which enhances its ability to conduct successful legacy initiatives.²⁸⁵

One of the current projects of the UN OHCHR is the Annotated Cambodian Code of Criminal Procedure, drafted on the basis of the ECCC's jurisprudence and selected international jurisprudence. The Code is an independent publication, as it was not endorsed by the RGC. Some consider this as being positive in theory, because it ensures the independence of the publication. However, in practice it may have been better to have received the endorsement of the RGC, as it was a novel idea and the endorsement could have helped to get the

²⁷⁶ UN OHCHR (1) 8.

²⁷⁷ ECCC, 'Revised Budget for 2014-2015' (31 March 2015) <<http://www.eccc.gov.kh/en/about-eccc/finances/eccc-revised-budget-2014-2015>> accessed 3 January 2016.

²⁷⁸ Bialek (n 116) 22.

²⁷⁹ Interview with Doreen Chen.

²⁸⁰ Bialek (n 116) 22-23; Olga Martin-Ortega & Johanna Herman, 'Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia' (2010) JAD-PbP Working Paper Series No 7, 16.

²⁸¹ Cambodian Center for Human Rights (n 68) 2; CHRAC & the Bar Association of the Kingdom of Cambodia (n 269) 18; Transparency International (n 65) 53-54.

²⁸² Buhmann & Castellani (n 261) 69 XII.

²⁸³ Interview with Human Rights Officer, UN OHCHR.

²⁸⁴ See: United Nations, Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post Conflict Societies States: Maximizing the Legacy of Hybrid Courts*, New York and Geneva, 2008, pp. 45; Interview with Michelle Staggs Kelsall.

²⁸⁵ Interview with Doreen Chen; Interview with Michelle Staggs Kelsall; Interview with Human Rights Officer, UN OHCHR.

support on the national level from those who are more suspicious of change.²⁸⁶ The Code was published in March 2014. It is a recent project and this makes it difficult to assess its current and future impact.²⁸⁷ However, one can argue in advance that the mere existence of the ECCC does not necessarily create a channel for its jurisprudence to be used and developed or even merely respected and understood.²⁸⁸ Even though national courts are authorized under domestic law to apply international human rights law, there seems to be a lack of familiarity with these norms, which makes their authority meaningless.²⁸⁹ This can be seen by the mentioned attitude of legal professionals on the national side, who think that the ECCC is a distinct court from the national court system, that the way the ECCC operates is not transferrable to the domestic level, and consequently, are reluctant to incorporate the ECCC's practices. Because of this attitude, initiatives like the Annotated Code will probably not work at the moment on the domestic level, which is unfortunate as this is a useful tool for legal practitioners and could positively contribute to the domestic system.²⁹⁰ However, the more the new generation of legal practitioners is educated and receives training on international human rights, the more these initiatives have the potential to become meaningful and the more the ECCC's practices will be transferrable to the domestic system as legal practitioners will be better equipped. Moreover, national staff working at the ECCC can play an important role in stimulating legal practitioners on the national level to get familiar with the annotated code and start using it.²⁹¹ This also shows the importance of outreach, in the sense that legacy initiatives shouldn't be isolated projects but should be communicated to the national level, providing guidance as to how the national level can gain from these initiatives. This also applies in a more general sense to the workings of the ECCC as a model court.

Two notable workshops on legacy were organised in 2012 and a follow-up in 2013. They were held in Phnom Penh and were primarily organised by The Cambodian Human Rights Action Committee, known as CHRAC.²⁹² The CHARC is one of the main actors involved in the ECCC legacy project and aims at developing a coordinated approach to bring relevant actors together and start specific legacy projects.²⁹³ The 2012 workshop was the first time that relevant stakeholders were given a wide forum to exchange their views and debate their different perspectives on the legacies of the ECCC.²⁹⁴ These initiatives are crucial as they bring different stakeholders together and offer the opportunity to share experiences and initiatives. The United Nations Secretary-General's report correctly states that national legal reforms must be domestically owned and driven and that "ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustained."²⁹⁵ The issue of ownership plays a big role in ensuring the success and sustainability of legacy efforts. As such, investment from both international and national organizations, Governments, legal communities and civil society are required. Ideally, all should feel invested in the process.²⁹⁶

H. Legacy after the closure of the ECCC

In order to maximize the legacy capabilities of the ECCC there should be a focus on how its legacy should be addressed after its closure. As the Secretary-General correctly states: "it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned."²⁹⁷ The Legacy Secretariat could, for example, still

²⁸⁶ Interview with Doreen Chen.

²⁸⁷ Interview with Michelle Staggs Kelsall.

²⁸⁸ Higonet (n 4) 13.

²⁸⁹ Interview with Run Saray.

²⁹⁰ Interview with Suon Bunthoeun.

²⁹¹ Interview with Michelle Staggs Kelsall.

²⁹² CHRAC & the Bar Association of the Kingdom of Cambodia, (n 269); ECCC & CHRAC (n 262).

²⁹³ CHRAC & the Bar Association of the Kingdom of Cambodia (n 269) 4.

²⁹⁴ ECCC & CHRAC (n 262) 1.

²⁹⁵ UN OHCHR (n 1) 6.

²⁹⁶ *ibid* 9.

²⁹⁷ UN SC (n 36) para 46.

function for a specific period in time after the closure of the ECCC, in order to fully transfer the legacy projects to the Cambodian actors. However, as already mentioned, the Legacy Secretariat is currently not active, the ECCC has not been extensively involved in legacy work and legacy is not part of its completion strategy. As such, it is improbable that legacy will be seriously taken into account once the ECCC closes its doors.

The UN OHCHR will still play a role within the field of legacy after the closure of the ECCC. This will be in a different form and probably not under the specific term of legacy. Most probably, their legacy program will be integrated in their Rule of Law Programme.²⁹⁸

After the closure of the ECCC, the Cambodian government should ideally play a role in continuing legacy initiatives. As such, governmental commitment and cooperation with civil society will be crucial. However, a limiting factor is that projects that affect the patronage system are systematically blocked. This makes it difficult to impact and reform the legal and judicial system in a profound way.²⁹⁹

To conclude, local ownership will have to be maximized so that local actors will be able to continue legacy work after the closure of the ECCC.³⁰⁰ This would probably take the form of 'rule of law' projects instead of legacy. However, both come down to the same.

I. Conclusion

The Cambodian case study shows that the ECCC has not lived up to its potential and aspirational role for the domestic legal and judicial system. The expectation that the ECCC could strengthen the domestic legal system and the rule of law can be considered as reachable goals. Unfortunately, the ECCC's potential to leave a lasting legacy for fair trial rights in Cambodia was not maximised, as the ECCC has neglected extensively its role in legacy. This is a lost chance for the international community, because the establishment of a hybrid court constitutes an exceptional window of opportunity due to the international community's attention, resources and efforts. The international community will not have this window of opportunity again after the closure of the ECCC.

There are different reasons for this failure. These include the lack of focus on legacy from the conception of the ECCC and the lack of explicit legacy mandate and strategy, which are key in gaining political and budgetary support. Additionally, the administration does not consider legacy as one of its main tasks, but considers it rather as a national responsibility. Consequently, the ECCC did not take up a leading role in coordinating legacy work between the different actors. Legacy initiatives depend instead on the interest and willingness of staff members. However, due to these different factors, it is difficult for ECCC staff members to initiate legacy initiatives, except in their spare time and without pay, and to coordinate these initiatives between the different sections of the Court. Additionally, due to the lack of explicit legacy mandate the interpretation of what legacy entails has been left to the discretion of these individuals. Even though the ECCC is in the best position to lead legacy work in Cambodia, the UN OHCHR has successfully taken up a leadership and coordination role.

Even if there would have been a greater focus on legacy work at the ECCC with the necessary political and budgetary support, there are still some limitations on the legacy of the ECCC that should be taken into account. These include alleged political interference, perceived corruption at the Court and the possibility of reverse/negative legacy. There is also a greater need of combining legacy initiatives with greater outreach and guidance in order to inform national actors of legacy initiatives, inform them of the workings of the ECCC and offer them guidance on how to best implement the practices of the ECCC. As mentioned, this should be the

²⁹⁸ Interview with Human Rights Officer, UN OHCHR.

²⁹⁹ Interview with Billy Chia-Lung Tia.

³⁰⁰ Interview with Billy Chia-Lung Tia.

case, for example, with regard to the workings of the ECCC as a model court, because there seems to be a disconnection between the national and international level about which aspects of the ECCC could be learned from and which could be implemented on the national level.

To conclude, even though it is correct to argue that the primary role of a hybrid court is to bring justice, it is also important to be aware of the capabilities of a hybrid court with regard to strengthening the domestic legal system and the exceptional window of opportunity for the international community in doing so. Legacy should be considered as compatible and complementary to the core mandate of a hybrid court. The issue of sustainability is equally important as bringing justice. International interventions through hybrid courts should be maximized in order to make a permanent and sustainable contribution to the capacity of the domestic judicial system to deal with crimes in the future.

V. Conclusions and recommendations

In this chapter a set of conclusion and recommendation will be made based on the Cambodian case study. These conclusions and recommendations focus on improving legacy initiatives of hybrid courts in the future. As such, they do not only apply to the ECCC, but to hybrid courts in general. These recommendations and conclusions do not stand on their own, but are interlinked with each other.

The conclusions and recommendations are divided in four sections. The first three sections cover each a different moment in time with regard to a hybrid court's legacy, *i.e.* the planning of legacy when establishing a hybrid court, legacy during the lifetime of a hybrid court and legacy after the closure of a hybrid court. The final section brings several themes together which can be deduced from the recommendations and conclusions and which are relevant to legacy in general, and specifically to the ECCC.

A. Legacy when establishing a hybrid court

- Legacy should be an important part of a hybrid court's constituting design, that, as such, should envisage to have a permanent and lasting impact on the host domestic justice system. Consequently, legacy should be addressed from the beginning, as successful legacy work requires planning from the outset. The establishment is a crucial phase during which the relationship with local actors should be inclusive, meaning that they should be consulted and included in the legacy design. The core of legacy is sustainability, meaning maximizing international interventions in the aftermath of mass atrocities and making a permanent contribution to a country's capacity to deal with systematic crimes.³⁰¹

- Criminal proceedings are the primary focus and responsibility of a hybrid court. However, the exceptional opportunity offered by hybrid courts in impacting and leaving a lasting legacy should not be neglected. Court actors should not consider the court's legacy as a distraction from the core mandate of the court. Legacy should rather be considered as being compatible and complementary to it.³⁰² The establishment of a hybrid tribunal constitutes a window of opportunity to bring significant positive change within a country as the international community's attention, resources and efforts are focused on that specific country. In order to take advantage of this window of opportunity as much as possible, it is crucial to create a legacy strategy from the beginning of the establishment of the hybrid court, as legacy will not happen automatically.³⁰³ According to the UN OHCHR Legacy Report, international experience has shown that the potential impact of a hybrid court's legacy is greater when legacy forms an integral part of policy planning from the conception of a hybrid court.³⁰⁴

³⁰¹ UN OHCHR (n 1) 40.

³⁰² *ibid* 40.

³⁰³ *ibid* 41.

³⁰⁴ *ibid* 42.

- It is important for a hybrid court to have a clear and explicit legacy mandate instead of an implied mandate. The mandate should appoint the primary responsible for legacy work and coordination. It should also define what is exactly understood under legacy. This will increase the capacity of streamlining the way legacy is approached by different actors. It would also be beneficial to incorporate legacy in the explicit duties of staff members of the court. An explicit legacy mandate will also make it easier to build political and budgetary support.

- In order to ensure effective legacy initiatives and activities, enough resources should be allocated. As such, a defined part of the core budget of the hybrid court should be reserved for legacy work. A modest percentage of the total budget (such as 5 to 10 per cent) would already go a long way.³⁰⁵ In order to ensure this, legacy has to be acknowledged as being part of the core activities of the hybrid court.

- It is important to have realistic expectations about the legacy a hybrid court can leave for the domestic legal system and in particular for fair trial rights. The different actors involved should make contributions where possible.³⁰⁶ It is important to take into account that a hybrid court will not cure a national legal system from all its malfunctions and deficiencies. As such, hybrid courts should not be expected to restore a damaged or destroyed domestic legal system. Rather they should seek to make a strategic contribution where possible.³⁰⁷

- The UN OHCHR Legacy Report is a comprehensive and useful guidebook on legacy for hybrid courts that should be taken seriously into account when planning a court's legacy. It can assist transitional administrations and civil society to better craft their efforts within the field of legacy work. The value of this report is that it builds on previous experience and lessons learned in United Nations operations.³⁰⁸ It clearly points out, for example, how a hybrid court's legacy can stimulate legal and judicial reform and can contribute to the strengthening of the local judicial system, how legacy work should be approached and what the challenges are. Thus, it is a very comprehensive tool that can easily be operationalized.

B. Legacy during the lifetime of a hybrid court

- Hybrid courts should not be viewed as isolated interventions, but rather as part of a multifaceted intervention in tackling the challenges of building and restoring a national legal system.³⁰⁹

- A cooperation and coordination strategy is needed between the different actors involved in legacy initiatives in order to streamline these initiatives and share legacy skills and knowledge. The hybrid court would probably be in the best position to lead the coordination of legacy work.

- Local ownership is a crucial aspect, in the sense that legacy initiatives should be ideally locally driven and supported. Therefore, these initiatives require a joint investment of international and national actors. This way, one avoids that legacy initiatives are seen as international interventions on the national level and as not being legitimate. There should be a focus on local ownership from the beginning by involving the national side in the design of the legacy project. However, experience has shown that the appropriate level of ownership is difficult to achieve and is intimately connected with political will.³¹⁰

- Collaboration between national and international actors is crucial. This relates to the importance of local ownership. Additionally, international actors should be aware through close collaboration with national actors, of

³⁰⁵ *ibid* 41.

³⁰⁶ *ibid* 40.

³⁰⁷ *ibid* 40.

³⁰⁸ *ibid* v.

³⁰⁹ *ibid* 2.

³¹⁰ *ibid* 9.

how the latter perceive legacy initiatives and projects and whether these projects have the local impact that is envisaged.

- Outreach is crucial, in the sense that legacy initiatives should be communicated to the national level and guidance on how to implement these initiatives should be offered.

- In order to ensure meaningful legacy work government involvement and support is crucial.

- The hybrid court should be a catalyser for legal and judicial reform. Political will and commitment will be crucial in succeeding in this regard.

- In order for hybrid courts to function as a model court and have a demonstration effect for the domestic judicial system it is crucial that the court applies the highest standards of independence, impartiality, international human rights norms, fair trial standards *etc.*, and thus demonstrates the supremacy of the law.³¹¹ It is also important to stress what aspects of the court can function as a model for the domestic judiciary.

- In-country location and the opportunity to work in mixed teams of internationals and nationals assist in successfully transferring skills and knowledge to national legal professionals. However, in order for this opportunity for professional development to be beneficial, it needs to be carefully managed, rather than being 'organic' and *ad hoc*. For example, mentoring by internationals should be part of their job description and be specified in the contract.³¹² National staff that work both on the international and the national level can stimulate the transfer of skills and knowledge. A coordinated approach to trainings and workshops for local national practitioner and students is also important, as well as organising these trainings and workshops from the viewpoint of the recipients and preferably starting from the basic concepts of fair trial rights, in order to establish a solid legal basis on which the recipients can build.

- Reverse/negative legacy, such as draining domestic capacity, must be avoided. Instead, there should be a focus on personnel policies and professional development programmes that allow for the building of a sustainable domestic judicial capacity to investigate, prosecute and defend complex crimes.³¹³ According to the UN OHCHR Legacy Report, reverse legacy can be avoided in three crucial ways. First, by avoiding a mere replacement of local resources by international ones or the creation of parallel systems, which is the case at the ECCC. Second, by pursuing a hybrid court with a general framework for strengthening the domestic legal system. Third and finally, by constituting a rigorous plan of handover plan based on conditions rather than dates.³¹⁴

- In post-conflict countries the local judicial system often suffers from highly inadequate financial, human and infrastructural resources. These pose challenges for legacy work. As such these challenges should be taken into account in order to conduct meaningful legacy work.

- One must take the possible negative connotation of the concept of 'legacy' into account. In this case, it might be preferable to use a different term, such as 'strengthening the rule of law', as both come down to the same.

³¹¹ *ibid* 43.

³¹² *ibid* 44.

³¹³ *ibid* 15 and 40.

³¹⁴ *ibid* 42.

C. Legacy after the closure of a hybrid court

- It is important to address legacy in two different moments in time, *i.e.* when the court is still active and after the court's closure. In order to maximize the legacy capabilities of a hybrid court, the legacy strategy should also include the period after the closure of the court. It should focus on maximizing local ownership over the legacy initiatives in order for them to be continued and sustained once the international community leaves. For this, government's cooperation and commitment will still be key factors in order to maximize the positive outcomes of such a project. It is also important to keep in mind that it will take many years for a hybrid court to have a profound impact on the domestic legal system. As such, it is a generational project that should complement fundamental judicial and legal reforms and fundamental changes in the mind-sets of legal professionals concerning how to deal with fair trial issues.

D. General themes relevant to legacy

From this set of recommendations and conclusions several themes can be deduced that are relevant to legacy work in general, and specifically to the ECCC:

First of all, the feasibility of legacy projects. The Cambodian case study has shown that political will is essential in ensuring the success of legacy projects and to promote a hybrid court's positive impact on the national system. Feasibility also includes adequate resources.

Second, the importance of intentionally developing and implementing legacy initiatives from a court's earliest stages.

Third, the importance of collaboration between all relevant stakeholders and actors, meaning collaboration within the court, such as between national and international staff and between sections, as well as beyond the court, such as between the court, government and civil society.

Fourth, the issue of sustainability of legacy initiatives, meaning that legacy work should make a permanent contribution to a country's capacity to deal with systematic crimes.³¹⁵

Lastly, the importance of local ownership of legacy initiatives, which increases their sustainability.

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