

## STUDENT CONTRIBUTION

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# Dispensation of Justice by the Extraordinary Chambers in the Courts of Cambodia: A Critical Appraisal

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M. Ehteshamul Bari\*

*This article examines the Extraordinary Chambers in the Courts of Cambodia established to try those responsible for the atrocities perpetrated against the Cambodian people by the former Khmer Rouge Regime (1975-1979). It focuses on the trial of the first case conducted by the ECCC which resulted in the 'lenient' judgment. The paper then outlines in details the factors such as political interference, corrupt practices and inordinate delay of the legal process which are undermining the ECCC's credibility to administer fair justice to the victims of genocide, crimes against humanity and war crimes. Finally, it stresses on the fact that the failure of the ECCC and its stakeholders to duly address these fundamental issues would end in the farcical dispensation of justice.*

### Keywords

ECCC, War Crimes, Crimes against Humanity, Genocide, Political Interference, Corruption and Inordinate Delay

\* Lecturer (on leave for study) at Department of Law, Manarat International University. Diploma in Law (London), LL.B. (Hons. London), LL.B. (1<sup>st</sup> Class Hons. Dhaka), LL.M. (Distinction Malaya, Kuala Lumpur). The author may be contacted at: mebari07@gmail.com / Address: Bungalow No-55, Jalan (Street)-16/2, Section-16, 46350 Petaling Jaya, Selangor, Malaysia.

## I. Introduction

The ‘Ultra-Maoist’ Khmer Rouge, which came to power in Cambodia in 1975 and deposed by the Vietnamese troops after nearly 4 years of its reign in 1979, annihilated 1.7 million people in the ‘killing fields’ - about a quarter of Cambodia’s population at that time.<sup>1</sup> In order to do justice to the victims of the mass atrocities of the Khmer Rouge regime, and to achieve the wider objective of preventing the perpetration of such mass atrocities in the future, the United Nations assisted the Cambodian government to establish the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a hybrid tribunal.<sup>2</sup> It became fully functional in June 2007 after lengthy and troublesome negotiations,<sup>3</sup> to bring to trial ‘senior’ and “most responsible leaders” of the Khmer Rouge<sup>4</sup> accused of committing genocide,<sup>5</sup> war crimes,<sup>6</sup> “crimes against humanity,”<sup>7</sup> and

<sup>1</sup> The communist Khmer Rouge under the leadership of Pol Pot backed by China opposed the Government led by popular leader Norodom Sihanouk. It gained support after Sihanouk was toppled by Lon Nol (1970) having the support and blessings of the United States. In between the two forces, a new force of communist Vietnamese fighters emerged and sought refuge in the neutral territory that was Cambodia at that time. Ultimately, secret US bombings, which allegedly caused more than 150,000 casualties, probably paved the way for Pol Pot, the leader of communist Khmer Rouge, and his troops to take up power. On April 17, 1975, Pol Pot’s troops marched into Phnom Penh. Their proclamation of ‘Year Zero’ opened up an era of terror and horror. In one single week, the 2.5 million citizens from Phnom Penh were forced out to the countryside. The Ultra-Maoist Khmers mercilessly held to the maxim: “Keeping you is no benefit, losing you is no loss.” The regime launched a revolution in which all pre-existing economic, social and cultural institutions were destroyed, all foreign influences were wiped out and the entire population was transformed into a collective work force. The Khmer Rouge set out to kill anyone who could possibly thwart its goal of creating a new society, including those among its own ranks whom were viewed as potential dissidents. It perceived ‘intellectuals’ such as doctors, teachers, lawyers, students and those capable of speaking a foreign language as particularly threatening a the mere fact of appearing to be intellectual by wearing spectacles was sufficient reason to be condemned to death. An unknown number of persons were thrown into slavery, arbitrarily executed, or died of starvation, disease or exhaustion in labour camps. In the space of 4 years, the Khmer Rouge genocide extinguished 1.7 million people in the ‘killing fields,’ or about a quarter of Cambodia’s population at that time. For further information, see II BRITANNICA READY REFERENCE ENCYCLOPAEDIA 134 (2007); Wendy Lambourne, *The Khmer Rouge Tribunal: Justice for Genocide in Cambodia?* 3-4 (Law and Society Association and New Zealand (“LSAANZ”) Conference, University of Sydney, Working Paper, Dec. 10-12, 2008), available at <http://ses.library.usyd.edu.au/bitstream/2123/4042/1/LSAANZ%20Lambourne%20Cambodia%20conf%20paper%20final.pdf> (last visited on Mar. 10, 2010); Trial Watch, *Criminal Court for Cambodia*, available at <http://www.trial-ch.org/index.php?id=923&L=5> (last visited on Mar. 12, 2010). The Secretary-General, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, 53d Sess., Agenda Item 110(b), U.N. Doc. A/53/850, at 9 & 13 (March 16, 1999); Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT’L & COMP. L. 803, 849 (1998); and Rachel S. Taylor, *Better Late Than Never*, in INTERNATIONAL AND COMPARATIVE CRIMINAL LAW SERIES, ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 237, 239 & 240 (Jane E. Stromseth ed., 2003).

<sup>2</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 295 (2003).

<sup>3</sup> For a comprehensive overview of the ECCC, see John D. Ciorciari, *History and Politics behind the Khmer Rouge Trials*, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 33 (John D. Ciorciari & Anne Heindel eds., 2009).

<sup>4</sup> The Law on the Establishment of the Extraordinary Chambers arts. 1 & 2, NS/RKM/1004/006 (2004).

<sup>5</sup> *Id.* art. 4.

other crimes under the Cambodian Penal Law<sup>8</sup> during the period of April 17, 1975 to January 6, 1979. Thus, those who assisted the Khmer Rouge in coming to power and supported them after they were overthrown by the Vietnamese have been kept out of the jurisdiction of the ECCC. Moreover, since trials have been limited to the senior leaders of the Khmer Rouge Regime and those who were most responsible for the crimes and serious violations, many of the lower perpetrators but responsible for serious crimes would escape punishment, thereby adding to the “sense of impunity” that has been prevailing in Cambodia for the last 30 years.<sup>9</sup>

The original plan of the Group of Experts,<sup>10</sup> as envisioned in their Report to the General Assembly and the Security Council in 1999,<sup>11</sup> was a relatively simple two-tier structure having a trial chamber and an appeal chamber. In the end, however, it was settled upon a complicated three-tier structure encompassing a Pre-Trial Chamber, a Trial Chamber and a Supreme Court Chamber.<sup>12</sup>

The ECCC has a total of seventeen judges presiding in the abovementioned three chambers. Both the Pre-Trial Chamber, which settles disagreements between the Co-Prosecutors and Co-Investigating Judges, and the Trial Court Chamber are consisted of three Cambodian and two international judges. Decisions delivered by these Chambers require an ‘absolute majority,’ that is, four of the five judges must agree in order to pass a judgment. Similarly, the Supreme Court Chamber consists of four Cambodian and three international judges, with decisions requiring the agreement of five judges.<sup>13</sup> It is

<sup>6</sup> *Id.* art. 6.

<sup>7</sup> *Id.* art. 5.

<sup>8</sup> *Id.* art. 8.

<sup>9</sup> Christina Son & Grant Niemann, *Cambodian Extraordinary Chambers: A Mixed Tribunal Destined to Fail*, 33 CRIM. L. J. 105, 107 (2009).

<sup>10</sup> In pursuance of paragraph 16 of the United Nations General Assembly Resolution entitled “Situation of Human Rights in Cambodia.” See G.A. RES. 52/135, 52nd Sess., 70th plen. mtg., Agenda Item 112(b), U.N. Doc. A/RES/52/135 (Dec. 12, 1997). The U.N. Secretary General Mr. Kofi Annan established a “Group of Experts” with three main goals: (1) to evaluate the existing evidence and determine the nature of the crimes committed [by the Khmer Rouge leaders]; (2) to assess the feasibility of bringing Khmer Rouge leaders to justice; and (3) to explore options for trials before international or domestic courts. See Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L L. 948-949 (1999).

<sup>11</sup> The Secretary-General, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, 53d Sess., Agenda Item 110(b), U.N. Doc. A/53/850 (Mar. 16, 1999). See also The Secretary-General, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, 53d Sess., Agenda Item 110(b), U.N. Doc. S/1999/231 (Mar. 16, 1999).

<sup>12</sup> Agreement to Establish an Independent Counsellor at the Extraordinary Chambers for the Courts in Cambodia, art. 3, *infra* note 128. See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 12 (Cherif Bassiouni ed., 2008), available at <http://www.cambodiatribunal.org/CTM/Cambodia%20Scheffer%20Abridged%20Chapter%20July%202007.pdf> (last visited on Mar. 10, 2010).

<sup>13</sup> EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA. AN INTRODUCTION TO THE KHMER ROUGE TRIALS (2008), available at [http://www.eccc.gov.kh/english/cabinet/publications/an\\_introduction\\_to\\_Khmer\\_Rouge\\_Trials\\_3th.pdf](http://www.eccc.gov.kh/english/cabinet/publications/an_introduction_to_Khmer_Rouge_Trials_3th.pdf) (last visited on Mar. 10, 2010).

evident that in each of the three chambers of the ECCC, an outcome would happen in accordance with the desire of the Cambodian negotiators, because the majority of the judges (3:2 except for the Supreme Court Chamber where the ratio is 4:3) are Cambodians. This is a clear-cut departure from the original proposal of the Group of Experts<sup>14</sup> which envisaged that in trial chambers the majority of the judges would be drawn from the international community, thereby ensuring impartiality and protection from local political interference.<sup>15</sup> Furthermore, the international judges as recommended by the UN are ultimately appointed by the Supreme Council of the Magistracy of Cambodia upon its satisfaction, while the national judges are internally appointed without the scrutiny of the UN whatsoever.<sup>16</sup> Additionally, the positions of two investigating judges (one a Cambodian and the other a foreigner) and of two prosecutors (one is a Cambodian and the other, a foreigner) were created at the ECCC as a result of a compromise between the common law tradition of a strong prosecutor and the civil law tradition of investigating judges.<sup>17</sup>

An attempt will be made in this paper to examine the trials conducted by the ECCC critically, in particular with special reference to the judgment delivered in its first case. Most importantly, the factors that are undermining ECCC's ability to render credible justice to the victims of genocide, war crimes and "crimes against humanity" in Cambodia would be brought to the fore.

## II. Trials of the Senior Leaders Charged

From July to November 2007, the ECCC detained 5 'senior leaders' who were 'most responsible' for war related crimes. The five accused persons were then implicated into two cases: Case 001 against Kaing Guek Eav alias Duch for crimes that occurred at or in conjunction with Tuol Sleng Prison (S-21) and Case 002 against Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan for their preeminent leadership role in the Khmer Rouge regime, which resulted in wide-spread atrocities throughout Cambodia for the duration of the ECCC's temporal jurisdiction.

Besides of the abovementioned 5 accused persons in custody, the international

<sup>14</sup> Scheffer, *supra* note 12, at 13.

<sup>15</sup> Son & Niemann, *supra* note 9, at 106-107.

<sup>16</sup> Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 327 (2006), available at <http://jicj.oxfordjournals.org/cgi/content/full/4/2/327> (last visited on Apr. 12, 2010).

<sup>17</sup> Scheffer, *supra* note 12, at 13.

prosecutor submitted the names of 5 additional suspects in two separate cases [Cases 003 and 004] to the investigating judges on September 7, 2009 requesting formal judicial investigation.<sup>18</sup> The names of these suspects and the subject-matter of the investigation, however, have been kept confidential<sup>19</sup> and none of these additional suspects have yet been formally charged or arrested.<sup>20</sup>

## A. Trial of Kaing Guek Eav Alias Duch [Case 001]

### 1. Overview

On July 31, 2007, the Tribunal indicted its first suspect Kaing Guek Eav, also known as ‘Comrade Duch.’<sup>21</sup> After the death of Ta Mok (The Butcher) while in custody in July 2006, Kaing Guek Eav, aged 67, is the youngest surviving member of the regime to be in prison since 1999.<sup>22</sup> A former math teacher, he used to be the Governor of the Tuol Sleng Prison known as S-21, a centre of torture where he oversaw the job of extracting confessions from prisoners of counter-revolutionary activity with fastidious attention to detail<sup>23</sup> and subsequently, ‘smash’<sup>24</sup> them by striking “the base of the neck with a metal bar,” slitting open “their throats or stomachs ... and [pushing] their bodies ... into pits.”<sup>25</sup> In Tuol Sleng Prison, an estimated 16,000<sup>26</sup> inmates were tortured, enslaved and

<sup>18</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* (Nov. 2009), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/eccc\\_20091120](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20091120) (last visited on Feb. 10, 2010).

<sup>19</sup> Although the names of the accused in Cases 003/004 remain confidential, there are indications that the accused are considered to be persons ‘most responsible’ for the crimes of the Khmer Rouge regime (e.g. not the ‘senior leaders’ who constitute the Case 002 defendants). See Open Society Justice Initiative, *Salvaging Independence: The Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia*, available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/khmer-rouge-tribunal-20101110/cambodia-khmer-rouge-20101110.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110/cambodia-khmer-rouge-20101110.pdf) (last visited on Dec. 12, 2010).

<sup>20</sup> *Id.*

<sup>21</sup> Case of Kaing Guek Eav, Case No. 001/18-07-2007, Order of Provisional Detention (July 21, 2007).

<sup>22</sup> *Khmer Rouge Leaders Facing Trial*, BBC NEWS, Feb. 13, 2009, available at <http://news.bbc.co.uk/2/hi/2856771.stm> (last visited on Mar. 5, 2010).

<sup>23</sup> Kevin Doyle, *Long-Delayed Justice in Cambodia*, TIME, Nov. 21, 2007, available at <http://www.time.com/time/world/article/0,8599,1686601,00.html> (last visited on Mar. 10, 2010).

<sup>24</sup> As Duch explained to the Court, “to smash ... means to arrest secretly [to interrogate] with torture employed, and then [to execute] secretly” without judicial process. Co-Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, 100 (July 26, 2010).

<sup>25</sup> *Id.* at 220.

<sup>26</sup> The Extraordinary Chambers in the Courts of Cambodia officially found the number detained at S-21 to be at least 12,273. See Case 001, *id.* at 141-43. The actual number was ‘considerably greater.’ Because of incomplete documentary records, however, only 12,273 victims could be verified. *Id.* The tentative scholarly consensus is that roughly 16,000 people perished at S-21. See Kenneth M. Quinn, *Pattern and Scope of Violence, in CAMBODIA, 1975?1978: RENDEZVOUS WITH DEATH* 198 (Karl D. Jackson ed., 1992).

murdered in the late 1970s,<sup>27</sup> of whom only twelve or so are known to have survived.<sup>28</sup> According to Vann Nath, one of the twelve survivors of the S-21, "... Duch killed people without consideration - whether they were elderly or children. What he did every day during that time was slaughter."<sup>29</sup> Duch was accordingly charged with "crimes against humanity," war crimes, and torture<sup>30</sup> and murder<sup>31</sup> under the 1956 Cambodian Penal Code.<sup>32</sup>

Ultimately, the trial of Duch began on February 17, 2009.<sup>33</sup> Duch's landmark hearing evoked for many Cambodians attending the court a sense of wonderment that the Khmer Rouge leadership was finally being taken into task.<sup>34</sup> Duch's right to adequate legal representation, to a public trial, and to confront witnesses and have adequate time and resources to present his defense, as specifically mandated in the Agreement concluded between Cambodia and the UN through the incorporation of Articles 14 and 15 of the International Covenant on Civil and Political Rights,<sup>35</sup> were complied with.<sup>36</sup> As one of the goals of the ECCC is to contribute to reconciliation and an enhanced understanding of justice in Cambodia,<sup>37</sup> the Court needed to conduct the Duch trial such a way that detailed factual testimony was presented and accessible to a large number of Cambodians who were born after the Khmer Rouge regime. The lack, until recently, of significant efforts to educate the public and particularly the younger generation about the Khmer Rouge, has created a void in the understanding in Cambodia about the Khmer Rouge legacy.<sup>38</sup> A full evidentiary trial, easily accessible through mass media to most Cambodians was necessary to meet the Court's goals of informing the public about the realities of the Khmer Rouge era. The Court's efforts on these fronts were commendable as about 28,000 people attended Duch's trial at the

<sup>27</sup> *Khmer Rouge Chief Stuns Court with Release Bid*, BBC NEWS, Nov. 27, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/8382118.stm> (last visited on Mar. 10, 2010).

<sup>28</sup> Doyle, *supra* note 23; Open Society Justice Initiative, *supra* note 18.

<sup>29</sup> *Id.*

<sup>30</sup> The Cambodian Penal Code art. 500 (1956).

<sup>31</sup> *Id.* arts. 501 & 503-508.

<sup>32</sup> Open Society Justice Initiative, *supra* note 18.

<sup>33</sup> Extraordinary Chambers in the Courts of Cambodia, *Case Information 001, 2009*, available at <http://www.eccc.gov.kh/en/case/topic/1> (last visited on Apr. 15, 2011).

<sup>34</sup> Doyle, *supra* note 23.

<sup>35</sup> 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 art. 12(2), U.N. Doc. A/RES/57/228B (June 6, 2003).

<sup>36</sup> Open Society Justice Initiative, *supra* note 18.

<sup>37</sup> INTRODUCTION TO THE KHMER ROUGE TRIALS (3d ed. 2008), available at [http://www.eccc.gov.kh/english/cabinet/publications/an\\_introduction\\_to\\_Khmer\\_Rouge\\_Trials\\_3th.pdf](http://www.eccc.gov.kh/english/cabinet/publications/an_introduction_to_Khmer_Rouge_Trials_3th.pdf). (last visited on Mar. 10, 2010).

<sup>38</sup> Christopher Shay, *The Khmer Rouge Tribunal: Cambodia's Healing Process*, TIME, Nov. 30, 2009, available at <http://www.time.com/time/world/article/0,8599,1943373,00.html> (last visited on Mar. 10, 2010).

ECCC and millions more Cambodians followed the tribunal on television and radio.<sup>39</sup> Thus, the chamber struck a good balance between the need to conduct an efficient trial and the need to publicly present a complete picture of the atrocities committed at S-21 Prison, Duch's alleged role in committing them, and the place of the prison in the Khmer Rouge regime. The Court properly permitted the parties to present evidence on all factual aspects of the case.<sup>40</sup> The testimony of twenty-two civil parties who spoke about their personal experiences at S-21 or the loss of family members added depth to thorough public understanding of the suffering caused by the operations at the prison.<sup>41</sup> Duch admitted guilt, but contended that everything he did was by the order of others.<sup>42</sup> However, the major surprise came on the final day of the trial when Duch outraged the UN-backed War Crime Tribunal by asking them to release him on the grounds that he was not a member of the Khmer Rouge hierarchy.<sup>43</sup> The judges did not pay heed to Duch's preposterous request and closed the proceedings.<sup>44</sup> On July 26, 2010, the Tribunal delivered its judgment against Duch.<sup>45</sup>

## 2. Judgment Delivered by the ECCC in Case 001

The ECCC found in Case 001 that Duch "willingly and zealously"<sup>46</sup> instituted and implemented a streamlined apparatus of torture to ensure that all detainees at S-21 confessed to betrayal of the regime, thus rationalising subsequent 'smashing.'<sup>47</sup> Moreover, by his own confession, Duch personally ordered and oversaw the torture of detainees,<sup>48</sup> which routinely included beatings, electrocution, asphyxiation with plastic bags, and water-boarding.<sup>49</sup> Torturers tore off and punctured prisoners' fingernails and toenails, inserted needles into them, and force-fed them their own excrement and

<sup>39</sup> *Id.*

<sup>40</sup> Open Society Justice Initiative, *supra* note 18.

<sup>41</sup> *Id.*

<sup>42</sup> *Khmer Rouge Leader Admits Crimes*, BBC NEWS, Mar. 31, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7973463.stm> (last visited on Mar. 10, 2010).

<sup>43</sup> *Khmer Rouge Chief Stuns Court with Release Bid*, BBC NEWS, Nov. 27, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/8382118.stm> (last visited on Mar. 10, 2010).

<sup>44</sup> *Id.*

<sup>45</sup> *Khmer Rouge Prison Chief Duch found Guilty*, BBC NEWS, July 26, 2010, available at <http://www.bbc.co.uk/news/world-asia-pacific-10757320> (last visited on Oct. 20, 2010).

<sup>46</sup> Case 001, *supra* note 24, at 393.

<sup>47</sup> *Id.* at 155 (noting that detainees were forced to confess to conspiratorial allegiances with the Central Intelligence Agency, KGB, or Vietnamese Communist Party- entities of which many detainees had never heard of).

<sup>48</sup> *Id.* at 176 (recounting Duch's confession that "[i]f the prisoners did not give satisfactory confessions, then I would annotate on the confessions that they had to use more torture in order to get the confessions, and I was the one to decide to order the interrogators to torture more").

<sup>49</sup> *Id.* at 241.

urine.<sup>50</sup> The torture included psychological abuse, with detainees forced to pay homage to images of dogs, which “in the Cambodian cultural context . . . caused victims extreme humiliation and severe emotional distress.”<sup>51</sup> Further, Duch personally ordered that certain detainees be subjected to medical experiments between their interrogation and their deaths at the Killing Fields.<sup>52</sup> Despite his admitted awareness that “much of the information [offered] in the confessions” elicited from such brutal interrogation techniques “was fabricated,”<sup>53</sup> Duch sanctioned these atrocities under the circular logic of “justify[ing] the decision to arrest the [confessing] detainee” in the first place.<sup>54</sup> Moreover, detainees were forced to reveal an imagined “network of traitors ... in the[ir] confession” who were then “investigated and eventually arrested,”<sup>55</sup> thus implicating the detainees themselves in perpetuating the disparaging horror of S-21.

For the abovementioned crimes, which the Court deemed “crimes against humanity” and grave breaches of the Geneva Conventions of 1949,<sup>56</sup> the Trial Chamber of the ECCC sentenced Duch to thirty-five years in prison. However, he would be required to serve only nineteen years as his conviction was reduced by sixteen years, which are 5 years for being held in illegal military detention from 1999 to 2007 and eleven years for time already served behind bars.<sup>57</sup> If the Trial Chamber’s sentence is upheld on appeal,<sup>58</sup> Duch, if alive, will walk free in 2029 at the age of eighty-six which

<sup>50</sup> *Id.* at 242-244, 249-250.

<sup>51</sup> *Id.* at 243.

<sup>52</sup> *Id.* at 182, 275.

<sup>53</sup> *Id.* at 179.

<sup>54</sup> *Id.* at 254.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 567. In particular, the ECCC found Duch guilty of “the following offences as “crimes against humanity”: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts” and “the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of a fair and regular trial, and unlawful confinement of a civilian.” *Id.* He was, however, not convicted for the charges of torture and murder brought against him under the 1956 Cambodian Penal Code in the absence of necessary supermajority. The International Judges argued that the statute of limitations had expired whilst the Cambodian Judges maintained that this limitation period should only begin from 1993 since Cambodia did not have a functioning judiciary that could have prosecuted Duch for the crimes of torture and murder before then (1993). Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, *Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes*, July 26, 2010, available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/637/20100726\\_Preliminary\\_Objection\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/637/20100726_Preliminary_Objection_Case_001_ENG_PUBLIC.pdf) (last visited on Nov. 10, 2010).

<sup>57</sup> Case 001, *supra* note 24, at 631-633.

<sup>58</sup> The prosecution filed an appeal against the judgment with the Supreme Court Chamber of the ECCC seeking a revised sentence of life imprisonment, with a reduction to 45 years in recognition of the violation of his rights (the unlawful detention by the Cambodian Military Court) and what they consider to have been minimal cooperation with the court. Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* (Dec. 2010), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/](http://www.soros.org/initiatives/justice/focus/international_justice/)



essentially means that he will spend less than the same number of days in prison as the number of persons killed in the Tuol Sleng Prison S-21.<sup>59</sup>

a) The Trial Chamber's reasoning for the Sentence Imposed against Duch

The Trial Chamber's deliberation of sentencing in Case 001 is brief, indecisive and unsatisfactory. It devoted merely eighteen (18) of its two hundred and eighty one (281) page opinion, discussing the appropriate punishment for Duch's crimes, even though the factual and legal issues with which it dealt were relatively straightforward given that Duch acknowledged his legal and moral responsibilities for the crimes committed at Tuol Sleng Prison.<sup>60</sup> The Court considered only four aggravating circumstances: (1) Duch's "abuse of power;" (2) his 'cruelty;' (3) his 'discriminatory intent;' and (4) "the defencelessness of the victims." It also balanced them against five mitigating circumstances: (1) his "cooperation with the ECCC" which facilitated the proceedings before the Chamber and "assisted ... national reconciliation;" (2) his "expressions of remorse;" (3) his propensity for rehabilitation; (4) his admission of responsibility; and (5) the " 'coercive environment' <sup>61</sup> ... in which he functioned."<sup>62</sup> The court then jumped to the conclusion that Duch deserved "full credit for the entirety of his [pre-trial] detention and an additional sentencing credit for the period which was unlawful and in violation his rights to a trial within reasonable time,"<sup>63</sup> somehow settling on a sentence of nineteen years without any additional discussion. Whereas the upper limit of sentencing (life imprisonment) itself is still a grossly inadequate punishment for Duch's horrific crimes,<sup>64</sup> discounts on sentencing have exposed the appalling disproportionality between Duch's crimes and his sentence. Even if the Court had actually followed in practice<sup>65</sup> the international precedent, established in *Prosecutor v. Aleksovski*,<sup>66</sup> which

articles\_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf (last visited on Dec. 15, 2010).

<sup>59</sup> Duch will spend only 6,935 (19 x 365) days in prison for the 16,000 people killed in the Tuol Sleng Prison. Robin McDowell, *For Most Cambodians, 'Justice' has Little Meaning*, ASSOCIATED PRESS, Aug. 8, 2010, available at <http://abcnews.go.com/International/wireStory?id=11353172> (last visited on Dec. 15, 2010).

<sup>60</sup> Case 001, *supra* note 24, at 47 & 570.

<sup>61</sup> The Court appeared to reject Duch's arguments that duress and superior orders be considered further mitigating factors, yet then curiously introduced the issue of Duch's 'coercive environment' when laying down its sentence. *Id.* at 629.

<sup>62</sup> Case 001, *supra* note 24, at 601, 609-611, 629.

<sup>63</sup> *Id.* at 624. See also *id.* at 623-627.

<sup>64</sup> *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment, 1146 (Sept. 27, 2006) (noting that, given the gravity of the crimes facing international tribunals, "a sentence, however harsh, will never be able to rectify the wrongs" committed by guilty defendants).

<sup>65</sup> The Court claimed that it had followed this precedent. Case 001, *supra* note 24, at 582.

<sup>66</sup> Case No. IT-95-14/1-A, Judgment (Mar. 24, 2000).

states that “the gravity of the crime committed is ‘the litmus test for the appropriate sentence,’ ”<sup>67</sup> life in prison should have been the lenient baseline for a proportionality calculation. Article 39 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia indeed empowers the Court to sentence any person guilty of “crimes against humanity”<sup>68</sup> and grave breaches of the Geneva Conventions of 1949,<sup>69</sup> to life imprisonment.

Therefore, in the absence of any clarification as to how the Court arrived at the initial thirty-five year sentence, it seems that the Trial Chamber subconsciously ‘anchored’ at the forty years sentence requested by the prosecution and the thirty years maximum sentence under the Rome Statute of the International Criminal Court<sup>70</sup> and then adjusted inward to arrive at the thirty-five year sentence.

#### b) Reaction of the Victims and Public to the Judgment

Obviously, it is the infliction of maximum possible punishment that gratifies the feeling of the victims of outrageous crimes. As such, the maximum sentences delivered by hybrid tribunals such as the Special Court for Sierra Leone<sup>71</sup> in high profile cases like *Prosecutor v. Sesay, Kallon and Gbao (RUF Case)*<sup>72</sup> were met with positive reactions from the victims of the decade-long civil war.<sup>73</sup> The punishment handed down to Duch by the ECCC, however, could not at all satisfy the surviving victims of his torture. Chum Mey, one of the three living survivors of the Tuol Sleng Prison, left the court in disgust on hearing the sentence.<sup>74</sup> Public reaction was also sharp and startling, channelling disbelief and dismay with elegantly simple retributive logic: “People lost ... their wives, their husbands, their sons and daughters ... they are dead now.” A Cambodian woman recalled, “so why should [Duch] be able to get out in 19 years and spend time with his grandchildren?”<sup>75</sup> Furthermore, a brutal killer like Duch, who is

<sup>67</sup> *Id.* at 182.

<sup>68</sup> The Law on the Establishment of the Extraordinary Chambers art. 5 (amended Oct. 27, 2004), NS/RKM/1004/006.

<sup>69</sup> *Id.* art. 6.

<sup>70</sup> Case 001, *supra* note 24, at 592-94.

<sup>71</sup> The Special Court for Sierra Leone was set up in 2002 jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for the killing of 50,000 people and the mutilation of the bodies of thousands in the territory of Sierra Leone since November 30, 1996.

<sup>72</sup> Case No. SCSL-04-15-T, Sentencing Judgment (Apr. 8, 2009). In this case, former Revolutionary United Front (“RUF”) ‘interim leader’ Issa Hassan Sesay was sentenced by the Court to 52 years in prison for war crimes and “crimes against humanity.” Case No. SCSL-04-15-T, Sentencing Judgment (Apr. 8, 2009).

<sup>73</sup> *S Leone trio guilty of war crimes*, BBC NEWS, Feb. 25, 2009, available at <http://news.bbc.co.uk/2/hi/africa/7910841.stm> (last visited on April 3, 2011).

<sup>74</sup> BBC News, *supra* note 45.

<sup>75</sup> Seth Mydans, *Prison Term for Khmer Rouge Jailer Leaves Many Dissatisfied*, N.Y. TIMES, July 27, 2010; Kuong Ly, *Justice Denied for Cambodians*, N.Y. TIMES, Aug. 2, 2010, available at <http://www.nytimes.com/2010/08/03/>

responsible for the death of 16,000 people, has been sentenced by the ECCC to only nineteen years in prison while low-level drug dealers in Cambodia are sentenced to life imprisonment.<sup>76</sup>

Supporters of the ECCC, however, expressed their satisfaction over the reality that, after three decades, a prominent member of the Khmer Rouge had at last been brought to justice. Youk Chhang, Director of the Documentation Centre of the Cambodia, urged the Cambodians to look beyond the lenience of Duch's sentence and ponder on Case 001's broader, abstract significance. He said,

The ECCC could sentence [Duch] to more than 14, 000 years ... and even that wouldn't make it fair .... By recognising the illegality of Duch's pre-trial detention and reducing his sentence accordingly, the verdict ... provides ... a model for fair trials in Cambodia. [Further, it offers] official accountability. This is the most important Court legacy: a final judgment recognising the crimes committed by the Khmer Rouge.<sup>77</sup>

## B. Trial of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan [Case 002]

### 1. Case Summaries

From September 19 to November 19, 2007, the following four Khmer Rouge leaders were detained by the ECCC.

#### Nuon Chea

On September 19, 2007, Nuon Chea, the chief political ideologist of the Khmer Rouge and right-hand man of the Khmer Rouge founder Pol Pot, was arrested and put in the custody of the Tribunal.<sup>78</sup> Commonly known as "Brother Number Two," Nuon Chea was second in command to Pol Pot, the leader of the Khmer Rouge,<sup>79</sup> and, as such, was the highest ranking official detained. Although he is quoted in an interview with the Associated Press in September 2007 as being ready to face the tribunal, he has consistently denied any wrongdoing. In the interview he claimed, "I was President of the National Assembly and had nothing to do with the operation of

opinion/03iht-edkuong.html (last visited on Dec. 15, 2010).

<sup>76</sup> McDowell, *supra* note 59.

<sup>77</sup> Documentation Centre of Cambodia, *The Duch Verdict: Khmer Rouge Tribunal Case 001* (2010), available at [www.dccam.org/Archives/Photographs/Exhibition\\_Khmer\\_RougeTribunal\\_Case\\_001-The\\_Duch\\_%27s\\_Verdict.pdf](http://www.dccam.org/Archives/Photographs/Exhibition_Khmer_RougeTribunal_Case_001-The_Duch_%27s_Verdict.pdf). (last visited on Dec. 13, 2010).

<sup>78</sup> Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCLJ, Provisional Detention Order (Sept. 19, 2007).

<sup>79</sup> BBC News, *supra* note 22.

the government.” He also claimed, “[s]ometimes I didn't know what they were doing because I was in the Assembly.”<sup>80</sup>

### Ieng Sary

Former Foreign Minister and Deputy Prime Minister Ieng Sary, also known as “Brother Number Three,” was the third person to be detained by the Tribunal on November 14, 2007.<sup>81</sup> As the Foreign Minister of the Khmer Rouge Regime, he was often the only point of contact between the regime concerned and the outside world.<sup>82</sup> He was responsible for convincing many educated Cambodians who had fled the Khmer Rouge to return to help rebuild the country.<sup>83</sup> Many of those who returned were then tortured and executed as a part of the purge of intellectuals.<sup>84</sup>

### Ieng Thirith

Ieng Thirith, wife of Ieng Sary, was one of the Khmer Rouge’s founding members and the most powerful woman.<sup>85</sup> She was the regime’s Minister for Social Affairs.<sup>86</sup> Her sister was married to the regime’s leader, Pol Pot.<sup>87</sup> Prosecutors believe that she knew about tens of thousands of people dying from starvation and disease on brutal collective farms, but did nothing to stop the disaster.<sup>88</sup>

### Khieu Samphan

Khieu Samphan, the Khmer Rouge’s former official Head of the State, was the fifth leader to be arrested on November 19, 2007 in Phnom Penh when he left the hospital where he had been treated for a stroke suffered on November 13, 2007.<sup>89</sup> He was the

<sup>80</sup> Jerry Harmer, *Former Khmer Rouge Leader Detained*, ASSOCIATED PRESS, July 19, 2007, available at <http://www.cambodiatribunal.org/CTM/Associated%20Press%207.20.07.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNj4> (last visited on Mar. 10, 2010).

<sup>81</sup> Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCLJ, Provisional Detention Order (Nov. 14, 2007).

<sup>82</sup> BBC News, *supra* note 22.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Jared Ferrie, *Tribunal Charges Khmer Rouge ‘First Lady’ with Genocide*, REUTERS, Dec. 21, 2009, available at <http://www.reuters.com/article/idUSTRE5BK17H20091221> (last visited on Mar. 10, 2010).

<sup>87</sup> BBC News, *supra* note 22.

<sup>88</sup> *Id.*

<sup>89</sup> Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCLJ, Provisional Detention Order (Nov. 19, 2007); Sopheng Cheang, *Ex-Khmer Rouge Head of State Arrested*, ASSOCIATED PRESS, Nov. 19, 2007, available at <http://www.cambodiatribunal.org/CTM/AP%2011-19-07.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNj4> (last visited on Mar. 10, 2010).

public face of the Khmer Rouge.<sup>90</sup> According to the Prosecutors, Khieu Samphan aided and abetted the policies of the Khmer Rouge, which were “characterised by murder, extermination, imprisonment, persecution on political grounds and other inhumane acts.”<sup>91</sup> Although he has never denied these deaths, he and his lawyers insist that, as Head of the State, he was never directly involved in the acts alleged.<sup>92</sup>

## 2. *The Result of the Investigation*

Although the investigations against the four senior-most living members of the Khmer Rouge regime, i.e. Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan, began in July 2007, it was completed only (after more than 3 years) on September 15, 2010, when the Co-Investigating Judges of the ECCC entered the 739 page closing order indicting all of the four. The Investigating Judges in the closing order charged the four with the following grounds: (a) “crimes against humanity;<sup>93</sup> (b) Genocide;<sup>94</sup> (c) Grave breaches of the four Geneva Conventions of 12 August 1949;<sup>95</sup> (d) Violations of the 1956 Cambodian Penal Code;<sup>96</sup> and (e) Joint Criminal Enterprise (“JCE”) as a mode of liability.<sup>97</sup>

It goes without saying that, the ECCC was fortunate that its first trial involved an accused who was as cooperative and articulate as Duch. The cooperation of Duch and his counsel made it much easier for the prosecution, which has the burden of proving

<sup>90</sup> BBC News, *supra* note 22.

<sup>91</sup> *Id.*

<sup>92</sup> *Genocide Charge for Khmer Rouge Leader Khieu Samphan*, BBC NEWS, Dec. 18, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/8419789.stm> (last visited on Mar. 10, 2010).

<sup>93</sup> Closing Order, Case File 002, Sept. 15, 2010, para. 1613, available at <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf> (last visited on Dec. 15, 2010). In particular, the ECCC charged the four with the following offences as “crimes against humanity”: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhuman acts.

<sup>94</sup> *Id.* Specifically, the ECCC accused the four with the offence of killing members of the groups of Vietnamese and Cham.

<sup>95</sup> *Id.* In particular, the ECCC indicted the four with the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian the rights of fair and regular trial and unlawful deportation or unlawful confinement of civilian.

<sup>96</sup> *Id.* Specifically the Court termed the following crimes as violations of the 1956 Cambodian Penal Code: homicide, torture and religious persecution.

<sup>97</sup> Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, December 8, 2009, No. D97/13. Joint Criminal Enterprise (“JCE”) eliminates the need to show that the accused physically perpetrated the crime in order to hold him/her individually responsible. There are three forms of JCE; the first is when a group shares a common intent to commit a crimes, the second is when actions are taken in “a common concerted system of ill-treatment,” and the third, and most broad, covers crimes that were the foreseeable consequence of a common plan. The applicability of JCE at the ECCC means that there is less of a burden on the prosecution to link individual defendants to specific crimes and there can instead be a focus on proving that crimes occurred and that they resulted from the policies of the leaders of the Khmer Rouge.

the elements of all the crimes charged,<sup>98</sup> and the Trial Chamber, responsible for trial management and the primary questioning of all witnesses, to clearly demonstrate the role of Duch in relation to S-21 Prison.<sup>99</sup> All indications are that those advantages will not be present when the Court begins the trial of Case 002, probably by the middle of 2011,<sup>100</sup> against the said four senior leaders of the Khmer Rouge.<sup>101</sup> Unlike Duch, these four defendants who held high-level positions in the Khmer Rouge have denied complicity in war crimes and refused to apologise.<sup>102</sup> Theng Sary, a survivor of the Khmer Rouge regime who is now a human rights lawyer in Phnom Penh, is of the opinion that Case 002 will make Duch's case look like a 'cake walk.'<sup>103</sup> Therefore, it appears that this trial will present the prosecution and the court with extremely formidable challenges in presenting evidence of the complex charges which include genocide and liability based on a joint criminal enterprise, and in telling a comprehensible story of the senior leadership of the Khmer Rouge.

### III. Elements Presently Undermining the Credibility of the ECCC

The credibility of the ECCC has seriously been undermined by the failure of the Tribunal and its stakeholders to effectively address the factors of: (1) political interference in the judicial process; (2) failure to address the allegations of corruption by not implementing a credible anticorruption programme; and (3) deliberate strategies to stall the legal process.

<sup>98</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 2) Rule 87 (2008), available at [http://www.cambodiatribunal.org/CTM/Internal\\_Rules\\_Revision2\\_05-01-08\\_En.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4](http://www.cambodiatribunal.org/CTM/Internal_Rules_Revision2_05-01-08_En.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4) (last visited on Mar. 10, 2010).

<sup>99</sup> Open Society Justice Initiative, *supra* note 18.

<sup>100</sup> Open Society Justice Initiative, *Salvaging Independence: The Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia*, available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/khmer-rouge-tribunal-20101110/cambodia-khmer-rouge-20101110.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110/cambodia-khmer-rouge-20101110.pdf) (last visited on Dec. 5, 2010); *Khmer Rouge leaders indicted by Cambodian genocide tribunal*, GUARDIAN (UK), Sept. 16, 2010, available at <http://www.guardian.co.uk/world/2010/sep/16/khmer-rouge-leaders-indicted> (last visited on Dec. 5, 2010).

<sup>101</sup> *Id.*

<sup>102</sup> Shay, *supra* note 38.

<sup>103</sup> *Id.*

## A. Political Interference in the Judicial Process

Independence of judiciary is *sine qua non* for a democratic society proclaiming the rule of law. The most traditional and central meaning of the independence of judiciary is that the judges are in a position to arrive at their decisions free from interference of the political branches, especially the executive, and from apprehension for suffering personally as a result of exercising judicial powers.<sup>104</sup> This noble concept, however, has not found its favour in Cambodia, where the political structure is characterised by a corrupt executive with a long history of interfering with its weak judiciary.<sup>105</sup> High political officials instruct Cambodian judges to rule in a certain way especially in cases involving political issues and threaten their safety if they do not rule as instructed.<sup>106</sup> Since 1993, physical attacks on judges have frequently occurred. In April 2003, moreover, a prominent judge was assassinated in the middle of the day as he drove to work in Phnom Penh.<sup>107</sup> In highly politicised cases, it is not uncommon for the executive to negotiate prearranged pardons to demonstrate its power over the judiciary.<sup>108</sup>

Taking into account the abovementioned realities, the UN Secretary General Mr. Kofi Annan on March 31, 2003 opined in his report to the General Assembly that both Chambers of the ECCC should be composed of a majority of international judges.<sup>109</sup> The United Nations Group of Experts also advocated for a predominantly international tribunal due to the long history of political interference on the Cambodian judicial system.<sup>110</sup> However, Cambodian Prime Minister Hun Sen dismissed these conclusions. Hun Sen even counter-proposed the creation of a joint tribunal with Cambodian personnel in majority,<sup>111</sup> which ultimately saw the light of the day. Many critics

<sup>104</sup> GARRY STURGESS & PHILIP CHUBB, *JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD'S LEADING COURTS* 149 (1988). See also R.M. DAWSON, *THE GOVERNMENT OF CANADA* 486 (1954); M. Ehteshamul Bari, *The Substantive Independence of the Judiciary under the Constitutions of Bangladesh and Malaysia: A Comparative Study* 5, 9 & 10 (2011) (Unpublished LL.M. dissertation, University of Malaya) (on file with author).

<sup>105</sup> Human Rights Watch, *Serious Flaw: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* 3-4, available at <http://www.hrw.org/en/reports/2003/04/30/serious-flaws-why-un-general-assembly-should-require-changes-draft-khmer-rouge-tr> (last visited March 10, 2010).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Amnesty International, *Kingdom of Cambodia, Amnesty International's Position and Concerns Regarding the Proposed 'Khmer Rouge' Tribunal*, ASA 23/005/2003 (2003), available at <http://www.unhcr.org/refworld/docid/3f12fb834.html> (last visited on Mar. 10, 2010)

<sup>109</sup> The Secretary-General, *Report of the Secretary General on Khmer Rouge Trials*, U.N. Doc. A/57/769, 11 (Mar. 31, 2003).

<sup>110</sup> Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 909 (2004).

<sup>111</sup> *Id.* at 911-912.

lambasted Hun Sen's insistence on the establishment of a joint tribunal that was fundamentally domestic in character as a ploy to dictate the proceedings<sup>112</sup> of the court. This move by Hun Sen to establish a Tribunal that was composed mostly of Cambodian personnel thus cast serious doubts over his sincerity, as manifested in his letter on 21 June 1997 addressed to the UN Secretary General Kofi Annan,<sup>113</sup> to bring to justice those Khmer Rouge leaders, responsible for war crimes, "crimes against humanity" and genocide from 1975-1979. Judging by the recent appointment of judges with questionable backgrounds, refusal by 6 witnesses holding government positions in Cambodia to honour summons to give testimony before the investigating judges in Case 002, and rejection by the Investigating Judges of the request to call Prime Minister Hun Sen and other key government figures, one would obviously agree that the criticisms were indeed well founded.

### *1. Appointment of Judges with Questionable Backgrounds to Influence the Proceedings of the ECCC*

The Cambodian Judges of the Tribunal, as pointed out earlier, are appointed by the Cambodian Government without the requirement of any scrutiny by the UN. This unfettered power rendered the Hun Sen government to appoint judges freely - many of whom received their law degrees in the former Soviet Communist bloc, such as East Germany, Russia, Kazakhstan and Vietnam, where carrying out the state's wishes perhaps counted for more than maintaining the appearance of impartiality<sup>114</sup> - closely associated with Hun Sen's political party. Among these judges, the appointments of (1) Ney Thol (President of the Military Court and also a member of the Central Committee of Hun Sen's ruling CPP, who presided over two major trials where Hun Sen's political opponents were convicted of national security related crimes)<sup>115</sup> to the Pre-Trial Chamber, (2) Thou Mony (who ruled twice against the supposed killers of Chea Vichea, a trade unionist who was allegedly assassinated on the orders of 'someone' in the Cambodian Government,<sup>116</sup> and once overturned a lower court's guilty ruling against Hun Sen's nephew, who had been involved in a shooting spree in 2003 in which two people were killed and two other wounded)<sup>117</sup> to the Trial Chamber, and (3) Nil Non

<sup>112</sup> Talitha Gray, *To Keep You is No Gain, to Kill You is No Loss: Securing Justice through the International Criminal Court*, 20 ARIZ. J. INT'L & COMP. L. 645, 682 (2003).

<sup>113</sup> See Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary General Annan (June 21, 1997).

<sup>114</sup> Son & Niemann, *supra* note 9, at 109.

<sup>115</sup> *Id.*

<sup>116</sup> Amnesty International, *Kingdom of Cambodia: The Killing of Trade Unionist Chea Vichea*, ASA 23/008/2004 (2004).

<sup>117</sup> Munthit K, *Cambodia Judges Credibility Questioned*, ASSOCIATED PRESS, May 22, 2006, available at



(who himself confessed of taking bribes from parties in court cases he judged) to the Trial Chamber as its President,<sup>118</sup> bear testimony of the evil design of manipulating the trial process by the Regime. Moreover, it is worth mentioning here that, two of the aforesaid three controversial judges, i.e. Thou Mony and Nil Non (as the President), both of whom sit in the Trial Chamber, may have played a major role in ‘anchoring’ the lenient verdict against Duch in Case 001 in deference to the dictates of the hierarchy of the Cambodian Government which is quite consistent with their past notorious reputation of being unduly influenced by their political supervisor.

### *2. Refusal of Six Witnesses Holding Government Positions to Honour Summons*

The apprehensions of political interference were heightened when six high government officials refused to honour summons to give testimony before the investigating judges in Case 002<sup>119</sup> and Prime Minister Hun Sen himself publicly encouraged this refusal. Hun Sen even went so far as saying that if the foreign officials involved in the tribunal are not satisfied with the refusal of government officials to testify before them, then they “can pack up their clothes and return home.”<sup>120</sup> This statement made by the Prime Minister reflects the total disregard of his Government’s direct obligation under Article 25 of the Agreement (concluded between the Royal Government of Cambodia and the UN) to assist the investigating judges in actions, including the “service of documents.”<sup>121</sup>

### *3. Rejection by the Investigating Judges of the Request to Call Hun Sen and Other Senior Government Officials*

On March 1, 2010, Investigating Judges, Marcel Lemonde and You Bunleng, declined to comply with the request of the defence teams of Nuon Chea and Khieu Samphan to call Prime Minister Hun Sen to testify along with Foreign Minister Hor Namhong, Finance

[http://www.genocidewatch.org/images/Cambodia\\_22\\_May\\_06\\_Cambodia\\_judges\\_credibility\\_questioned.pdf](http://www.genocidewatch.org/images/Cambodia_22_May_06_Cambodia_judges_credibility_questioned.pdf) (last visited on Mar. 10, 2010).

<sup>118</sup> LICADHO, HUMAN RIGHTS IN CAMBODIA: THE FAÇADE OF STABILITY 25 (May 2006), available at <http://www.licadho-cambodia.org/reports/files/8682LICADHOFacadeDemocracyReport2005-06.pdf> (last visited on Mar. 10, 2010).

<sup>119</sup> Press Release of ECCC, *A Number of Case File Documents in Case 002 Published* (Oct. 7, 2009), available at [http://www.eccc.gov.kh/english/cabinet/press/134/ECCC\\_Press\\_Release\\_7\\_Oct\\_2009\\_ENG-FRE.pdf](http://www.eccc.gov.kh/english/cabinet/press/134/ECCC_Press_Release_7_Oct_2009_ENG-FRE.pdf) (last visited on Mar. 10, 2010). The six high government officials who refused to honour summons are Senate President Chea Sim, National Assembly President Heng Samrin, Foreign Minister Hon Namhong, Finance Minister Keat Chhon and Senators Sim Ka and Ouk Bunchhoeun.

<sup>120</sup> *Cambodia PM Questions Khmer Rouge Court Summonses*, AGENCE FRANCE PRESSE (“AFP”), Oct. 8, 2009; and *Khmer Rouge Court Calls Government Witnesses*, AFP, Oct. 7, 2009.

<sup>121</sup> See The Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea art. 25, U.N. Doc A/RES/57/228B (June 6, 2003).

Minister Keat Chhon and other senior government leaders.<sup>122</sup> Judge You Bungleang reasoned that these senior officials were not likely to provide any additional evidence and, as such, there was no justification of interviewing them.<sup>123</sup>

#### 4. *Interference in the Investigation of Additional Suspects*

Apprehensions of political interference in the investigation work of the ECCC were escalated in December 2008 when the Cambodian Co-Prosecutor, Chea Leang, would not agree with the International Co-Prosecutor at that time Robert Petit to the investigation of five additional suspects beyond the five named defendants.<sup>124</sup> The reasons she provided to justify her position had nothing to do with the sufficiency of the evidence or the legal basis for additional investigations, but were political in nature and aligned with the long-held views of Cambodian Prime Minister Hun Sen who has long wanted to limit the trials to his political enemies and who resisted efforts which brought people in positions of power (or whose patrons) before the court.<sup>125</sup>

However, in August 2009, nine months after the International Prosecutor's filing of disagreement notice concerning the submission of the names of five additional suspects for judicial investigation, the Pre-Trial Chamber issued a divided ruling that allowed the submission to go forward.<sup>126</sup> Following the public announcement of this decision, the Cambodian Prime Minister Hun Sen bluntly stated his objection to bring charges against any additional accused, implying that it would result in social unrest that may kill 200,000 to 300,000 people.<sup>127</sup> On October 27, 2010, Hun Sen overtly told the UN Secretary General Mr. BAN Ki-moon during a meeting in Phnom Penh that: "Cases 003/004 will not be allowed ... The Court will try the four senior leaders successfully and then finish with Case 002."<sup>128</sup> These statements of the Prime Minister crystallize the concern about the future of the Case 003/004, as it is alleged that the Cambodian members of the Staff at the ECCC are now being forced to adhere to Hun Sen's political direction by refusing to cooperate and participate in the investigation of the five

<sup>122</sup> *Tribunal Asked to Call Hun Sen: Letter Sok Khemara*, VOA NEWS, Mar. 2, 2010, available at <http://www1.voanews.com/english/news> (last visited on Apr. 20, 2010).

<sup>123</sup> *Id.*

<sup>124</sup> John A. Hall, *Judging the Khmer Rouge Tribunal*, FAR EASTERN ECON. REV. (2009).

<sup>125</sup> *Id.*

<sup>126</sup> Open Society Justice Initiative, *supra* note 18.

<sup>127</sup> Chean Sokha and Robbie Corey-Boulet, *ECCC Ruling Risks Unrest: PM*, PHNOM PENH POST, Sept. 8, 2009; Sopheang Cheang, *Cambodia PM Accuses Other Countries of Stirring Unrest*, Associated Press, Sept. 10, 2009; and Vong Sokheng, *Inquiries could sink ECCC: PM*, PHNOM PENH POST, Sept. 10, 2009.

<sup>128</sup> *Cambodian PM says no third Khmer Rouge Trial*, AFP, Oct. 27, 2010; *Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC*, PHNOM PENH POST, Oct. 27, 2010, available at <http://www.phnompenhpost.com/index.php/2010102744318/National-news/hun-sen-sees-pending-krt-as-threat-to-stability.html> (last visited on Apr. 20, 2010).

additional suspects in Cases 003/004.<sup>129</sup>

The independence of the ECCC has been severely undermined, as it is the hierarchy of the Cambodian Government, and not the Judges of the ECCC, who are deciding whom to charge, what to charge and who should testify. This direct interference in the investigation is a clear violation of the Cambodian Government's commitments under the provisions laid down in Articles 5(3), 12(2) and 13(1) of the Agreement.<sup>130</sup> The Government has instructed or encouraged officials concerned to disregard court orders and refuse to undertake investigations in contravention, not only of the abovementioned three provisions of the Agreement, but also of the provisions of the UN Basic Principles on the Independence of Judiciary, 1985 which in Articles 1 and 4

<sup>129</sup> As it was stated by the court regarding Cases 003/004 that "two field missions were undertaken by *international investigators*, with six witness interviews for crimes based within different crime sites" [Italic added], *The Court Report* (Nov. 2010). This announcement is consistent with earlier indications that any investigation into Cases 003/004 is being done without the cooperation of Cambodian staff or officials. At a victims outreach meeting on September 26, 2009, Chea Leang, the Cambodian Co-Prosecutor, when expressly questioned about the possibility of additional arrests and the desire of victims to see more than five accused before the court, refused to acknowledge the possibility of proceedings against suspects other than the original five charged persons. A Cambodian representative of the investigating judges' office made similar misleading remarks at the same meeting, *in Open Society Justice Initiative*, *supra* note 18.

<sup>130</sup> 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 art. 5(3), U.N. Doc. A/RES/57/228B (June 6, 2003), provides that: "The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979."

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 art. 12(2), U.N. Doc. A/RES/57/228B (June 6, 2003), states that: "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice."

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 art. 13(1), U.N. Doc. A/RES/57/228B (June 6, 2003), lays down that: "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her."

expressly state that:

The independence of the judiciary shall be guaranteed by the State .... It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.<sup>131</sup>

There shall not be any inappropriate or unwarranted interference with the judicial process.<sup>132</sup>

## **B. Failure to Address the Allegations of Corruption by Not Implementing a Credible Anticorruption Programme**

Corruption within the ECCC is such a severe problem<sup>133</sup> that requires the UN and other major stakeholders to take effective measures so as to ensure that their money is well spent. The complaints of corruption at the ECCC were first brought to the notice of the UN by the Cambodian staffs<sup>134</sup> when they claimed that they had to give money in exchange for their jobs.<sup>135</sup> These complaints were followed by a call from the Open Society Justice Initiative, a watchdog NGO, trying to set up an independent investigation mechanism for accusations of corruption.<sup>136</sup> Ultimately, on February 23, 2008, a high-level UN delegation met the Cambodian Deputy Prime Minister Sok An, and issued a joint statement to the effect that an agreement has been reached involving continuing parallel domestic and international mechanisms to investigate corruption.<sup>137</sup> However, this statement was ambiguous and unclear as to the specifics of the said mechanisms and, as such, smacked of political compromise.

After about a year of negotiations, on August 11, 2009, the Government of Cambodia and the UN signed the Agreement to Establish an Independent Counsellor at the Extraordinary Chambers for the Courts in Cambodia.<sup>138</sup> This Agreement provided the skeletal outline of an anticorruption program that might, if properly developed, be a step toward both ensuring that ECCC staff have a safe and effective remedy if they are aware of or subjected to corrupt practices. Thus, it might also set to secure the credibility

<sup>131</sup> U.N. Basic Principles on the Independence of the Judiciary art. 1 (1985).

<sup>132</sup> *Id.* art. 4.

<sup>133</sup> Son & Niemann, *supra* note 9, at 111.

<sup>134</sup> The names of these Cambodian staffs, however, were never disclosed in any document.

<sup>135</sup> Hall, *supra* note 124.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Press Release, Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in the Courts of Cambodia, U.N. Doc. L/3146 (Aug. 12, 2009), available at <http://www.un.org/News/Press/docs//2009/L3146.doc.htm> (last visited on Jan. 21, 2010).

of the Court impaired by almost three years of inadequate addressing of corruption allegations. In recent, however, significant concerns have been expressed about the independence of the 'Independent Counsellor' charged with running the programme because of his role as the head of the Cambodia National Audit Authority, a body that should have been independent of the Cambodian Government in theory.<sup>139</sup>

Since the announcement of the plan on August 11, 2009, the Independent Counsellor has visited the Court and held a single press conference. There, he promised to be accessible to all staff.<sup>140</sup> He expressed the intention to collect information relating to all corruption and other complaints from court staffs, and would be involved in resolving those deemed to be 'well-founded.'<sup>141</sup> These limited promises appear to be empty as no significant action has been taken by him thus far, i.e. he has not yet revealed publicly, or to the staff of the ECCC, what procedures are in place to ensure protection and anonymity for whistleblowers, how to contact him, the nature and limit of his power to investigate charges, and other critical elements that are a prerequisite to an effective programme.<sup>142</sup>

In a statement at the end of March 2010, the Cambodia National Authority announced that the Independent Counsellor had begun investigations into three received complaints, of which two were from Cambodian staff and one from a UN staff member. It was also announced by the Independent Counsellor's office that a public report of his work would be available in July 2010.<sup>143</sup> Contrary to this announcement, the Independent Counsellor declared on October 18, 2010 that he would not publish a report summarising the activities of his office in pursuance of UN's instructions.<sup>144</sup> The non-publication of the Report of the Independent Counsellor calls into question the openness and transparency of the entire anticorruption process at the ECCC.

<sup>139</sup> Robbie Corey-Boulet, *Corruption Counsel's Role at ECCC Unclear*, PHNOM PENH POST, Sept. 23, 2009, quoting expressions of concerns about the independence of the appointed independent counselor: "Sophal Ear, a professor at the US Naval Postgraduate School in California whose father died during the Khmer Rouge regime, wrote in a Wall Street Journal op-tpe-d that the selection of Uth Chhorn in particular was troubling [because of his position as head of the National Audit Authority ("NAA")]. . . . he said the NAA's lack of transparency had robbed it of all credibility, adding: "Since the auditor general and the independent counsellor will be one and the same, this does not bode well for the credibility of the ECCC." The NAA, which began its work in 2002 and is tasked with auditing all government bodies, is officially independent under the Law on Audit. However, a 2008 review by the nonprofit Global Integrity stated: The NAA is believed to not be politically independent, even by law. See Sophal Ear, *Opinion: Cambodian 'Justice' Without Major Personnel Changes, the Khmer Rouge Trial Risks Descending into Farce*, WALL ST. J., Sept. 1, 2009.

<sup>140</sup> Society Justice Initiative, *supra* note 18.

<sup>141</sup> Robbie Corey-Boulet, *ECCC Official to Collect Evidence*, PHNOM PENH POST, Sept. 24, 2009.

<sup>142</sup> Open Society Justice Initiative, *supra* note 18.

<sup>143</sup> Vong Sokheng, *KRT Graft Report Due by July*, PHNOM PENH POST, June 17, 2010.

<sup>144</sup> James O'Toole, *UN Keeps Corruption Probe Confidential*, PHNOM PENH POST, Oct. 18, 2010.

The non-strengthening of the anticorruption mechanism at the ECCC, which results from lack of determination on the part of key stakeholders, severely undermines the Court's credibility. As one observer noted, "... corruption is one key issue that simply can't be ignored. The ECCC cannot make survivors of Democratic Kampuchea whole for the abuses they suffered. What it can do is deliver ... credible verdicts and the promise of a judicial system that will better protect ... Cambodians' rights in the future."<sup>145</sup> It is believed that, the UN, the donors, and the Cambodian Government show their seriousness towards the adoption of a resolution concerning anticorruption mechanism only when critical funding is needed for the court. Once the immediate pressure for funding is off, discussions and progress regarding the matter come to an end. Because of this kind of 'window dressing,' the court and the UN will have difficulty in convincing court staff and Cambodians whether they have any sincere plan to solve the corruption problems faced by the Court.<sup>146</sup>

### C. Deliberate Strategies to Stall the Legal Process

Manifestly, the Cambodians prolonged the process of establishing the ECCC in a calculated and planned manner so that a certain number of most notorious Khmer Rouge leaders including Pol Pot, the man most wanted for "crimes against humanity," Son Sen, Defense Minister and responsible for the Santebal, the Political Police, Yun Yat, Minister, Thiounn Thioeunn, Minister, Ta Mok 'the Butcher,' the Regime's Chief of Military Command and one of Pol Pot's most ruthless henchmen, and his deputy Ke Pauk, having died in the interim, could never brought to justice.<sup>147</sup>

The trial of Nuon Chea, Ieng Sary, Ieng Thirth, and Khieu Samphan, as mentioned earlier, is not expected to commence before mid-2011.<sup>148</sup> This inordinate delay in trying these aging (most of them also in ill health<sup>149</sup>) atrocity lords may also be deliberately planned so that some or all of the defendants involved in this case may not be alive to face the tribunal.<sup>150</sup> In this context, the views of Vanna Chan, daughter of a Cambodian

<sup>145</sup> John D. Ciorciari, *Justice and Judicial Corruption* (Commentary), SEARCHING FOR THE TRUTH (Magazine of the Documentation Center of Cambodia), available at <http://www.cambodiatribunal.org/CTM/Ciorciari%20October%202007.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLzXFdNJ4> (last visited on Nov. 10, 2010).

<sup>146</sup> *Id.*

<sup>147</sup> Trial Watch. *Criminal Court for Cambodia*, available at <http://www.trial-ch.org/index.php?id=923&L=5> (last visited on Mar. 12, 2010).

<sup>148</sup> Guardian (UK), *supra* note 100.

<sup>149</sup> Geoffrey Cain, *Justice Comes to the Killing Fields*, FAR EASTERN ECON. REV. (2009), available at <http://www.feer.com/politics/2009/FEBRUARY/Justice-Comes-to-the-Killing-Fields> (last visited on Mar. 10, 2010).

<sup>150</sup> Shay, *supra* note 38.

genocide survivor, are worthy of note that “they [Cambodian Government Officials] may stall [the legal process] so much that all the remaining key Khmer Rouge officials will die of old age.”<sup>151</sup>

It cannot reasonably be expected that “Hun Sen and his CPP would allow the Khmer Rouge Trial to be completed soon and according to international standard of justice,”<sup>152</sup> when all the high-profile crimes including the politically motivated ‘Grenade Attack’ of March 30, 1997, the murder of union activists’ politicians, prominent monks, reporters and recent forced removal of people from their land are still unresolved.<sup>153</sup>

## IV. Conclusion

The foregoing discussion reveals that the establishment of the ECCC which was designed as a national court with ‘extraordinary’ international character, following an agreement reached between the UN and Cambodia after 26 years of genocide, demonstrates that impunity will not be successful in Cambodia for surviving senior Khmer Rouge leaders or others most accused of the atrocity crimes of the Pol Pot regime committed between 1975 and 1979. This establishment alone sends a powerful message throughout the world that the international community is getting more serious about accountability for atrocity crimes and that there is no stopwatch for justice.

However, the progress ECCC achieved by successfully completing the trial of Kaing Guek Eav, has, to a great extent, been tarnished by the judgment delivered by the Tribunal in this case, and the failure of the Tribunal and its stakeholders (including the UN) in addressing certain existing problems of profound nature like blatant and naked political interference, corruption, and delaying tactics resorted to by the Cambodian officials at the ECCC. To proceed with the trials, without properly addressing the political interference and allegations of corruption, obviously risks tainting the entire process and casting a shadow over any legal outcomes. Furthermore, such a dispensation of justice would create an imperfect and unhealthy precedent of the UN acquiescence to a regime seeking to profit from and control internationally-backed tribunals. Joseph Mussomeli, the United States Ambassador to Cambodia, has aptly

<sup>151</sup> Rolfsmeier L, *Minnesota’s Cambodian Immigrants Remember Genocide and Wait for Justice*, MINN. POST, Apr. 2, 2008.

<sup>152</sup> Tith N, *For Whom the bells Tolls: Unresolved Murders under Hun Sen’s Dictatorship*, Comment under No. 15, available at <http://www.cambodiana.org/default.aspx> (last visited on Mar. 11, 2010).

<sup>153</sup> Son & Niemann, *supra* note 9, at 112.

said, “the only thing worse than no trial is a trial that is a farce.”<sup>154</sup> It should be kept in mind that, if the ECCC does not adjudicate the cases brought before it in a free, impartial and independent manner, justice to be administered by it would be a meaningless word. As Viscount Bryce said, “... if the law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail ... If the lamp of justice goes out in darkness, how great is that darkness!”<sup>155</sup> What matters most is the upholding of the public and international community’s perception of the independence and impartiality of the judges, which is well reflected in the oft-quoted maxim that: “Justice must not only be done, but must also be seen to be done.”

<sup>154</sup> Faiola A, *Victims of Cambodia’s Khmer Rouge Fear Derailment of Trials*, WASH. POST, Feb. 2 2007.

<sup>155</sup> JAMES BRYCE, II *MODERN DEMOCRACIES* 384 (1921).