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The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia

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ARTICLE

THE UNCERTAIN RELATIONSHIP BETWEEN INTERNATIONAL CRIMINAL LAW ACCOUNTABILITY AND THE RULE OF LAW IN POST-ATROCITY STATES:

LESSONS FROM CAMBODIA

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ABSTRACT

One of the goals routinely ascribed to international criminal law ("ICL") prosecutions is the ability to improve the rule of law domestically in post-atrocity states. This Article reassesses the common assumption that the relationship between the pursuit of ICL accountability and improving the rule of law in post-atrocity states is necessarily a linear, wholly positive one. It does so through an analysis of the relationship between the Extraordinary Chambers in the Courts of Cambodia and the rule of law domestically in Cambodia. Through this analysis, this Article highlights the oft-ignored possibility that ICL prosecutions may actually have a mix of positive, nil, and negative effects on the domestic rule of law, at least in the short run. In the Cambodian context, this Article argues that such risk is quite real and arguably, in the process of being realized. These harmful rule of law consequences are most visible when viewed in light of the particularities of Cambodia's rule of law deficit, which increasingly stems from government practices of subverting the rule of law through means obscured behind façades of legality. The ECCC's tacit toleration of the Cambodian government's apparent interference with

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the Court's work risks legitimating the notion that the rule of law is mere window dressing, rather than anything of substance in even the most basic, procedural sense.

I. INTRODUCTION

International criminal justice is often presented as having a positive effect on the rule of law both internationally and domestically in post-atrocity states. Internationally, institutions such as the International Criminal Court ("ICC") are often characterized as promoting the rule of law by combatting impunity for the most serious international crimes.[1] While there is much to be said concerning the

1. For an example of such a characterization, *see* Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRON. (2012), https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-

relationship between international criminal justice and the concept of an international rule of law, this Article focuses exclusively on the relationship between international criminal justice and the rule of law at the domestic level, specifically in post-atrocity states. Within this context, the pursuit of international criminal law ("ICL") accountability is commonly presented as an integral part of a broader project of establishing a liberal, human rights-based rule of law in societies devastated by atrocity.[2] According to this standard narrative, atrocity crimes tend to occur amidst a climate of social chaos marked partially by a complete breakdown in the rule of law.[3] International

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and-establishing-rule-law [https://perma.cc/S8MY-57HE] (last visited June 22, 2018) ("Without the rule of law, impunity reigns. By punishing violations of international legal norms and by promoting adherence to these norms, the ICC and the wider Rome Statute system play an important part in advancing the rule of law, thereby reducing impunity."). For a critique of the anti-impunity turn within international human rights discourses, *see generally* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015).

2. For a widely cited example of this standard transitional justice narrative, *see* RUTI G TEITEL, TRANSITIONAL JUSTICE 28 (2000) (observing that the argument that impunity for criminal behavior for ordinary domestic crimes entail serious negative social consequences "is apparently stronger in [post-atrocity transitional contexts] because in the conditions of prior lawlessness, expectations are greater of the impact of even isolated acts of accountability on rule of law. For these are extraordinary circumstances of past injustices, often state sponsored. It is against this backdrop that the argument from impunity takes on new meaning. In this context, the exercise of criminal justice is thought to best undo past state justice and to advance the normative transformation of these times to a rule-of-law system."). For a helpful overview of the centrality of domestic rule of law improvement to the aims of transitional justice efforts, including the pursuit of ICL accountability, along with a critique of some of the assumptions embedded in this dominant narrative, *see* PÁDRAIG MCAULIFFE, TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION: A CONTENTIOUS RELATIONSHIP 180–223 (2013).

3. For an articulation of the notion that atrocities mostly occur amidst environments of social chaos marked by a complete breakdown in the rule of law, *see* Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 100–01 (2009). This position is, of course, contingent on one's underlying conceptualization of law itself and can be traced back to the well-known debate between H.LA. Hart and Lon Fuller concerning the nature of legality, including for example, whether the German Nazi regime adhered to the rule of law. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); *cf.* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, HARV. L. REV. 630, 630–72 (1958). More recently, David Kennedy has argued that international law increasingly enables, rather than constrains atrocity commission, by legalizing, and thereby normalizing warfare. *See* DAVID KENNEDY, OF WAR AND LAW (2006). While there is much to these debates, an analysis of the accuracy of the claim that genocide, crimes against humanity, and war crimes tend to primarily occur amidst a general climate of social chaos, including the fundamental breakdown of the rule of law, is outside the scope of the present inquiry, which is more narrowly focused on the role of ICL in improving the rule of law in post-atrocity states. For descriptions of the effects of periods of atrocity

criminal justice institutions, especially those located on-site in post-atrocity states, may thus, be seen as stepping into a veritable legal void in the wake of atrocity. Operating within this perceived absence of law, such institutions are commonly portrayed by their proponents–and quite often actively portray themselves–as, amongst other things, sowing the seeds for the reconstruction of the rule of law by combatting impunity while upholding fair trial standards and more generally demonstrating how the law ought to be administered.[4]

Determining the accuracy of this presumption that ICL prosecutions are innately beneficial to the rule of law in post-atrocity states is a difficult task. The rule of law itself remains a contested concept, rendering it a moving target and making general assessments difficult.[5] Meanwhile, ICL continues to be selectively applied and deeply politicized, thereby undermining its own rule of law credentials according to most mainstream rule of law definitions.[6] Thus, even if

commission on the rule of law and legal infrastructure, *see* John Coughlan, Sana Ghouse & Richard Smith, *The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System*, 4 AMSTERDAM L. F. 16, 16–17 (2012); Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 251–52 (2007) [hereinafter Stromseth, *Pursuing Accountability*].

4. MCAULIFFE, *supra* note 2, at 88–93. McAuliffe argues specifically that "the expressivist role of trial presents criminal justice as the culmination of a [linear] redemptive chronicle. In this schema, democracy, justice, rights and the rule of law are inextricably linked." *Id.* at 84. For an additional discussion of this narrative, *see*, *e.g.*, Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE L. 87 (2009) [hereinafter Stromseth, *Justice on the Ground*]. This is not to suggest that the rule of law movement, especially as it pertains to the relationship between the Global North and Global South, is not itself, often deeply problematic. There are many deeply critical observations to be made concerning the neoliberal and neocolonial underpinnings of many mainstream rule of law frameworks and activities. This Article is not intended as a defense of rule of law-building projects generally, but rather a critique of the tendency to uncritically accept the unproven assumption that ICL prosecutions can only help to improve the rule of law domestically within post-atrocity states. For an example of such criticisms, *see generally* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the 'Rule of Law,'"* 101 MICHIGAN L. REV. 2275 (2003).

5. For an overview of the various ways in which the rule of law is conceptualized at both the international and domestic levels, *see* Henrik Andersen, *Hybrid Courts and Multilevel Rules of Law: Some Overall Considerations, Challenges and Opportunities*, 6 INT'L J. CRIMINOLOGY & SOC. 117, 117–21 (2017).

6. On the selectivity of ICL and its implications, *see* ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME (2005). On the politicization of ICL, *see generally,* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS, (Christian De Vos, Sara Kendall, & Carsten Stahn eds., 2015). For analysis of the relationship between criminal

one adopts a rather rudimentary model of the rule of law as a means of reducing "arbitrariness through general rules applied juridically,"[7] it remains unclear how ICL is able to teach principles which it does not itself appear to adhere to. Moreover, in post-atrocity states themselves, while building the rule of law tends to be framed as a largely technocratic, value-neutral endeavor,[8] the ways in which "law" and the "rule of law" are locally conceptualized invariably fluctuates.[9] These factors all seem to militate against one-size-fits-all approaches to post-atrocity rule of law building, which may or may not address the particularized rule of law challenges presented by each individual situation.[10] While these and other potential pitfalls have led some to question whether the imposition of ICL accountability actually presents a clear pathway for improving the rule of law in post-atrocity states,[11] ICL institutions and international criminal justice advocates continue to regularly claim that ICL prosecutions represent a pathway towards positive rule of law outcomes integral to the social, political, and legal reconstruction of post-atrocity states.[12]

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prosecutions, transitional justice and the rule of law, *see* MCAULIFFE, *supra* note 2, at 123-223.

7. Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE J. ON RULE L. 96, 96 (2014).

8. *See, e.g.*, Sara Kendall, *Donors' Justice: Recasting International Criminal Accountability*, 24 LEIDEN J. INT'L L. 585, 591 (2011).

9. *See* Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice*, 10 YALE HUM. RTS. DEV. L.J. 178, 185–87 (2007).

10. *See* MCAULIFFE, *supra* note 2, at 88–89; *see also* Stromseth, *Pursuing Accountability, supra* note 3; Stromseth, *Justice on the Ground*, *supra* note 4.

11. For example, Stromseth concludes that the effects of ICL accountability processes "on domestic rule of law have been mixed, complex, and often unclear, and more research is needed to fully understand their longer-term impact." *See* Stromseth, *Pursuing Accountability, supra* note 3, at 319. McAuliffe meanwhile, is more critical of the assumption that the pursuit of criminal accountability for past atrocity crimes will necessarily improve the rule of law in transitional states. *See* Pádraig McAuliffe, *Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?*, 2 HAGUE J. ON RULE L. 110, 127–54 (2010).

12. For an articulation of this claim, *see* TEITEL, *supra* note 2, at 28. For an example of this claim being advanced in relationship to the policies of the ICC Office of the Prosecutor within the context of its approach to complementarity, *see* Justine Tillier, *The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?*, 13 INT'L CRIM. L. REV. 507, 511 (2013) (arguing that "the practices of the [ICC Office of the Prosecutor] can contribute to strengthen the Rule of Law in situation countries."). For an example of such a claim being made in relation to the ICC's complementarity regime within the specific context of rule of law reform efforts in Kenya, *see* Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. DEV. L.J. 26 (2011). For an example of such a claim being made by an international criminal justice

This Article reassesses the relationship between the pursuit of ICL accountability and the rule of law in post-atrocity states. It does so by examining the relationship between the rule of law in Cambodia and ICL accountability efforts ongoing at the Extraordinary Chambers in the Courts of Cambodia ("ECCC"),[13] focusing specifically on the rule of law ramifications of the longstanding controversy concerning how many individuals the Court will ultimately try. This case study is selected for several reasons. First, as a hybrid international criminal justice institution housed within the existing Cambodian judiciary and located on-site in Cambodia, the ECCC exemplifies the common assumption that localized justice will produce enhanced localized rule of law benefits.[14] Second, the Court and its backers have themselves touted the ECCC's potential for improving the rule of law in Cambodia.[15] Third, despite years of formal legal reforms and extensive rule of law building efforts, Cambodia continues to suffer from an extreme rule of law deficit,[16] making the Court's effects in this area especially important to everyday life in contemporary Cambodia.

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institution itself, *see Extraordinary Chambers in the Courts of Cambodia*, THE ECCC AT A GLANCE (2014), https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf [https://perma.cc/X7CE-4KAN] (last visited Mar. 4, 2018) (stating that the Court "is expected to bring justice to Cambodians, *strengthen rule of law in the country* and promote national reconciliation.") (emphasis added). Alexander Hinton views such assumptions as tied into a broader "transitional justice imaginary," which he argues obscures more complex, localized understandings of justice and the like. *See generally* ALEXANDER HINTON, THE JUSTICE FACADE: TRIALS OF TRANSITION IN CAMBODIA (2016) [hereinafter HINTON, JUSTICE FACADE].

13. The ECCC, also known as the Khmer Rouge Tribunal, is a hybrid United Nations-Cambodian tribunal with jurisdiction over various domestic and international crimes committed in Cambodia during the reign of the Khmer Rouge (1975-1979). *See generally* JOHN D. CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2014).

14. *See* Stromseth, *Justice on the Ground*, *supra* note 4, at 96.

15. *See, e.g.*, United Nations Office of the High Comm'r for Human Rights, *Promotion of ECCC Legacy*, OHCHR - CAMBODIA (2015), http://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-legacy [https://perma.cc/9T4B-HJLB] (last visited Mar. 19, 2018); JENNY HOLLIGAN & MAHDEV MOHAN, ECCC'S LEGACY FOR THE RULE OF LAW IN CAMBODIA (Oeung Jeudy, Billy Chia-lung Tai & Sang Sothun eds., 2013); OLGA MARTIN-ORTEGA & JOHANNA HERMAN, HYBRID TRIBUNALS AND THE RULE OF LAW: NOTES FROM BOSNIA AND HERZEGOVINA AND CAMBODIA 15-27 (2010); *Extraordinary Chambers in the Courts of Cambodia*, *supra* note 12; CIORCIARI & HEINDEL, *supra* note 13, at 251–60; OPEN SOC'Y JUSTICE INITIATIVE, PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 17–18 (2016) [hereinafter PERFORMANCE AND PERCEPTION].

16. *See* Coughlan, Ghouse & Smith, *supra* note 3, at 16; Lucy West, *Rule of law in*

This analysis demonstrates both the complexity and uncertainty of the relationship between ICL prosecutions and the rule of law domestically in post-atrocity states such as Cambodia. In terms of complexity, various rule of law-related interests, such as consistency in application of the law, promoting judicial independence, and resisting political interference, may be at play simultaneously, interacting dynamically and potentially clashing with one another. In terms of uncertainty, the ECCC experience also demonstrates that ICL institutions may produce both positive *and negative* domestic rule of law outcomes in post-atrocity states, making their net effect on the rule of law far from certain. In the specific context of Cambodia and the ECCC, this Article argues that there exists a real possibility that the Court, at least in the near term, may do little to improve the rule of law in Cambodia and may even have a net negative effect in this regard.

This potential outcome helps elucidate the reality that the pursuit of ICL accountability in the wake of atrocity may not necessarily help build the rule of law in all post-atrocity states. Rather, the pursuit of such accountability may only bear rule of law benefits where a preexisting baseline commitment to the rule of law already exists. Conversely, in states such as Cambodia, where key actors–especially those in government–are hostile to the basic requirements of the rule of law, engaging local actors in ICL prosecutions may merely allow those in power to continue eroding the rule of law while more artfully obscuring such erosion behind façades of legality. Consequently, ICL may do the least in terms of domestic rule of law reform in post-atrocity states that are most seriously in need of such reform.

To make out this argument, this Article proceeds in three parts. Part I discusses how domestic rule of law improvement has been incorporated as part of the mission of international criminal justice and how the rule of law itself is conceptualized in this regard as a set of procedural requirements infused with a thin bundle of human rights-based substantive commitments. Part II provides an overview of the contemporary rule of law situation in Cambodia, describing how the

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Cambodia – reflections from the field, GRIFFITH ASIA INSIGHTS (2016), https://blogs.griffith.edu.au/asiainsights/rule-of-law-in-cambodia/ [https://perma.cc/Z72S-8KLT]; Christoph Sperfeldt, *Cambodia's Unruly Rule of Law*, EAST ASIA F. (2016), http://www.eastasiaforum.org/2016/05/19/cambodias-unruly-rule-of-law/ [https://perma.cc/72WP-KVKK] (last visited Oct 4, 2018); Peter J. Hammer, *Why Has the Rule of Law Languished in Cambodia?*, ASIA DIALOGUE (2017), http://theasiadialogue.com/2017/08/10/why-has-the-rule-of-law-languished-in-cambodia/ [https://perma.cc/ECT7-JC43]; LAUREN MOONEY & LANA BAYDAS, CAMBODIAN CIVIL SOCIETY AT A CRITICAL JUNCTURE 9 (2018).

ruling Cambodian People's Party ("CPP") and a small group of elites increasingly exercise power through law in ways that deeply compromise the rule of law. Part III provides an overview of the ECCC and the ongoing controversy concerning how many individuals will be tried at the Court, followed by an analysis of the rule of law implications of this controversy. Part III argues that, in its treatment of the Court's controversial third and fourth cases, the ECCC is at risk of participating in processes similar to those through which the rule of law is subverted domestically in Cambodia. That is, through the deeply politicized, selective, and inconsistent interpretation of vague legal provisions; in this case, somewhat vague quasi-jurisdictional language appearing in the Court's constitutive legal instrument. In engaging in such processes, the ECCC risks implicating itself in the ongoing subversion of the rule of law in Cambodia in two ways. First, by risking being perceived as engaging in inconsistent, politically motivated interpretation of relevant laws, the ECCC may unwittingly be lending tacit international legitimization to similar processes through which the rule of law is subverted domestically in Cambodia. Second, in terms of skills training and legal capacity building, the Court may not be improving the rule of law by improving the technical capabilities of, and setting examples for, Cambodian legal professionals. To the contrary, in actuality the Court may be simply training such actors to more artfully undermine the rule of law in Cambodia by teaching them how to construct more convincing façades of legality which can be used to provide cover for the further erosion of the rule of law.

II. IMPROVING THE RULE OF LAW IN POST-ATROCITY STATES AS PART OF THE MISSION OF INTERNATIONAL CRIMINAL JUSTICE

Just what the point of international criminal justice is remains unclear and subject to considerable contestation.[17] The same can be

17. For discussion on the myriad of purposes ascribed to international criminal justice, *see* Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHIC.-KENT L. REV. 329 (2008). This lack of clarity in terms of goals is exacerbated by the fact that the normative foundations of ICL itself remain contested and unclear, evidenced by the ongoing proliferation of proposed normative and descriptive theories of both ICL generally, and its constituent subparts, such as genocide and crimes against humanity. *See* Sarah Nouwen, *International Criminal Law: Theory All Over the Place*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 738–61 (Anne Orford, Florian Hoffmann, & Martin Clark eds., 2016)

said for the rule of law, which remains a perpetually contested concept subject to a wide variety of competing definitions.[18] Despite this continuing contestation, international criminal justice advocates and international criminal justice institutions themselves regularly promote ICL accountability as contributing to a wide variety of desirable outcomes, including serving as catalyst for improving the rule of law domestically in post-atrocity states.[19] This notion–that ICL prosecutions will both achieve a measure of justice *and* help improve the rule of law in post-atrocity states–is especially resonant given that the commission of atrocities themselves tends to be associated with fundamental breakdowns in the rule of law.[20] This view bolsters ICL's atrocity prevention claims, as the maintenance of a robust rule of law is widely considered to be a bulwark against the commission (or recurrence) of atrocities.[21] Against this backdrop, the idea that ICL accountability may improve the rule of law in post-atrocity states undoubtedly helps to justify the immense expenditures associated with ICL prosecutions. This is especially true for so-called "hybrid" international criminal justice institutions such as the ECCC, which combine local and international staff, and operate on-site in post-atrocity states.[22]

(providing an overview of the multitude of varying theories of ICL). For examples of such theories, see Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFFALO CRIM. L. REV. 273 (2005); Ohlin, *supra* note 3; ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT (2010); Larry May, *A Hobbesian Defense of International Criminal Law*, 14 INT'L CRIM. L. REV. 768 (2014); LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); Robert Dubler, *What's in a Name? A Theory of Crimes against Humanity*, 15 AUST. INT'L L.J. 85 (2008); David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT'L L. 85 (2004).

18. *See, e.g.*, Ohlin, *supra* note 3 at 110; MCAULIFFE, *supra* note 2, at 83–114.

19. *See, e.g.*, PROMOTION OF ECCC LEGACY, *supra* note 15; *Extraordinary Chambers in the Courts of Cambodia*, *supra* note 12. On the general relationship between ICL and the rule of law, see, BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 52–54 (2003); Stromseth, *Pursuing Accountability, supra* note 3, at 252; Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT'L AFF. 191–211, 196–98 (2010).

20. *See* MCAULIFFE, *supra* note 2; Ohlin, *supra* note 3, at 100–01.

21. *See, e.g.*, FREEDOM HOUSE ET AL., PREVENTING ATROCITIES: FIVE KEY PRIMERS 29–44 (2014), https://freedomhouse.org/report/special-reports/preventing-atrocities-five-key-primers [https://perma.cc/LPT5-A4ZZ].

22. *See* Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003). Advocates of international criminal justice meanwhile often sidestep the longstanding peace versus justice debate by adopting the mantra that sustainable peace cannot be achieved without

A. The Rule of Law as a Set of Procedural Requirements Infused with Minimal Human Rights Substantive Values

Although the rule of law remains a deeply contested concept generally, within mainstream transitional and international criminal justice discourses, the rule of law tends to be associated with a mix of basic procedural and substantive commitments grounded in human rights norms. Procedurally, the rule of law is associated with adherence to a set of basic requirements in terms of how laws are passed and enforced. Substantively, the rule of law tends to be associated with commitments to representative governance and the protection of basic human rights by an independent judiciary.[23] For example, the United Nations' "International Law and Justice" webpage states that the rule of law, defined as "[t]he principle that everyone–from the individual to the State itself–is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the [United Nations'] work."[24] Writing on the relationship between international criminal justice and the rule of law, Ilias Bantekas argues that "[m]ore than anything else, the rule of law entails the application of a minimum set of human rights rules

justice. In this context, the term "justice" tends to be deployed as a means of referring specifically to ICL prosecutions. In this vein, Neha Jain observes, "[p]ro-prosecution advocates assert that it is *only* through justice-establishing accountability for abuses, creating an accurate historical record, and providing some relief for victims-that a conflict society can transition to a peaceful and stable one based on the rule of law." Neha Jain, *Between the Scylla and Charybdis Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247, 266 (2010) (emphasis added) (citing Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 602 (2007)); José E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2031-32 (1998); TEITEL, *supra* note 2; Juan E. Méndez, *In Defense of Transitional Justice*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 7 (A. James MacAdams ed., 1997). For an example of the common tendency to conflate the broad concept of "international justice" with the much more specific pursuit of international *criminal* justice, see *International Justice*, HUM. RTS. WATCH, https://www.hrw.org/topic/international-justice [https://perma.cc/GGZ2-7PPS] (defining "international justice" as "accountability for genocide, war crimes, and crimes against humanity").

23. *See, e.g.*, David Dyzenhaus, *Judicial Independence, Transitional Justice and the Rule of Law*, 10 OTAGO L. REV. 345 (2001) [hereinafter Dyzenhaus, *Judicial Independence*]; MCAULIFFE, *supra* note 2, at 83–93.

24. *International Law and Justice*, UNITED NATIONS (2016), http://www.un.org/en/sections/issues-depth/international-law-and-justice/index.html [https://perma.cc/RNR2-EH69] (last visited June 21, 2018).

to which the public authorities must religiously adhere to."[25] This general conceptualization of the rule of law is exemplified by a widely cited 2004 report on the rule of law and transitional justice in conflict and post-conflict societies, wherein the UN Secretary-General defines the rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[26]

These articulations of the rule of law combine basic procedural requirements (e.g., public promulgation and legal certainty) with a baseline of substantive commitments to basic human rights principles (e.g., equality and fairness). Procedurally, the model proposed by the Secretary-General closely resembles Lon Fuller's well-known articulation of the rule of law,[27] though adding to it a layer of substantive commitments grounded in human rights norms.[28] According to Fuller, the internal or procedural "morality" of legality requires that all law substantially conform to eight criteria of legality:

1. generality;
2. promulgation;

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25. Ilias Bantekas, *The Rule of Law Through International Criminal Justice Mechanisms*, 1 L. & JUST. REV. 49 (2010).

26. U.N. SECRETARY-GENERAL, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *The Rule of Law* (2004)]. An update to the report was released in 2011. *See* U.N. SECRETARY-GENERAL, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Oct. 12, 2011) [hereinafter *The Rule of Law* (2011)].

27. It should be noted that although Fuller's work is central to rule of law scholarship, Fuller himself never used the phrase "rule of law," instead referring to the "inner morality" of law. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969). For a discussion of this semantic difference, *see* David Luban, *The Rule of Law and Human Dignity: Re-examining Fuller's Canons*, 2 HAGUE J. ON RULE L. 1, 2-4 (2010) [hereinafter Luban, *The Rule of Law and Human Dignity*].

28. *The Rule of Law* (2004), *supra* note 26; *The Rule of Law* (2011), *supra* note 26.

3. non-retroactivity;
4. clarity;
5. non-contradiction;
6. not requiring the impossible;
7. constancy; and
8. congruence between the law and official action.[29]

Jutta Brunnée and Stephen Toope helpfully summarize these requirements as requiring that laws be:

> general, prohibiting, requiring, or permitting certain conduct. They must also be promulgated, and therefore accessible to the public, enabling actors to know what the law requires. Law should not be retroactive, but prospective, enabling citizens to take the law into account in their decision making. Actors must also be able to understand what is permitted, prohibited, or required by law–the law must be clear. Law should avoid contradiction, not requiring or permitting and prohibiting at the same time. Law must be realistic and not demand the impossible. Its demands on citizens must remain relatively constant. Finally, there should be congruence between legal norms and the actions of officials operating under the law.[30]

These requirements can be used to assess the legal legitimacy of not only individual norms or rules, but also entire legal regimes, or sub-parts thereof.[31]

Brunnée and Toope's summary of Fuller's legality criteria help elucidate the centrality of Fuller's work to how the rule of law tends to be conceptualized by actors in the fields of transitional justice and ICL. Fuller's legality criteria, while for the most part procedural in nature, in that they dictate the processes through which laws must be created and applied, nonetheless contain minimal substantive normative commitments to equality before the law and fairness, in terms of generality of application.[32] Fuller justifies these thin substantive

29. *See generally* FULLER, *supra* note 27.

30. Jutta Brunnée & Stephen J. Toope, *Interactional International Law: An Introduction*, 3 INT'L THEORY 307, 310 (2011) (citing Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 240-41 (2005)).

31. JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 26 (2010) (noting that Fuller's legality criteria "apply to both individual rules and systems of rule-making").

32. These thin normative commitments are evident in Fuller's requirements of generality,

commitments by arguing that they are inherent in the form of law itself as it is broadly understood by those subject to legal regimes.[33] He makes this argument by presenting hypothetical situations wherein purported laws wholly fail to conform to his legality criteria, by being for example, secret and hence inscrutable to the public, or in a constant state of flux, so no member of the public can determine the state of the law applicable to them with any certainty at a specific moment in time.[34]

According to Fuller's approach, determining whether a specific rule can be accurately labelled "law" or an entire legal system adheres to the basic requirements of the rule of law, is an assessment of degree, rather than simple binary one.[35] Thus, the dividing line between both a single rule being properly labelled "law" and an entire legal system being properly described as adhering to the rule of law is a decidedly inexact, fuzzy one.[36] Indeed, Fuller himself notes that absolute adherence to all eight criteria of legality remains functionally impossible, observing that "[a]t the height of the ascent we are tempted to imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia, the rules remain constant through time, demand only what is possible and are scrupulously observed by courts, police, and everyone else charged with their administration."[37] Of course, while wide gradations of conformance to this ideal exist and may be difficult to parse, at the poles, it may be quite clear when the basic requirements of the rule of law are scrupulously adhered to or fundamentally lacking.

For example, Fuller, in his famous exchange with H.L.A. Hart, argued that various laws passed by the Nazi regime in Germany, which were of course, extremely unequal in a substantive sense, also violated

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non-contradiction, and congruence between the law and official action. Unless lawmakers are willing to formally differentiate between different categories of individuals and treat one group as legally inferior to the other, it is difficult to imagine a legal system substantially complying with these legality criteria that has no commitments to legal equality whatsoever.

33. FULLER, *supra* note 27, at 104.

34. *Id.* at 33–94.

35. *Id.* at 41. Fuller describes this as the reality that laws and legal systems can, and do, "half exist." *Id.* at 122.

36. *Id.* at 122.

37. *Id.* at 41.

many of Fuller's criteria of legality.[38] Such "laws" were often retroactive, enacted secretly, not clear or possible to follow by those subject to them, contradicted other German laws still in force, and were themselves regularly brushed aside in the name of expediency and convenience.[39] Thus, in Fuller's view, such Nazi edicts were not "law" in any true sense of the word, as they flagrantly violated the legality requirements of generality, promulgation, non-retroactivity, being possible to follow, non-contradiction and congruence between the law and official action, and were hence, an example of raw power masquerading as law.[40]

While the debate between those in favor of a Fullerian conception of the rule of law and those with alternative views–especially strict legal positivists–is unlikely to be settled in the foreseeable future, the dominant basic conception of the rule of law underlying the fields of human rights, transitional justice and ICL, as exemplified in the UN Secretary-General's 2004 report, largely mirror Fuller's view of the rule of law as a set of largely procedural requirements inherently infused with minimal substantive commitments to basic formal equality. For example, the requirements of general applicability, public promulgation, equality before the law, evenhanded enforcement, legal certainty, and avoidance of arbitrariness referenced by the UN Secretary-General closely resemble Fuller's criteria of generality, promulgation, clarity, non-contradiction, and congruence between the law and official action.[41] These models of legality tend towards a basic substantive commitment to equality. Law can hardly abide by Fuller's requirements of generality, clarity, being possible to follow and being generally obeyed in practice (i.e. "congruent" with official action),

38. Fuller, *supra* note 3, at 650.

39. *Id.* at 650–55. David Dyzenhaus similarly demonstrates how attempts to legalize Apartheid in South Africa inevitably violated basic rule of law requirements. *See* David Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, 17 REV. CONST. STUD. 1, 2-11 (2012) [hereinafter Dyzenhause, *Dignity in Administrative Law*]. Elsewhere, Dyzenhaus argues that the notion of "law" within the contemporary rule of law movement "connotes both the positive legal regime created by a formally valid statute and the principles of legality associated with the rule of law." David Dyzenhaus, *Preventive Justice and the Rule-of-Law Project*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 91, 91-114 (Andrew Ashworth, Lucia Zedner, & Patrick Tomlin eds., 2013) [hereinafter Dyzenhause, *Preventative Justice*].

40. Fuller, *supra* note 3, at 632-57.

41. *Rule of Law* (2004), *supra* note 26; *cf.* FULLER, *supra* note 27.

without at least some minimal commitment to treating those subject to the law equally in a substantive sense.[42]

It is this basic model of the rule of law, as a sliding scale made up of largely procedural requirements infused with important, but minimal, substantive commitments to equality,[43] that this Article uses as a framework assessing the rule of law situation in Cambodia and its relationship to the work of the ECCC.[44] This framework is useful for two main reasons. First, as intimated above, in a rough sense, it is this basic understanding of the rule of law that international criminal justice advocates and institutions tend to refer to, implicitly or explicitly, when arguing that ICL prosecutions can improve the rule of law in post-atrocity states.[45] Second, Cambodia itself has, in its Constitution and

42. That is, unless lawmakers are willing to create formal legal distinctions between different classes of citizens and explicitly state that one class of citizens is not entitled to equal protection of the law. Only the most persecutory regimes are willing to engage in such distinctions. For example, even in the Jim Crow South in the United States and Apartheid-era South Africa, the legal fiction of formal equality under the law was maintained through "separate but equal" doctrines, despite explicit legal segregation. David Dyzenhaus demonstrates how attempts to maintain such "separate but equal" legal fictions inherently undermine the rule of law, arguing that "there is a core of equality-the specifically legal status of equal dignity-to the public law order of any law-governed state." Dyzenhaus, *Preventive Justice*, *supra* note 39, at 112. For Dyzenhaus, this argument is true of all societies, be they categorized as "transitional" or not. *See* Dyzenhaus, *Judicial Independence*, *supra* note 23.

43. For an analysis of Fuller's work on the rule of law in this vein, *see* Luban, *The Rule of Law and Human Dignity*, *supra* note 27.

44. Of course, Cambodia may not be a "transitional" country in that it is not undergoing a meaningful shift away from conflict and authoritarianism and towards a renewed state commitment to the rule of law and democratization. Rather, Cambodia has undergone a series of largely authoritarian transitions following the collapse of the Khmer Rouge regime in 1979. For example, Alexander Hinton argues that Cambodia has undergone at least three distinct "transitions" since 1979, none of which fit into the classical mode envisioned within the transitional justice imaginary. *See* HINTON, JUSTICE FACADE, *supra* note 12, at 37–63. Moreover, the trials conducted by the ECCC relate to events occurring over four decades ago, rather than more recent atrocities. While this presents additional difficulties to the improvement of the rule of law in Cambodia through the ECCC experience, given the extremely weak rule of law situation in Cambodia presently and how such lack affects the daily lives of Cambodians, along with the fact that the ECCC and its backers have repeatedly touted the Court's ability to improve the rule of law in Cambodia, an evaluation of this relationship remains important to understanding the assumptions embedded in the notion that the pursuit of ICL accountability has a wholly positive and linear relationship with the domestic rule of law in post-atrocity states.

45. Often, the rule of law domestically and the concept of global governance through an international rule of law are conflated within transitional justice and ICL discourses. While the two concepts are undoubtedly related, they remain distinct in important ways. On the "branding" of ICL's rule of law credentials, the oft-conflation between the rule of law domestically and internationally, and the notion that the international rule of law can be a "solution to the lack of a domestic rule of law," *see* Christine Schwöbel-Patel, *The Rule of Law as a Marketing Tool:*

by signing on to eight core international human rights treaties, at least nominally committed itself to democratic rule of law-based governance in this basic mold.[46]

As will become clear, however, Cambodia's commitment to such rule of law-based governance is increasingly paid mere lip-service by the dominant CPP, which regularly brushes aside, changes, or simply ignores altogether laws it finds inconvenient in an unpredictable and ad hoc manner.[47] The ECCC's failure to meaningfully insert itself in a positive manner into domestic practices related to the rule of law suggests that, at least in the near-term, ICL prosecutions may only serve to bolster the rule of law in post-atrocity states *already* fundamentally committed, politically and socially, to improving the rule of law. Thus, in situations such as that in Cambodia, wherein the rule of law is most glaringly lacking and relevant political actors are actively hostile to the rule of law, international criminal justice institutions may be unable to translate their work into positive developments for the rule of law at the domestic level. Moreover, as exemplified by the ECCC experience in Cambodia, if such institutions are actually committed to improving the rule of law, such commitment may conflict with other goals, such as obtaining local cooperation or securing final judgments.

III. UNDERSTANDING THE RULE OF LAW DEFICIT IN CONTEMPORARY CAMBODIA

According to virtually any mainstream conception of it, including the one sketched out in the preceding section, the rule of law is something Cambodia glaringly lacks. In its most recent global rule of law index, the World Justice Project ranked Cambodia second to last

The International Criminal Court and the Brand of Global Justice, *in* RESEARCH HANDBOOK ON THE RULE OF LAW (Christopher May & Adam Winchester eds., 2018).

46. For an overview of Cambodia's human rights treaty commitments, *see Fact Sheet: Applicability of International Human Rights Law in Cambodia (2014)*, CAMBODIAN CTR. FOR HUM. RTS., https://cchrcambodia.org/admin/media/factsheet/factsheet/english/2014_01_09_CCHR_Fact_sheet_Applicability_of_international_law_in_Cambodia_ENG.pdf [https://perma.cc/6TCH-3RCB] (last visited Oct. 15, 2018).

This is not to suggest that Cambodia is an outlier in terms of the government's wholly nominal commitment to protecting human rights. Numerous countries are rife with contradictions concerning the gulf between rhetoric and actual practice when it comes to human rights protections. The United States is a prime example of such contradictory practices, as it presents itself as global leader in promoting equality and human rights despite itself contributing to numerous human rights violations, both abroad and domestically.

47. *See*, *e.g.*, Coughlan, Ghouse & Smith, *supra* note 3, at 20–31.

(112th) out of the 113 countries assessed, with only Venezuela ranking lower.[48] This incredibly low ranking is attributable to a combination of factors. The Cambodian judicial system is underfunded, largely subservient to the CPP, and deeply embedded within the entrenched patronage networks that have long structured Cambodian society.[49] Justice sector officials, including judges, routinely pay bribes to obtain their positions, and bribery is a routine component of litigation.[50] Enforcement of the law is also highly selective and contingent on one's social status and connections.[51] Consequently, while Cambodia's justice system is harshly wielded against activists and political opponents of the CPP,[52] impunity, even for serious, well-documented crimes or regulatory infractions, remains the norm for high-ranking CPP members and other social elites.[53]

A. Historical Context: Atrocity, Conflict and Foreign Intervention

It is important to understand not only how Cambodia's rule of law deficit currently manifests itself, but also the root causes of this deficit and the processes through which the rule of law is undermined in order

48. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 21 (2016). This is not to suggest that the World Justice Project's assessment criteria and process are not without deep structural flaws, but is meant solely as a rough indicator of the undeniably weak rule of law situation in contemporary Cambodia.

49. Patron-client relationships have long played a major role in structuring Cambodian society. For general discussions of the roles patronage networks have historically played in structuring Cambodian society, *see* DAVID P. CHANDLER, A HISTORY OF CAMBODIA 104–05 (2d ed. 1992) [hereinafter CHANDLER, A HISTORY OF CAMBODIA]. For an analysis of the role such patronage networks played in the Khmer Rouge regime, *see* ALEXANDER LABAN HINTON, WHY DID THEY KILL? CAMBODIA IN THE SHADOW OF GENOCIDE 96–170 (2005) [hereinafter HINTON, WHY DID THEY KILL?]. For discussions of how patronage networks shape the rule of law in contemporary Cambodia, *see* Stephen McCarthy & Kheang Un, *The Evolution of Rule of Law in Cambodia*, 24 DEMOCRATIZATION 100–18 (2017); Coughlan, Ghouse, & Smith, *supra* note 3 at 17–21.

50. *See* McCarthy & Un, *supra* note 49, at 111.

51. *See*, *e.g.*, *id.* at 112.

52. *See id.* at 105–09; *see also* MOONEY & BAYDAS, *supra* note 16, at 9; Siena Anstis, *Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia*, 4 J. HUM. RTS. PRAC. 312 (2012).

53. For an example of such impunity and how it is perpetuated by the Cambodian legal system, *see* MCCARTHY & UN, *supra* note 49, at 112; *see also* Brad Adams, *"Tell Them That I Want to Kill Them": Two Decades of Impunity in Hun Sen's Cambodia*, HUM. RTS WATCH (Nov. 13, 2012), https://www.hrw.org/report/2012/11/13/tell-them-i-want-kill-them/two-decades-impunity-hun-sens-cambodia [https://perma.cc/A4JE-V7M6] (last visited Sept. 24, 2018).

to meaningfully assess the ECCC's relationship to domestic rule of law reform efforts. This is especially important in the Cambodian context, where the origins of the country's current rule of law shortcomings can be traced back to Cambodia's long history of colonial domination, foreign intervention, civil war and atrocity, and its ongoing, uncertain struggle to achieve democratic governance. Without at least a basic understanding of this history, one cannot fully appreciate how and why Cambodia suffers from such an acute rule of law deficit despite decades of legal reform efforts.

Cambodia has never enjoyed a period of sustained peace, stability, and governance in accordance with anything resembling a human rights-respecting rule of law regime. After generations of decreasing regional power and influence following the decline of the Angkorian Empire, Cambodia was colonized by the French from 1863 to 1953.[54] While the French established a basic civil law system in Cambodia, many aspects of which survive to this day, this system was far from the kind of human rights-based rule of law regime envisioned by most transitional justice advocates and described by the UN Secretary-General in his 2004 report.[55] The overriding objective of the French colonial administration was to extract Cambodia's resources and wealth through taxation and natural resource extraction and thus, little attention was paid to establishing anything resembling a functioning nationwide legal system, save for enforcing tax collection.[56]

Cambodia's independence, negotiated by King Norodom Sihanouk in 1953, brought with it the drafting of a new constitution and the promise of other legal reforms.[57] However, before the country was able to construct and stabilize a working justice system, Cambodia was drawn into the Vietnam War, despite its policy of neutrality.[58] Sihanouk, who had become Prime Minister after negotiating Cambodia's independence and abdicating the throne, was deposed in a

54. For an overview of this period, *see* CHANDLER, A HISTORY OF CAMBODIA, *supra* note 49, at 137–90.

55. MCCARTHY & UN, *supra* note 49, at 103.

56. *See* CHANDLER, A HISTORY OF CAMBODIA, *supra* note 49, at 137–90. Moreover, French colonial administrators were themselves, virtually exempt from the law. *Id.*

57. *Id.*

58. DAVID P. CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR AND REVOLUTION SINCE 1945 85–196 (1991) [hereinafter CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY].

1970 coup led by one of his generals, Lon Nol.[59] This ushered in a brutal five-year civil war.[60] This war, and the United States' often haphazard aerial bombardment of Cambodia's countryside in support of the Lon Nol regime, killed many thousands of civilians and devastated Cambodia's already limited infrastructure.[61]

The civil war ended on April 17, 1975, when the Communist Party of Kampuchea, popularly known as the Khmer Rouge, seized power following the abrupt pullout of the United States.[62] The Khmer Rouge immediately set about radically reorganizing Cambodian society, in the process engaging in stifling oppression and repeated waves of violent purges.[63] Amidst the chaos and killing of the Khmer Rouge's reign, Cambodia's legal infrastructure was decimated. Virtually all Khmer-language legal texts were destroyed and nearly all Cambodian legal professionals were killed, either directly by execution, or indirectly through overwork and starvation.[64]

The Khmer Rouge were eventually ousted from power by the Vietnamese military in January 1979.[65] The rule of law void left behind by the devastation of the 1970s was not, however, systematically addressed in the immediate post-Khmer Rouge period. The Vietnamese-installed People's Republic of Kampuchea ("PRK") government put very little effort into the creation of a functioning legal system, as the government was modeled on a Soviet-style system wherein courts perform a limited function, operating solely as an arm

59. *See id.* at 197–210.

60. *Id.* at 206–35.

61. On the civil war generally, *see id.* at 1–30; BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79 1–30 (3d ed. 2008). On the US bombing campaign, *see* Taylor Owen & Ben Kiernan, *Bombs over Cambodia*, THE WALRUS, 2006, at 62–69.

62. *See* CHANDLER, A HISTORY OF CAMBODIA, *supra* note 49, at 206–08.

63. For overviews of Khmer Rouge policies and purges, *see generally* CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY, *supra* note 58, at 236–72; KIERNAN, *supra* note 61; HINTON, WHY DID THEY KILL?, *supra* note 49.

64. For an example of the Khmer Rouge regime generally, including living conditions, mass executions and the targeting of former city dwellers and intellectuals, *see* ELIZABETH BECKER, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION (1998); KIERNAN, *supra* note 61; KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA 1975 -1979 (2007); McCarthy & Un, *supra* note 49, at 103–04. According to one estimate, only ten qualified Cambodian lawyers survived the Khmer Rouge regime. *See* Coughlan, *supra* note 3, at 16 (citing AMNESTY INTERNATIONAL, KINGDOM OF CAMBODIA: URGENT NEED FOR JUDICIAL REFORM (2002)).

65. *See* CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY, *supra* note 58, at 1–2.

of the government's power.[66] Cambodia was also far from stable at the time, as the country suffered periodic bouts of armed conflict between the government and the remnants of the Khmer Rouge.[67]

Achieving peace and a semblance of stability in Cambodia proved a difficult and long process. The remnants of the Khmer Rouge continued to conduct guerrilla warfare and were not fully demobilized until 1996. Eventually, the PRK government, led by Hun Sen, a former Khmer Rouge military cadre who had defected to Vietnam in 1977 and was installed by the Vietnamese as Prime Minister of Cambodia in 1985,[68] negotiated a provisional peace deal in 1991, known as the Paris Peace Accords ("the Accords").[69] From 1992 to 1993, pursuant to the Accords, the United Nations took responsibility for governing Cambodia, setting up the United Nations Transitional Authority for Cambodia ("UNTAC") to facilitate Cambodia's first post-Khmer Rouge democratic elections in 1993.[70] These hotly contested elections were narrowly, but definitively, won by the royalist National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia ("FUNCINPEC")[71] party led by Sihanouk's son, Prince Norodom Ranariddh. The recently formed CPP, led by Hun Sen, came in second, however, Hun Sen and the CPP refused to accept the result. Eventually a compromise was struck whereby a coalition FUNCINPEC-CPP government was formed, with Prince Ranariddh and Hun Sen as co-Prime Ministers.[72] Shortly after this coalition was formed, Hun Sen and the CPP consolidated power over Cambodia, in what many observers describe as a coup, by progressively ousting Ranariddh and the FUNCINPEC from power, at times violently.[73] Since 1997, the CPP have maintained a majority government in Cambodia with Hun Sen as Prime Minister. Although Cambodia has had regular elections, the CPP

66. *See* McCarthy & Un, *supra* note 49, at 104; *see also* MOONEY & BAYDAS, *supra* note 16 at 9.

67. For an overview of this history, *see generally* JOEL BRINKLEY, CAMBODIA'S CURSE: THE MODERN HISTORY OF A TROUBLED LAND 53–154 (2012).

68. Adams, *supra* note 53, at 4–11.

69. BRINKLEY, *supra* note 67, at 67–68.

70. *Id.* at 69–85; Adams, *supra* note 53, at 11.

71. The "National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia." The acronym FUNCINPEC is from the French version of this title. *See* SEBASTIAN STRANGIO, HUN SEN'S CAMBODIA 36 (2014).

72. BRINKLEY, *supra* note 67, at 79–85.

73. For an overview of these violent tactics as documented by UNTAC, including the 1997-1998 CPP coup, *see id.* at 123-131; Adams, *supra* note 53, at 11–32.

has maintained power through a mix of populism, the power of incumbency, the persecution of political opponents, and occasional acts of violence aimed at stifling dissent.[74]

As Cambodia stabilized during the 1990s and early 2000s, formal legal reforms were conducted and foreign aid money, much of it aimed at improving the rule of law, flooded into Cambodia.[75] Many such reforms seemed to indicate that post-atrocity Cambodia would eventually achieve a reasonable degree of adherence to the rule of law. This promise, however, has thus far remained unfulfilled. While the CPP era has been considerably more stable than Cambodia's previous periods of foreign domination, upheaval, and atrocity, little progress has been made in terms of constructing a functioning rule of law in Cambodia.

B. The Rule of Law Façade in Contemporary Cambodia

Nominally, contemporary Cambodia maintains a firm commitment to the construction of a democratic, rule of law-based society. This commitment is evident in various provisions of the current Cambodian Constitution, which states that Cambodia shall be organized as a "system of a liberal multi-party democracy, to guarantee human rights, [and] to ensure the respect of law."[76] The Constitution also provides for various formal components commonly associated with the rule of law, including an independent judiciary tasked with protecting the "rights and freedoms" of Cambodian citizens, a multi-tiered court system providing for appellate review, and the creation of a Constitutional Council, tasked with ensuring "the constitutionality of laws, rules, and regulations through review and veto powers."[77] The Constitution also explicitly recognizes the legal status of human rights, states that all Cambodian citizens are "equal before the law,"[78] and

74. BRINKLEY, *supra* note 67, at 133–346.

75. *See, e.g.*, EK CHANBORETH & SOK HACH, AID EFFECTIVENESS IN CAMBODIA 1 (2008) (estimating that from 1998 to 20018, "total development assistance to Cambodia amounted to about US$5.5 billion").

76. រដ្ឋបាលមនុញ្ញនៃព្រះរាជាណាចក្រកម្ពុជា [THE CONSTITUTION OF THE KINGDOM OF CAMBODIA] Sept. 21, 1993, preamble.

77. McCarthy & Un, *supra* note 49, at 104. Article 51 of the Constitution explicitly provides for liberal, democratic governance and the separation of powers between the legislative, executive and judicial branches. THE CONSTITUTION OF THE KINGDOM OF CAMBODIA, *supra* note 76, art. 51.

78. THE CONSTITUTION OF THE KINGDOM OF CAMBODIA, *supra* note 76, art. 31.

enshrines key democratic rights, such as those to free speech, to peacefully demonstrate, to vote, and to form political parties and associations.[79]

Despite these nominal commitments, the promise of the early 1990s that the rule of law in Cambodia would improve in a progressive, linear fashion has proven largely illusory. As the CPP has entrenched itself in power, Cambodia has not progressed towards becoming the kind of liberal, rule of law nation envisaged in its Constitution. Instead, Cambodia has become essentially a one-party state within which the dominant CPP wields the law as it sees fit.[80] As Stephen McCarthy and Kheang Un observe, the CPP appears to be emulating the "Beijing Consensus" model of the rule of law, according to which the rule of law itself is conceived of as "narrow, proceduralist," "divorced from democracy promotion," and focused on facilitating top-down economic and social control.[81] According to this model, of which Singapore's legal system is a prime example, the role of law is not to protect the rights of individual citizens, but to maintain "an ordered society wherein human rights are subordinated to political stability and economic growth."[82]

While the rhetoric emanating from the CPP at times suggests that the government is shifting away from outwardly claiming to support of human rights and a human rights-based rule of law, the CPP more often claims to be operating within the law, even when abundant evidence suggests it is not.[83] Thus, while there may be differing conceptions of the rule of law amongst Cambodian and international actors, including within the ECCC, the CPP is, at the very least, committed to maintaining the appearance of conforming to the basic rule of law requirements outlined in the Cambodian Constitution.

If one views the rule of law through the CPP's thin, formalist approach emphasizing stability and order over individual rights and

79. *Id.* arts. 31-50.

80. *See infra* at 22-30.

81. McCarthy & Un, *supra* note 49, at 102.

82. *Id.* at 103.

83. For example, after sweeping electoral victories following the CPP-led dissolution of Cambodia's main opposition parties, CPP spokesman Sok Esyan touted the efficiency benefits of one-party states, such as China, stating that "having one party dominate both houses of parliament would get rid of any legislative obstacles." Pang Vichea, *CPP Spokesman Touts One-Party Rule, Points to China's Example*, PHNOM PENH POST (Feb. 27, 2018), https://www.phnompenhpost.com/national-politics/cpp-spokesman-touts-one-party-rule-points-chinas-example [https://perma.cc/T7UT-AUQV].

freedoms, democratic governance, and equality, the otherwise strange juxtaposition of Cambodia's recent proliferation of new laws amidst an ongoing erosion of the rule of law begins to make sense. The CPP has artfully trod a fine line between placating donor countries concerned with Cambodia's worrying human rights record and glaring rule of law deficit, and its desire to create additional levers through which it may exert social control. Nominal legal reform projects have provided an opportunity for the CPP to leverage its control over lawmaking processes and the judiciary to create various legal mechanisms through which the government can exert power, especially to weaken political opponents and silence critics, often while simultaneously claiming to be strengthening the rule of law.[84] In recent years, the CPP has increasingly exercised power through such ostensibly legal means, utilizing both the promulgation of new, oft-vague laws and the selective interpretation and enforcement of existing laws.

The CPP's utilization of Cambodia's criminal justice system to serve its interests exemplifies the government's use of law as an instrument of projecting its power. As the ECCC is at its core, a criminal justice institution, the criminal justice sector is the area for which claims of the Court's ability to improve the rule of law gain the most traction. If the ECCC were able to have a meaningful positive effect on criminal justice reform in Cambodia, it would be a major contribution to improving the rule of law in the country more generally, as the administration of criminal justice is one area utterly lacking in terms of adherence to basic rule of law criteria in Cambodia. Despite the adoption of a comprehensive code of criminal law and procedure in 2009,[85] criminal laws continue to contain key areas of ambiguity, are enforced selectively, and are subject to unpredictable, oft contradictory interpretations.[86]

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84. For an overview of legal proceedings brought by the CPP against its opponents, see McCarthy & Un, *supra* note 49, at 105-09.

85. Prior to the adoption of its present criminal code, Cambodia relied on a skeletal code of criminal law and procedure enacted in 1992 by UNTAC. *See Cambodia: Criminal Law & Procedure of 1992 of UNTAC (United Nations Transitional Authority for Cambodia)*, WIPO (1992), http://www.wipo.int/wipolex/en/text.jsp [https://perma.cc/DRT3-422W] (last visited Sept. 24, 2018).

86. For descriptions of some of the many rule of law shortcomings of Cambodia's criminal justice sector, *see generally* Adams, *supra* note 53; PERFORMANCE AND PERCEPTION, *supra* note 15.

While the current Cambodian Code of Criminal Law and Procedure ("Criminal Code"), undoubtedly improved the clarity of Cambodian criminal law and ostensibly confers fair trial rights on criminal defendants, it also retains various vaguely defined offenses, such as defamation and treason.[87] The CPP, despite the Cambodian Constitution's nominal protection of free speech rights, has a longstanding history of using criminal defamation laws as a means of attacking political opponents and dissidents.[88] This political leveraging of defamation has continued, and perhaps even expanded, since 2009, enabled by vaguely worded criminal offenses and a pliant judiciary.[89]

Attacks on political opponents via spurious defamation charges are often used in conjunction with other, non-criminal areas of the law. For example, Cambodia's 2009 Law on Peaceful Assembly contains vague provisions conferring on government officials the authority to arbitrarily "approve or ban almost any peaceful protest" allowing the CPP to tightly control Cambodia's supposedly free speech.[90] If disgruntled citizens decide to protest without getting prior approval, they risk being charged with vague criminal offenses, such as those of "insulting" or "obstructing" public officials.[91] In a similar vein, the CPP has also pushed through legislation regulating Non-Governmental Organizations ("NGOs") operating within Cambodia, containing vague registration requirements and other provisions that allow the government to greatly impair the ability of NGOs it finds troublesome to operate.[92] As many of Cambodia's civil society organizations are organized as NGOs,[93] the law provides a convenient tool for the CPP to wield against potential sources of opposition.

87. CRIMINAL CODE OF THE KINGDOM OF CAMBODIA [CRIMINAL CODE], arts. 305-10 (Bunleng Cheung, trans., 2011).

88. *See* McCarthy & Un, *supra* note 49, at 105.

89. McCarthy and Un argue that such lawsuits are deployed by the CPP as "political weapons." *Id*.

90. *See generally* Anstis, *supra* note 52, at 320.

91. CRIMINAL CODE, *supra* note 87, arts. 502-05. For examples of the use of these laws to quell protests, *see* Anstis, *supra* note 52; Ananth Baliga & Lay Samean, *Boeung Kak Activists Found Guilty*, PHNOM PENH POST (Sept. 20, 2016), http://www.phnompenhpost.com/national/boeung-kak-activists-found-guilty [https://perma.cc/F4M2-DLBV].

92. Anstis, *supra* note 52, at 322–25; McCarthy & Un, *supra* note 49, at 105; Taing Vida, *NGO Law Passes*, PHNOM PENH POST (July 13, 2015), http://www.phnompenhpost.com/national/ngo-law-passes [https://perma.cc/W3NH-HDYD].

93. By organizing themselves as NGOs, civil society organizations are best positioned to obtain crucial international funding. Open Development Cambodia estimated that as of June 2016 there were approximately 4,637 NGOs operating in Cambodia. *Open Development*

The CPP has repeatedly followed this strategy of pushing through laws creating onerous and ambiguous registration and reporting requirements that interact with criminal law and can be selectively interpreted and enforced to maintain the CPP's political dominancy. Most recently, following gains by an emergent opposition party, the Cambodian National Rescue Party ("CNRP") in June 2017 local elections,[94] the CPP pushed through "urgent" amendments to Cambodia's Law on Political Parties in July 2017.[95] The amendments included both a ban on individuals convicted of criminal offenses from holding positions in political parties and troublingly vague language forbidding political parties from, *inter alia*, "[c]reating a secession that would lead to the destruction of national unity and territorial integrity of Cambodia"; "sabotag[ing]" Cambodia's supposed liberal, multi-party democracy or constitutional monarchy; "[c]arry[ing] out an activity that would affect the security of the state"; or "incit[ing]" to "break up . . . national unity."[96] The amended Law on Political Parties' passage was roundly condemned by Cambodian and international civil society organizations, who argued that the amended law is not only bad law, but that the amendments violate fundamental provisions of both the Cambodian Constitution and Cambodia's treaty-based human rights obligations.[97]

At the time of its passage, the amended law was widely interpreted as a direct attack on the CNRP and its leader at the time, Sam Rainsy, Hun Sen's longtime political opponent currently living in exile in France after being convicted of defamation charges.[98] Disqualified by

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Cambodia, CIV. SOC'Y OPEN DEV. CAMBODIA (ODC) (2017), https://opendevelopmentcambodia.net/topics/civil-society/ [https://perma.cc/DDB6-4LDV]; MOONEY & BAYDAS, *supra* note 16 at 16–23. For an analysis of how the CPP has sought to oppress civil society activists through attacks on NGOs, *see* Anstis, *supra* note 52.

94. *Cambodia Opposition Claim Gains in Local Elections*, ALJAZEERA (June 4, 2017), http://www.aljazeera.com/news/2017/06/cambodia-opposition-claim-gains-local-elections-170604200114256.html [https://perma.cc/JDV9-JU77].

95. Savi Khorn, *Cambodia Signs Controversial Amendment into Law*, RADIO FREE ASIA (July 28, 2017), https://www.rfa.org/english/news/cambodia/law-07282017165222.html [https://perma.cc/T5FZ-EPKB].

96. *See id.*; *see also* OFFICE OF THE UNITED NATIONS & HIGH COMM'R FOR HUMAN RIGHTS IN CAMBODIA, A HUMAN RIGHTS ANALYSIS OF THE AMENDED LAW ON POLITICAL PARTIES (2017).

97. Khorn, *supra* note 95.

98. Sam Rainsy, a former FUNCINPEC member, has been a political opponent of Hun Sen and the CPP for decades. On this longstanding rivalry, *see generally* STRANGIO, *supra* note 71; Adams, *supra* note 53. For news articles discussing the amended law and its fallout for Sam

the amendments, Rainsy stepped down as leader of the CNRP and was replaced by his deputy, Kem Sokha, a man who himself had previously been accused of defamation and imprisoned in 2005 when he was the director of the Cambodian Center for Human Rights.[99] Kem Sokha was arrested again shortly after assuming the leadership of the CNRP, this time on manifestly spurious charges of treason, for having allegedly made anti-government remarks in a 2013 speech delivered in Australia.[100] Despite his failing health and the vague, unsubstantiated nature of the charges against him, Kem Sokha was repeatedly denied pre-trial release by the Cambodian Supreme Court, despite his ill-health, and was released only after the conclusion of the July 2018 national elections.[101]

After removing the top two leaders of the CNRP, the Cambodian Interior Ministry filed a lawsuit in October 2017 seeking to dissolve the CNRP along with various other smaller opposition parties for failing to comply with the amended Law on Political Parties.[102] The Cambodian Supreme Court acquiesced almost immediately, dissolving the CNRP and other opposition parties after a one-day hearing, holding that none of the parties had complied with the arduous registration and bookkeeping procedures demanded by the amended Law on Political Parties.[103] Following the dissolution of Cambodia's main opposition

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Rainsy and the CNRP, *see* Thai Tha & Joshua Lipes, *Cambodia Amendment Effectively Cuts Sam Rainsy Ties to CNRP*, RADIO FREE ASIA (July 10, 2017), https://www.rfa.org/english/news/cambodia/amendment-07102017132555.html [https://perma.cc/VV5C-3RBU]; Meas Sokchea & Erin Handley, *Assembly Passes Party Law Changes Targeting Rainsy*, PHNOM PENH POST (July 10, 2017), http://www.phnompenhpost.com/national/breaking-assembly-passes-party-law-changes-targeting-rainsy [https://perma.cc/G56N-8UNR].

99. Kem Sokha was released without conviction following international pressure. *See* McCarthy & Un, *supra* note 49, at 106.

100. Julia Wallace, *Cambodia Charges Opposition Leader Kem Sokha With Treason*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/world/asia/cambodia-kem-sokha-treason.html (last visited Oct. 16, 2018).

101. *See* Chhay Channyda & Ben Sokhean, *Hun Sen Muses on 'Prisoners' after Sokha Bail Denied*, PHNOM PENH POST (Mar. 12, 2018), http://www.phnompenhpost.com/national/hun-sen-muses-prisoners-after-sokha-bail-denied [https://perma.cc/3HF8-4SHM].

102. Kann Vicheika, *Supreme Court Schedules Hearing for Opposition Party Dissolution*, VOA CAMBODIA (Oct. 31, 2017), https://www.voacambodia.com/a/supreme-court-schedules-hearing-for-opposition-party-dissolution/4092675.html [https://perma.cc/6PWQ-GHHS].

103. *See* Mech Dara, *Supreme Court Ruling Dissolves 9 Small Parties*, PHNOM PENH POST (Oct. 31, 2017), http://www.phnompenhpost.com/national/supreme-court-ruling-dissolves-9-small-parties [https://perma.cc/K5FK-3UZX]; Ananth Baliga & Niem Chheng, *CPP to Sweep Senate*, PHNOM PENH POST (Dec. 27, 2017), http://www.phnompenhpost.com/national-politics/cpp-set-sweep-senate [https://perma.cc/8HGS-JNCU].

parties, many former CNRP and other opposition politicians have been pressured to join the CPP.[104] With the CNRP disbanded, a host of small new political parties emerged in advance of the July 2018 elections.[105] These parties are commonly referred to by Cambodians as "firefly" parties, as they suddenly appear shortly before an election and then promptly disappear as soon as the election is over.[106] These firefly parties are small, disorganized, and pose no realistic threat to the CPP's ironclad grip on power.[107] Indeed, many Cambodia-watchers surmise that such parties are, in fact, indirectly funded by the CPP itself, with the specific goal of maintaining a democratic veneer to appease donor states and to avoid economic sanctions.[108]

With the threat of the CNRP removed, and no credible, organized opposition to replace it, all that remained for the CPP to secure a sweeping electoral victory was to ensure voter turnout.[109] Opposition politicians and civil society actors called for a boycott of the election, in a movement dubbed the "clean finger" campaign.[110] In response, the CPP-controlled Cambodian National Elections Council ("NEC") fined the former CNRP politicians who called for the boycott, and the CPP engaged in intimidation tactics, suggesting that it was illegal to not vote and that those who failed to vote might be subject to repercussions.[111]

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104. Julia Wallace, *'Fireflies' and 'Ghosts' in Cambodia Prop Up Facade of Real Election*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/world/asia/cambodia-election-hun-sen.html (last visited Oct. 16, 2018) [hereinafter Wallace, *'Fireflies' and 'Ghosts'*].

105. *See id.*

106. *See id.*

107. *Id.*

108. *Id.*

109. *See* Narin Sun, *As Election Draws Near, Ruling Party Seeks to Win War for Legitimacy*, VOA (July 27, 2018), https://projects.voanews.com/cambodia-election-2018/english/feature/as-election-draws-near-ruling-party-seeks-to-win-war-for-legitimacy.html [https://perma.cc/N7PZ-X2EM].

110. The term "clean finger" is a reference to Cambodian voting practices, as a fingerprint of all voters is recorded in Cambodia, leaving a telltale blue ink mark on their fingers. Mong Palatino, *Cambodia's "clean finger" campaign urges voters to boycott 'sham' election*, GLOBAL VOICES (July 24, 2018), https://globalvoices.org/2018/07/24/cambodias-clean-finger-campaign-urges-voters-to-boycott-sham-election/ [https://perma.cc/VV75-F4QV].

111. *See* Mech Dara, *Police Warn Boycott FB Group Involved in the "Clean Fingers Campaign,"* PHNOM PENH POST (June 13, 2018), https://www.phnompenhpost.com/national/police-warn-boycott-fb-group-involved-clean-fingers-campaign [https://perma.cc/RG98-3CZ6]; Soth Koemsoeun, *NEC fines 'Clean Finger' five*, PHNOM PENH POST (Aug. 9, 2018), https://www.phnompenhpost.com/national/nec-fines-clean-finger-five [https://perma.cc/VX8G-GPFM]; Joshua Lipes, *UN Expert Decries Voter Intimidation in Lead-up to Cambodia*

The CPP's separate, systematic crackdown on the free press, including the forced closure of the longstanding Cambodia Daily newspaper and the forced sale of the other main independent news outlet, the Phnom Penh Post, to a CPP-affiliated Malaysian businessman, severely diminished the ability of Cambodians to access independent information in the lead-up to the election.[112] Predictably, after removing all legitimate opposition, the CPP won a landslide victory in the July 2018 election, widely dismissed as a total democratic sham.[113]

These and other similar actions of the CPP government not only undermine democracy and the protection of human rights in Cambodia, but also deeply compromise the rule of law, despite being pursued through seemingly legal means. In their substance and implementation, Cambodian laws such as the Criminal Code, the NGO Law, the amended Law on Political Parties, and to some extent, even the Cambodian Constitution flagrantly violate several of Fuller's criteria of legality.

Firstly, the regular insertion of vague language in Cambodia's laws severely undermines the clarity of these laws.[114] For example, the Cambodian Constitution suffers from considerable vagueness in terms of how certain rights are to be legally regulated and balanced against the need to maintain public order.[115] Meanwhile, other laws, such as the Criminal Code and the amended Law on Political Parties, contain

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Election, RADIO FREE ASIA (July 20, 2018), https://www.rfa.org/english/news/cambodia/intimidation-07202018154053.html [https://perma.cc/6U6T-RR23].

112. *See* Molly Ball, *When the Presses Stop*, THE ATLANTIC (Dec. 16, 2017), https://www.theatlantic.com/magazine/archive/2018/01/the-cambodia-daily-bernie-krisher/546563/ [https://perma.cc/Z6LE-B7UY]; Julia Wallace & Mike Ives, *A Newspaper Is Sold, and Cambodians Fear the End of Press Freedom*, N.Y. TIMES (May 7, 2018), https://www.nytimes.com/2018/05/07/world/asia/cambodia-phnom-penh-post-sale.html (last visited Oct. 16, 2018).

113. *See, e.g.*, *Cambodia Ruling Party Claims Landslide*, BBC NEWS (July 30, 2018), https://www.bbc.com/news/world-asia-44999358 [https://perma.cc/9H3Q-DC4F].

114. In the Criminal Code, this is exemplified by the quite vague and subjective language in outlining the elements of the offenses of defamation and treason. *See* CRIMINAL CODE, *supra* note 87, arts. 305-10, 439-50.

115. For example, Article 41 of the Constitution states on one hand that "Khmer [i.e. Cambodian] citizens shall have the freedom to express their personal opinions, the freedom of press, of publication and of assembly." However, the same Article inserts a vaguely worded set of limitations on such rights, stating further that "No one can take abusively advantage of these rights to impinge on dignity of others, to affect the good mores and custom of society, public order and national security [and that t]he regime of the media shall be regulated by law." CONSTITUTION OF THE KINGDOM OF CAMBODIA, *supra* note 76, art. 41.

numerous unclear provisions. Often these areas of vagueness pertain to critically important questions. For example, the NGO Law lacks clarity in terms of the critical question of on what grounds an NGO may be denied registration.[116]

The vagueness of many Cambodian laws also impairs the generality of such laws, as the interpretation of vague provisions tends to fluctuate depending on whom the law is being applied to and what the CPP's interests are, or at least are perceived to be. Consequently, while ordinary Cambodians may, for example, expect to be tried and punished severely when charged with a crime, typically without being afforded basic fair trial rights, Cambodian elites and CPP members routinely enjoy impunity for even the most serious crimes, even in the face of an abundance of inculpatory evidence.[117]

Cambodian laws also regularly conflict with one another, both in terms of their substance and how they are interpreted and applied. For example, the Cambodian Constitution and the various human rights legal instruments Cambodia is party to confer a host of rights on Cambodian citizens.[118] The CPP has pushed through legislation with seemingly no regard for the fact that aspects of such proposed laws routinely conflict quite directly with the Cambodian Constitution, Cambodia's human rights treaty commitments and other preexisting laws. For example, although the Cambodian Constitution states that Cambodia is to be organized as a democracy with free speech, freedom of association, and the right to form political parties, the CPP regularly violates these rights, including through new laws, such as the amended Law on Political Parties, as discussed previously.[119] This is also true of the interpretation of the various ambiguities that plague many Cambodian laws, which are typically interpreted by a pliant judiciary in line with the explicit or perceived wishes of the CPP, rather than in any attempt to create a broadly coherent, non-contradictory legal

116. *See* OFFICE OF THE UNITED NATIONS & HIGH COMM'R FOR HUMAN RIGHTS IN CAMBODIA, A HUMAN RIGHTS ANALYSIS, *supra* note 96; Vida, *supra* note 92; Anstis, *supra* note 52.

117. *See generally* Adams, *supra* note 53.

118. *See* CONSTITUTION OF THE KINGDOM OF CAMBODIA, *supra* note 76, arts. 31-50; *see also* CAMBODIAN CTR. FOR HUM. RTS., *supra* note 46; OFFICE OF THE UNITED NATIONS & HIGH COMM'R FOR HUMAN RIGHTS IN CAMBODIA, A HUMAN RIGHTS ANALYSIS, *supra* note 96, at 3-7.

119. *See generally* OFFICE OF THE UNITED NATIONS & HIGH COMM'R FOR HUMAN RIGHTS IN CAMBODIA, A HUMAN RIGHTS ANALYSIS, *supra* note 96.

system.[120] Thus, laws are construed either strictly to limit the freedom of the CPP's opponents, or broadly to facilitate the actions of Cambodia's elite powerbrokers.[121] This creates contradiction and further undermines clarity of the law.

Finally, the extreme selectivity with which Cambodian laws are applied deeply impairs Fuller's final rule of law criterion of "congruence" between the law and official action.[122] For example, the CPP orchestrated the passage, and aggressively sought the enforcement of the amended Law on Political Parties in a clear effort to disband the CNRP.[123] However, when asked what steps the government would take to safeguard the Cambodian Constitution's requirement of democratic governance, Hun Sen incredibly invoked the separation of powers as the reason why the government lacked the legal authority to intervene to halt the ongoing erosion of democratic governance in Cambodia that the CPP itself has clearly been systematically orchestrating.[124] This demonstrates how the CPP alternately invokes rule of law-based arguments when convenient, while ignoring basic rule of law requirements altogether when it proves inconvenient.

Through these and other practices of obscuring the repeated violation of basic rule of law principles behind thinly constructed façades of legality, Cambodia's legal system has come to exemplify what David Dyzenhaus refers to as "empty" "cycles of legality," wherein "the content of legality is understood in an ever more formal or vacuous manner, resulting in the mere appearance or even the pretense of legality."[125] Such pretenses of legality abound in Cambodia, to the point that the concept of "law" itself in Cambodia has

120. On the lack of judicial independence in Cambodia, *see* MOONEY & BAYDAS, *supra* note 16, at 4; *see generally* Adams, *supra* note 53.

121. *See* MOONEY & BAYDAS, *supra* note 16, at 4; *see generally* Adams, *supra* note 53.

122. *See generally* FULLER, THE MORALITY OF LAW, *supra* note 27.

123. *See infra* at 25-27.

124. For example, after being the driving force behind the amendments to the Law on Political Parties and the use of such amended laws to dissolve nine opposition parties, including the CNRP, Hun Sen was quoted as assuring Cambodians that the presence of other, smaller and less organized political parties ensured that democratic principles would be upheld, going as far as to claim that the "government will commit to protecting the multiparty democracy process, and the approaching election will be arranged by the [National Election Committee], which is an independent unit." Baliga & Chheng, *supra* note 103.

125. Dyzenhaus, *Dignity in Administrative Law*, *supra* note 39, at 98. While some conceptually distinguish between "legality" and the "rule of law," Dyzenhaus uses the terms more or less interchangeably in his analysis. *See supra* notes 39-42 and accompanying text.

largely come to be viewed domestically as merely constituting a certain kind of process through which the CPP exercises its power and exerts social control. Thus, as Cambodia has distanced itself from its chaotic and violent past, it continues to suffer from an acute and worsening rule of law deficit. This deficit is becoming less and less attributable to a lack of capacity, infrastructure, or funding, and more attributable to the CPP's purposeful efforts to manipulate Cambodia's laws and judiciary to further entrench itself in power.

While the ECCC is clearly ill-equipped to step in to fully remedy these deep-seated structural rule of law shortcomings in Cambodia, the Court, its backers, and international criminal justice advocates more generally continue to claim that ICL institutions such as the ECCC have a wholly positive, if incremental, impact on the rule of law in post-atrocity states such as Cambodia.[126] The following part, through an analysis of the ECCC experience in Cambodia, demonstrates that this assumption glosses over the complex realities of what is ultimately a quite uncertain relationship between the pursuit of ICL accountability and the improvement of the rule of law in post-atrocity states.

III. THE CASE 003 AND 004 CONTROVERSY AT THE EXTRAORDINARY CHAMBER IN THE COURTS OF CAMBODIA: A RULE OF LAW ASSESSMENT

A. The ECCC Experiment

The ECCC, which began operations in 2006, has jurisdiction over specified international and domestic crimes committed between April 17, 1975 and January 6, 1979, the precise time period the Khmer Rouge held power.[127] The stated purpose of the ECCC is to try "senior leaders of [the Khmer Rouge] 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."[128]

126. *See*, *e.g.*, MCAULIFFE, *supra* note 2, at 180–223; Vinjamuri, *supra* note 19, at 196-98.

127. 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. 1, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter Agreement].

128. *Id.*

Cambodia's rule of law shortcomings were a major factor in the creation of the ECCC and its ultimate constitution as a hybrid institution based in Cambodia. The negotiations leading to the creation were protracted and often contentious, in large part because of Cambodia's insistence on maintaining control over any tribunal created and the United Nations' concerns over the potential implications of such control given Cambodia's rule of law deficit.[129] Eventually, a complicated compromise was reached, whereby the ECCC was created as a specialized hybrid domestic/international chamber within the existing Cambodian judiciary.[130] The core compromise struck in relation to the Cambodian versus international nature of the Court involved dividing the Court's staff and judiciary. As such, the Court has both a Cambodian and international "Co-Prosecutor," and each accused has both Cambodian and international defense counsel, and so on.[131] The ECCC judiciary is similarly divided up in this way. As the Court follows civil law procedures for the most part, it has two "Co-Investigating Judges," one Cambodian and one international.[132] Meanwhile, each of the Court's three judicial chambers–the Pre-Trial Chamber, Trial Chamber, and Supreme Court Chamber–have an odd number of judges, with one more Cambodian judge than international judge at each level.[133] To prevent block voting by Cambodian judges, the United Nations negotiated a supermajority requirement, pursuant to which the decision of any chamber is only binding with the agreement of at least one international judge.[134]

This convoluted system was created largely because of the impasse created by the Cambodian government's insistence on the ECCC being a Cambodian court and the United Nations' concerns

129. *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 341–408 (2012); CIORCIARI & HEINDEL, *supra* note 13, at 14–102. *See generally* Steve Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia* (Apr. 26, 2011), http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf [https://perma.cc/URH9-87DW] (last visited Sept. 24, 2017).

130. Agreement, *supra* note 127.

131. *See generally* EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, INTERNAL RULES (REV.9) [INTERNAL RULES] (2015); *see also* CIORCIARI & HEINDEL, *supra* note 13, at 14–108; Jain, *supra* note 22.

132. *See id.*

133. *See id.*

134. *See id.*

about the rule of law and fair trial implications of such an outcome.[135] The compromise struck, while widely acknowledged as non-ideal, was viewed as acceptable partially because of the notion that by having Cambodian legal professionals work alongside international counterparts, the capacity of the ECCC's staff would be built up, theoretically leading to an improved rule of law in Cambodia.[136]

Thus far, however, this approach has not produced anything in the way of a tangible positive effect on the rule of law in Cambodia, let alone created conditions for a rule of law sea change. The ECCC, as an exceptional and temporary institution, has been alternately ignored and manipulated by Hun Sen and the CPP. Part of the CPP's prestige and power is grounded in its construction of a straightforward narrative of stability, progress, and the elimination of armed conflict.[137] According to this narrative, the CPP is the party made up of Cambodians who helped the Vietnamese oust the Khmer Rouge from power, eventually defeated the Khmer Rouge militarily, and ended Cambodia's long period of conflict and atrocity.[138] Over time, this narrative has become deeply entrenched, to the point that national days of remembrance of Khmer Rouge era atrocities and the end of this period of violence have become celebrations of the CPP itself.[139] Commentators have suggested that maintenance of this uncomplicated narrative and the related goal of emphasizing the responsibility of the Khmer Rouge's top leadership for atrocities, while downplaying the culpability of former mid-level Khmer Rouge cadres, has shaped the Cambodian government's fluctuating relationship with the ECCC.[140] At times, Hun Sen and the CPP have lauded the ECCC and highlighted the role the

135. *See* SCHEFFER, *supra* note 129, at 341-408.

136. This reasoning was routinely included in efforts to justify the creation of, and secure funding and political support for, the ECCC. For descriptions of these efforts at selling the ECCC, *see* MARTIN-ORTEGA & HERMAN, *supra* note 15; CIORCIARI & HEINDEL, *supra* note 13, at 14–103.

137. *See* Kirsten Ainley, *Transitional Justice in Cambodia: The Coincidence of Power and Principle*, *in* TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 125–56 (Renée Jeffery & Hun Joon Kim eds., 2014).

138. Kirsten Ainley refers to this dominant constructed narrative as one of the CPP's "rescue" of Cambodia. *Id.* at 149.

139. *See* SAVINA SIRIK, EVERYDAY EXPERIENCES OF GENOCIDE SURVIVORS IN LANDSCAPES OF VIOLENCE IN CAMBODIA 49 (2015).

140. *See, e.g.*, *id; see also* Stéphanie Giry, *Necessary Scapegoats? The Making of the Khmer Rouge Tribunal*, THE N.Y. REV. OF BOOKS (July 23, 2012), http://www.nybooks.com/daily/2012/07/23/necessary-scapegoats-khmer-rouge-tribunal/ [https://perma.cc/EM5P-ACR7]; STRANGIO, *supra* note 71, at 236–57.

Cambodian government has played in seeking justice for the atrocities of the Khmer Rouge era by helping create and supporting the Court.[141] At other times, Hun Sen and the CPP have dismissed the Court as irrelevant, refused to cooperate with it, or otherwise interfered with the Court's work.[142] Such interference has tended to occur when the ECCC's proceedings have had the potential to stray from a narrative which places the blame for the atrocities committed under the Khmer Rouge wholly on Pol Pot and/or a select group of other key individuals, such as convicted ECCC accused Nuon Chea and Khieu Samphan.[143]

B. The Case 003 and 004 Controversy at the ECCC

The longstanding controversy concerning how many suspects will be tried at the ECCC sits at the crux of the question of what narrative of Khmer Rouge culpability will ultimately emanate from the Court. As such, the controversy surrounding ECCC Cases 003 and 004 is emblematic of the complicated, often contentious relationships between the various parties with an interest in the ECCC, including the Cambodian government, Cambodian civil society actors, the United Nations, key donor countries, and domestic and international ECCC staff. As will become clear, much of the contention in these relationships relate closely to the rule of law, both in terms of competing conceptions of the role and independence of judicial institutions themselves, and in terms of the perceived tension between adherence to rule of law principles and fair trial rights in ECCC processes.

In many ways, Cases 003 and 004 at the ECCC have become the cases that virtually no one, including the United Nations and donor countries, want, yet also have become the cases that may ultimately determine whether the Court is remembered as a success or failure. In a basic sense, the fundamental problem is that no readily apparent, *legally justifiable* avenue for ending the cases prior to trial exists that would not be broadly perceived as a politically motivated pretext.[144] As

141. *See, e.g.*, STRANGIO, *supra* note 71, at 236–57.

142. *See id.*

143. Cases 003 and 004 for example, involve suspects who occupied levels of authority under the Khmer Rouge to those certain current CPP officials held while still members of the Khmer Rouge. *See* Giry, *supra* note 140.

144. In this vein, *see* John D. Ciorciari, *U.N. Credibility on Trial in Cambodia*, YALEGLOBAL ONLINE (May 4, 2015), https://yaleglobal.yale.edu/content/un-credibility-trial-

such, the cases have become a litmus test for assessing the resolve of the United Nations and the international community when confronted by the CPP's political subversion of the rule of law at the ECCC and, by extension, in Cambodia.[145] To date, the ECCC has failed this test rather miserably, as dominant public perception is that the Cambodian government has pursued a policy of preventing the cases from proceeding to trial that has, thus far, proven quite successful. As demonstrated in the foregoing analysis, the CPP has employed similar legal manipulation tactics to those it utilizes domestically to undermine Cases 003 and 004 and thereby maintain its clean "rescue" narrative.[146] As a result, the ECCC risks being perceived, especially by Cambodians all too familiar with the CPP's manipulation of domestic courts, as being yet another example of the CPP exercising its power to inhibit unwanted criminal investigations and dictate the interpretation of key legal provisions, even when resultant interpretations seem to directly contradict prior interpretations of the same law.

The five initial suspects in ECCC Cases 001 and 002 were relatively uncontroversial, as it was widely assumed that these individuals would be tried throughout the negotiation process leading to the creation of the Court.[147] Case 001 concerned a single accused, Kaing Guek Eav, known by his alias, "Duch," who had been the commander of the notorious *Tuol Sleng* "S-21" prison in Phnom Penh, today preserved as a museum.[148] That Duch would be prosecuted was a near certainty, as when the ECCC was created he had already been detained by Cambodian authorities for nearly seven years.[149] Absent prosecuting him at the ECCC, the Cambodian government was faced with the choice of either releasing Duch or treading down the path of domestic prosecutions, both of which the CPP preferred to avoid.[150]

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cambodia [https://perma.cc/MRF7-Y9X5]; *see also* PERFORMANCE AND PERCEPTION, *supra* note 15, at 25–29.

145. *See* Ciorciari, *supra* note 144.

146. *See* Ainley, *supra* note 137 and accompanying text; *see also* CIORCIARI & HEINDEL, *supra* note, 13 at 167-201; PERFORMANCE AND PERCEPTION, *supra* note 15, at 26.

147. *See* SCHEFFER, *supra* note 129 at 341-408; Heder, *supra* note 129.

148. *See* Prosecutor v. Kaing Guek Eav alias "Duch," Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC (Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, Feb. 3, 2012). For an overview of *Tuol Sleng* prison, *see* DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON (1999) [hereinafter CHANDLER, VOICES FROM S-21].

149. *See* Heder, *supra* note 129, at 14-17.

150. *See id.*

The accused in Case 002 were the four most senior (and socially visible) former Khmer Rouge leaders still alive when the Court began operations: Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan. Again, these individuals were uncontroversial, wholly expected suspects.[151] Nuon Chea, often referred to as "Brother Number Two," was Pol Pot's closest confidant and second in command during the Khmer Rouge period.[152] Khieu Samphan was the nominal head of state during this time, although his actual authority remains disputed.[153] Ieng Sary was the Minister of Foreign Affairs and along with his wife, Ieng Thirith–herself the Minister of Social Affairs–was a member of Pol Pot's inner circle.[154] Although neither Ieng Sary nor Ieng Thirith survived long enough for the ECCC Trial Chamber to issue a judgment against them,[155] Nuon Chea and Khieu Samphan were convicted of various crimes in the first Case 002 trial[156] and are currently awaiting judgment for additional crimes in a second trial.[157]

From the perspective of the Cambodian government, the five accused in Cases 001 and 002 were sufficient. Prosecuting these select, high-level leaders, along with Duch, who ran the Khmer Rouge's most notorious prison, would serve an honorific function of generally condemning the regime and would provide a neat bookend to the CPP's carefully crafted narrative.[158] Further prosecutions however, would create the possibility, however slight, of complicating this narrative. If the ECCC pursued regional commanders or other, lower-level Khmer Rouge officials, it might venture into a similar tier of Khmer Rouge

151. *See id.*; SCHEFFER, *supra* note 129, at 341–408.

152. Prosecutor v. NUON Chea & KHIEU Samphan, Judgment, 002/19-09-2007/ECCC/TC, Doc. No. E313, Case 002/01, ¶¶ 303-348 (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, Aug. 7, 2014).

153. S*ee id.* at ¶¶ 349-409.

154. *See generally* KIERNAN, *supra* note 61; Heder, *supra* note 129; SCHEFFER, *supra* note 129, at 341–408.

155. Ieng Thirith was found unfit to stand trial in 2012 due to suffering from dementia and died in 2015. Ieng Sary died in 2013 during the Case 002 trial. *See* Thomas Fuller, *Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83*, N.Y. TIMES, (Aug. 22, 2015), https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html.

156. *NUON Chea & KHIEU Samphan*, Judgment, 002/19-09-2007/ECCC/TC, Doc. No. E313, Case 002/01, ¶¶ 303-348.

157. Case 002 was bifurcated into a series of trials due to its massive scope. *See* Prosecutor v. NUON Chea, Severance Order Pursuant to Rule 89TER, 002/19-09-2007-ECCC/TC, (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia Sept. 22, 2011).

158. On this narrative, *see* Ainley, *supra* note 137.

leadership formerly occupied by certain key CPP members, including Hun Sen himself, before they defected to Vietnam.[159] It also might address times and places where some of these officials operated while still Khmer Rouge members, thereby dredging up an uncomfortable past for the CPP and complicating its carefully managed narrative.[160]

Against this backdrop, former International Co-Prosecutor Robert Petit initiated Cases 003 and 004, by submitting two introductory submissions to the ECCC Office of the Co-Investigating Judges in November 2008.[161] While a detailed history of these cases is beyond the scope of this Article, a basic summary of this history is necessary in order to understand and contextualize their rule of law implications. These cases initially involved a total of five suspects, each of whom were alleged to have participated in various atrocity crimes involving many hundreds of thousands of victims, including multiple hundreds of thousands of deaths.[162] The suspects in Case 003 were Meas Muth and Sou Met.[163] Meas Muth is alleged to have been a Khmer Rouge military commander whose authority included control of the navy.[164] In this capacity, he is alleged to have participated in a variety of domestic and international crimes, including genocide and the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, persecution, and various other inhumane acts.[165]

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159. *See generally* STRANGIO, *supra* note 71; *see also* PERFORMANCE AND PERCEPTION, *supra* note 15 at 26 ("While the government has publicly stated that pursuing Cases 003 and 004 could compromise political stability in Cambodia, most court observers reject it as a smokescreen for the real concern that the cases, which involve cadre with connections to the ruling [CPP], may embarrass the party and its leader, Hun Sen.") (citing Giry, *supra* note 140).

160. *See* STRANGIO, *supra* note 71; PERFORMANCE AND PERCEPTION, supra note 15, at 26.

161. These Introductory Submissions were officially confidential, yet were leaked to the press and widely disseminated in the media. For a general background of the initiation of Cases 003 and 004, *see generally* OPEN SOC'Y JUSTICE INITIATIVE, THE FUTURE OF CASES 003/004 AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2012) [hereinafter THE FUTURE OF CASES 003/004].

162. *See* Douglas Gillison, *Crime Scenes of the Khmer*, THE INVESTIGATIVE FUND (Feb. 27, 2012), https://www.theinvestigativefund.org/investigation/2012/02/27/crime-scenes-khmer/ [https://perma.cc/V8HW-8DBD].

163. *See* Randle C. DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law*, 8 GENOCIDE STUD. & PREVENTION 45, 56 (2014); PERFORMANCE AND PERCEPTION, *supra* note 15, at 26.

164. *See* DeFalco, *supra* note 163, at 56; PERFORMANCE AND PERCEPTION, *supra* note 15, at 26.

165. Meas Muth, ECCC, https://www.eccc.gov.kh/en/indicted-person/meas-muth [https://perma.cc/HS5S-CQGN] (last visited Sept. 24, 2018).

Sou Met, another military commander alleged to have been in charge of the Khmer Rouge air force, died in 2013, terminating proceedings against him.[166]

Meanwhile, Case 004 initially concerned three suspects: Ao An, Im Chaem and Yim Tith.[167] Ao An is alleged to have held the position of deputy secretary of the Central Zone during the Khmer Rouge period,[168] during which time Cambodia's provinces were reorganized into "[z]ones" and administered by "secretaries", whose positions were akin to that of a state or provincial governor.[169] In this capacity, Ao An is alleged to have participated in widespread purges carried out at various prisons and internment camps in central and eastern Cambodia.[170] Im Chaem, the second woman, along with the now-deceased Ieng Thirith, to be investigated by the ECCC, is alleged to have been placed in charge of Preah Net Preah district in Northwestern Cambodia in 1977, where she is alleged to have overseen forced labor at a massive dam construction site and been in charge of Phnom Trayoung prison, where many thousands of victims were imprisoned and executed.[171] Finally, Yim Tith is alleged to have held various positions at the district, sector and zone levels in Northwestern Cambodia during the Khmer Rouge period and to have participated in various international crimes committed at a host of prisons, execution sites and forced labor camps.[172]

Cases 003 and 004 proved controversial from their very inception and have remained so as they have slowly wound their way through their respective investigative phases for nearly a decade.[173] The introductory submissions in both cases were filed without the assent of Cambodian ECCC Co-Prosecutor Chea Leang, signaling the possibility

166. Lauren Crothers, *Khmer Rouge War Crimes Suspect Sou Met Dead*, THE CAMBODIA DAILY (June 27, 2013), https://www.cambodiadaily.com/news/khmer-rouge-war-crimes-suspect-sou-met-dead-32184/ [https://perma.cc/M4MS-W54X].

167. *See* DeFalco, *supra* note 163, at 56.

168. *See id.* at 56–57; *Ao An*, ECCC https://www.eccc.gov.kh/en/indicted-person/ao [https://perma.cc/B5JQ-5FGU] (last visited June 21, 2018).

169. Dy, *supra* note 64, at 23-25.

170. *See Ao An*, *supra* note 168.

171. *See generally* Prosecutor v. IM Chaem, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) (Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, July 10, 2017).

172. *Yim Tith*, ECCC, https://www.eccc.gov.kh/en/indicted-person/yim-tith [https://perma.cc/KZA7-QNHB].

173. *See* DeFalco, *supra* note 163, at 46-47.

of a broader recalcitrance amongst the ECCC's Cambodian staff towards moving the cases forward that has since materialized.[174] Nonetheless, the ECCC's internal rules clearly mandate that investigations are to proceed, even when the subject of disagreement between the Co-Prosecutors or Co-Investigating Judges, and so the investigations have remained officially open since 2008.[175]

Since the very inception of Cases 003 and 004, the CPP has maintained a general stance of opposition to their proceeding to trial. This opposition has been made clear via various public statements made by Hun Sen and other prominent CPP officials.[176] Meanwhile, most of the Cambodian staff at the ECCC, including the Court's Cambodian judges, have tended to follow the lead of the CPP, stymying key investigatory efforts and at times refusing to participate in the investigations altogether.[177] Numerous International Court staff have quit out of frustration with their inability to investigate and move these cases forward, including all four International Co-Investigating Judges who preceded current International Co-Investigating Judge Michael Bohlander.[178] Indeed, shortly before resigning himself, former Co-Investigating Judge Laurent Kasper-Ansermet, who had been blocked from having the "reserve" designation removed from his title when his predecessor, Marcel Lemonde, resigned, issued a public decision describing the "egregious dysfunction" within the ECCC in relation to the Cases 003 and 004 investigations.[179]

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174. *See id.*; THE FUTURE OF CASES 003/004, *supra* note 161.

175. *See generally* THE FUTURE OF CASES 003/004, *supra* note 161, at 14.

176. Hun Sen has been quoted variously as stating that the cases "will not be allowed" and claiming that, despite any evidence suggesting this outcome is in any way possible, let alone likely, that Cambodia could plunge back into civil war if the cases proceed. *See* Kuch Naren, *Hun Sen Warns Of Civil War If ECCC Goes Beyond 'Limit,'* CAMBODIA DAILY (Feb. 27, 2015), https://www.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/ [https://perma.cc/636A-3G4R]; *No Third Khmer Rouge Trial, Says Hun Sen*, RADIO FR. INTERNATIONALE (Oct. 27, 2010), http://en.rfi.fr/asia-pacific/20101027-no-third-khmer-rouge-trial-says-pm [https://perma.cc/BKR3-MGYZ]; THE FUTURE OF CASES 003/004, *supra* note 161, at 2.

177. PERFORMANCE AND PERCEPTION, *supra* note 15 at 27-29.

178. *See, e.g.*, STRANGIO, *supra* note 71, at 251; Bridget Di Certo, *Judge Decries 003, 004 'Sabotage,'* PHNOM PENH POST, (Mar. 22, 2012), http://www.phnompenhpost.com/national/judge-decries-003-004-%E2%80%98sabotage%E2%80%99 [https://perma.cc/H45Q-PGAU].

179. *See generally* LAURENT KASPER-ANSERMET, NOTE OF THE INTERNATIONAL RESERVE CO-INVESTIGATING JUDGE TO THE PARTIES ON THE EGREGIOUS DYSFUNCTIONS WITHIN THE ECCC IMPEDING THE PROPER CONDUCT OF INVESTIGATIONS IN CASES 003 AND 004 (2012).

Meanwhile, Cambodian Co-Investigating Judge You Bunleng has consistently expressed a desire to end the cases as soon as possible, adhering consistently to the view that none of the Case 003 and 004 suspects should be considered "senior leaders" or "most responsible" individuals and therefore do not fall within the ambit of the ECCC's personal jurisdiction.[180] This opinion is shared by Chea Leang, who has, from the very inception of Cases 003 and 004 maintained that "only the existing accused [in Cases 001 and 002] at the ECCC are the senior leaders and most responsible persons" and "priority, therefore, should be given to the prosecution of those accused in order to sufficiently fulfill the [Court's] mandate."[181] Coincidentally, both Judge You and Chea Leang are members of the Cambodian Supreme Council of Magistracy, and were hence, involved in blocking Judge Kasper-Ansermet from assuming his position.[182]

This correlation, between the wishes of the CPP as they are broadly socially perceived, and the action of Cambodian officials and judges, is quite familiar to those aware of how the rule of law is subverted in domestic Cambodian courts. Statements made by Hun Sen and other prominent CPP figures, often in the form of off-the-cuff remarks at public events, signal the wishes of the CPP to all Cambodians, including ECCC staffers. While such statements are, most often, not addressed to any specific individual and do not demand any specific actions, they tend to be interpreted as quasi-official CPP policy statements. Relevant Cambodian officials, including those working at the ECCC, who are reliant on patronage networks for social and professional advancement, know full well that if they help effectuate the desired outcomes of those holding power, they are likely to be rewarded in due course.[183] Conversely, those who are seen to be obstructing the wishes of those more powerful than themselves risk

180. OPEN SOC'Y JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: THREAT TO PERMANENTLY STAY CASES 003, 004 AND 004/2A, at 4 (2017) [hereinafter RECENT DEVELOPMENTS (2017)].

181. *See* ECCC OFFICE OF THE CO-PROSECUTORS, STATEMENT BY THE OFFICE OF THE CO-PROSECUTORS ON CASE 004/02 (2017).

182. The Cambodian Supreme Council of Magistracy must confirm each judge at the ECCC before he or she may assume their judicial position. The Council refused to confirm Kasper-Ansermet without providing reasons why in what is widely viewed as a political move to block Cases 003 and 004 from proceeding. *See* DeFalco, *supra* note, 163, at 46–47.

183. For a description of these Cambodia's "sprawling network" of "vertical *khsae*, or 'strings,' of patronage emanating from Hun Sen and his close associates," *see* STRANGIO, *supra* note 71, at 134.

being personally and professionally ostracized, or even made the target of reprisals in the form of spurious criminal allegations or even violence.[184]

The net result is that the CPP is able to influence public officials and the judiciary without ever needing to resort to explicitly ordering them what to do, holding clandestine meetings, or even making any direct contact with them. Instead, Cambodia's most powerful individuals simply make their wishes publicly known, with the implicit promise of social advancement for those who help effectuate such wishes. Dense webs of patronage networks take care of the rest.[185]

This pattern seems to be taking place at the ECCC, as the Cambodian staff has worked to impede the progress of Cases 003 and 004 in near lock-step.[186] For years the cases seemed to be locked in a stalemate, with investigations proceeding in fits and starts.[187] While the investigations remained officially confidential for years, the identities of the five suspects were a matter of public knowledge, with some of the suspects even granting interviews.[188] Nonetheless, all indications suggest an increasing unlikelihood that trials of any of the four remaining suspects will ever occur, as in 2017, the Co-Investigating Judges dismissed all charges against Im Chaem[189] and floated the idea of issuing a permanent stay of the charges against Ao An, Yim Tith and Meas Muth.[190]

C. The Rule of Law Implications of Cases 003 and 004

Understanding the domestic rule of law implications for Cambodia of the ongoing saga of Cases 003 and 004 at the ECCC requires a fine-grained analysis of applicable law in light of the particularities of how the rule of law is subverted in Cambodia. As

184. *See* MOONEY & BAYDAS, *supra* note 16, at 10–11; *see generally* Adams, *supra* note 53.

185. *See* STRANGIO, *supra* note 71, at 134.

186. *See, e.g.*, PERFORMANCE AND PERCEPTION, *supra* note 15, at 26-29.

187. *See, e.g.*, *id.*

188. *See, e.g.*, Julia Wallace, *The Bucolic Life of a Cambodian Grandmother Accused of Mass Killings*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/world/asia/cambodia-khmer-rouge-im-chaem.html [hereinafter Wallace, *Bucolic Life*].

189. *See* Prosecutor v. IM Chaem, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) (Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, July 10, 2017).

190. RECENT DEVELOPMENTS (2017), *supra* note 180.

McCarthy and Un argue, within the domestic context, the CPP and other Cambodian elites tend to treat law as merely a tool in the service of maintaining order and the status quo.[191] While willing to pay lip service to Constitutional guarantees of liberal democratic governance, free speech rights, and the independence of the judiciary, the CPP only tolerates such independence so long as it does not threaten or embarrass the party or its patrons.[192] From this perspective, one may quite reasonably conclude that the Cambodian government has, to date, allowed the ECCC to operate independently, so long as the Court does not present the risk of threatening CPP interests, including the maintenance of its foundational "rescue" narrative.[193]

Meanwhile, the United Nations, legal commentators, and international justice organizations have generally tended to support Cases 003 and 004 both proceeding to trial, citing the mantra of anti-impunity and arguing that the rule of law demands trials in these cases.[194] The impasse that has resulted is largely a product of the fact that proponents of the cases proceeding to trial have raised arguments that appear *legally* accurate in a substantive sense.[195] However, as noted above, the CPP does not necessarily conceptualize the rule of law along these lines.[196] Moreover, there are multiple levels of legal considerations relevant to the outcomes of the two cases and the contentious nature of the investigations. In particular, alleged investigatory irregularities in the cases create fair trial concerns of their own, further complicating the rule of law implications of the controversy surrounding them.

The main legal question relating to whether trials are appropriate in Cases 003 and 004 concerns whether the suspects–Ao An, Im Chaem, Meas Muth, Yim Tith and, before his death, Sou Met–fall

191. *See* McCarthy & Un, *supra* note 49; *see generally* MOONEY & BAYDAS, *supra* note 16.

192. *See generally* Wallace, *'Fireflies' and 'Ghosts,' supra* note 104; MOONEY & BAYDAS, *supra* note 16.

193. *See* Ainley, *supra* note 137 and accompanying text.

194. *See, e.g.*, THE FUTURE OF CASES 003/004, *supra* note 161; *Cambodia: Stop Blocking Justice for Khmer Rouge Crimes*, HUMAN RTS. WATCH (Mar. 22, 2015), https://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes [https://perma.cc/SK9V-226R].

195. For an overview of the legal issues related to Cases 003 and 004 and why there does not appear to be any legitimate avenue for ending the cases judicially absent trials, or dismissals based on the evidence itself, *see, e.g.*, THE FUTURE OF CASES 003/004, *supra* note 161.

196. *See* McCarthy & Un, *supra* note 49.

within the personal jurisdiction of the ECCC in the first place.[197] As previously noted, the ECCC Agreement contains language seeming to limit the ECCC's personal jurisdiction to individuals qualifying as either former "senior leaders" of the Khmer Rouge or those "most responsible" for the atrocities committed during the Khmer Rouge's reign.[198] Case 001 accused Duch argued in his appeal filings that he did not qualify as either a senior leader or most responsible person and that consequently, the ECCC lacked personal jurisdiction over him.[199] This argument was dismissed by the ECCC Supreme Court Chamber, which held that the relevant language in the ECCC Agreement is best interpreted as a guide to the exercise of prosecutorial discretion and is thus not a true, strictly enforceable jurisdictional element.[200] Such discretion is, however, according to the Chamber, bounded by general duties of good faith.[201] In rejecting Duch's appeal,[202] the Supreme Court Chamber implicitly concluded that the decision to classify Duch as a most responsible individual fell within these broad limits.

Given the holding of the Supreme Court Chamber, its status as the ECCC's highest appellate chamber, and its implicit finding that it was reasonable for the ECCC Co-Prosecutors, Co-Investigating Judges and Trial Chamber, to consider Duch a "most responsible" individual, there does not appear to be any legally sound mechanism for concluding either Case 003 or 004 without trials on jurisdictional grounds.[203]

However, instead of basing their opinion that Cases 003 and 004 should not proceed to trial wholly on evidentiary considerations or doubt concerning the guilt of the relevant suspects, those opposed to the cases, including International Co-Prosecutor Chea Leang and Co-Investigating Judge You Bunleng, have continued to maintain the position that none of the suspects fall under the ECCC's personal jurisdiction.[204] This position, while seemingly reasonable at first

197. *See* DeFalco, *supra* note 163.

198. Agreement*, supra* note 127, art. 1.

199. Prosecutor v. Kaing Guek Eav alias "Duch," Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC, ¶¶ 21-24 (Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, Feb. 3, 2012).

200. *Id.* at ¶ 74.

201. *Id.* at ¶ 80.

202. *Id.* at 320 (disposition of the Chamber, dismissing the defense appeal).

203. *See, e.g.*, PERFORMANCE AND PERCEPTION, *supra* note 15, at 28; DeFalco, *supra* note 163.

204. *See* ECCC OFFICE OF THE CO-PROSECUTORS, *supra* note 181; RECENT DEVELOPMENTS (2017), *supra* note 180, at 4.

glance, becomes highly questionable when considering Duch's conviction in Case 001 and the implicit characterization of Duch as a "most responsible" individual. ICL jurisprudence lays out a host of criteria to be used in the assessment of the relative responsibility of various suspects implicated in atrocity crimes and the determination of who, in a legal sense, qualifies as a "most responsible" individual.[205] These criteria emphasize the gravity of the alleged crimes and the relevant individual's relative degree of probable culpability therefor.[206] Thus, an individual who participated in, but was not necessarily the driving force behind the commission of an especially large-scale crime, may be characterized as "most responsible," as can an individual who was the driving force behind the commission of a comparatively less serious crime.[207]

Of course, there is no mathematical formula which can be used to definitively determine whether any specific individual qualifies as "most responsible." However, when one compares Cases 001 with Cases 003 and 004 at the ECCC, the suspects in the latter cases all appear to be at least as responsible for Khmer Rouge era atrocity crimes, if not more so, than Duch. The main difference between the cases is that Duch's crimes occurred at *Tuol Sleng*, an especially visible and high-profile prison. *Tuol Sleng* occupies a significant place in the history of the Khmer Rouge regime because it was where foreigners, high-level "internal enemies," and other special prisoners were sent to be tortured and executed, and still stands as a museum and tourist attraction.[208] It was, however, only one of nearly two-hundred prisons established by the Khmer Rouge nationwide and was far from the

205. For an overview of this jurisprudence, *see* DeFalco, *supra* note 163, at 51-55; CIORCIARI & HEINDEL, *supra* note 13, 169–73.

206. I have conducted a detailed analysis of these factors, which focus generally on the gravity of the relevant crimes (in terms of severity of harms and number of victims) and the suspects' relative culpability (in terms of the importance of the suspect's role in the overall commission of the relevant crimes), elsewhere. *See* DeFalco, *supra* note 163*; see also* CIORCIARI & HEINDEL, *supra* note 13, 169–73; Michael G. Karnavas, *"But Duch is a Senior Leader/Most Responsible While Chaem is Not?"*, INT'L CRIM. L. BLOG (Feb. 27, 2017), http://michaelgkarnavas.net/blog/2017/02/27/duch-vs-chaem/ [https://perma.cc/E28Y-G5YF] [hereinafter Karnavas, *But Duch*].

207. *See generally* DeFalco, *supra* note 163; *cf.* Karnavas, *But Duch*, *supra* note 206.

208. For an overview of the workings of this prison, *see* CHANDLER, VOICES FROM S-21, *supra* note 148.

largest in terms of the total number of victims killed.[209] Various other prisons, including those subject to investigation in Cases 003 and 004 were, in fact, clearly far larger operations.[210]

Duch's authority was also strictly confined to *Tuol Sleng* itself, and he was under standing orders to execute every single prisoner he received.[211] Duch thus had virtually no discretion, except in choosing whom to torture and how. Indeed, numerous *Tuol Sleng* guards and workers were themselves arrested, imprisoned at *Tuol Sleng* itself, and executed.[212] While none of the Case 003 or 004 suspects held positions in the top echelons of the Khmer Rouge's hierarchical command structure (and hence, are, like Duch, unlikely to qualify as "senior leaders"), each of them appears to have wielded a degree of local and/or regional influence far greater than Duch.[213] Such influence appears to have included the authority to order, or decline to order, executions.[214]

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209. For a list of crimes sites investigated in Cases 003 and 004, *see Case 003 & 004 Crime Sites*, ECCC (Oct. 2013), https://www.eccc.gov.kh/sites/default/files/Case%20003-004%20Crime%20Sites_ENG_OCT%202013.pdf [https://perma.cc/J8ZG-98ZN]. For a rough list of mass grave sites in Cambodia (which have not been systematically mapped or exhumed), see *Mapping Project: 1995-Present*, DOCUMENTATION CTR. OF CAMBODIA, http://www.d.dccam.org/Projects/Maps/Mapping.htm [https://perma.cc/3CZK-6N55]. This is not to suggest that *Tuol Sleng* is not an important crime site, but merely to assert that there were many prisons and mass execution sites throughout Cambodia during the Khmer Rouge period of at least comparable size.

210. *See Case 003 & 004 Crime Sites*, *supra* note 209*; Mapping Project: 1995-Present*, *supra* note 209.

211. *See generally* CHANDLER, VOICES FROM S-21, *supra* note 148.

212. *See id.*

213. While it is impossible to accurately assess the alleged authority and culpability of the four remaining Case 003 and 004 suspects in the absence of full disclosure of available evidence and trial processes, all indications are that each of the suspects directly implemented brutal Khmer Rouge policies, including overseeing the commission of extreme violence. *See, e.g.*, Prosecutor v. IM Chaem, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) (Extraordinary Chambers in the Courts of Cambodia, July 10, 2017); DeFalco, *supra* note 163, at 56-57; CIORCIARI & HEINDEL, *supra* note 13, at 176-177. According to leaked cables from the US Embassy in Phnom Penh, there exists evidence that at least some of the Case 003 and 004 suspects "took direct orders from the likes of DK Security Minister and Pol Pot himself to carry out purges and 'smashing' [i.e. killing by execution] on a mass scale." CIORCIARI & HEINDEL, *supra* note 13, at 176 (quoting U.S. Embassy Phnom Penh, *Cable 09PHNOMPENH648, Khmer Rouge Tribunal: Five More for Prosecution* ¶ 5, WIKILEAKS (Sept. 1, 2009), http://www.wikileaks.org/ cable/2009/09/ 09PHNOMPENH648.html).

214. *IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) at ¶ 175 (finding that evidence exists *suggesting* that Im Chaem held the authority to order executions).

Thus, while none of the Case 003 or 004 suspects appear to have occupied positions at the very top of the Khmer Rouge hierarchy, strong evidence implicates all of them in atrocities involving more victims than those in Case 001, including in terms of total deaths.[215] Moreover, as regional authority figures operating in Cambodia's countryside, rather than at a prison in Phnom Penh under the direct authority of the Khmer Rouge's top leadership, each of these suspects clearly exercised far more discretionary power than Duch.[216] There has been no suggestion from either of the ECCC Co-Prosecutors or any ECCC judges that Duch should not be considered amongst those individuals considered "most responsible" for the atrocities of the Khmer Rouge era. These basic facts render Duch's conviction an inconvenient impediment to any finding that the Case 003 and 004 suspects are not also properly considered "most responsible" individuals.[217]

The decision of the Co-Investigating Judges dismissing the charges against Im Chaem, arguably the least senior of all four

215. For an overview of the sites investigated in Cases 003 and 004, see *Case 003 & 004 Crime Sites*, *supra* note 209**.** Estimates of the number of deaths that occurred at the various sites investigated in Cases 003 and 004 vary. *See, e.g.*, Gillison, supra note 162. In 2009, demographic experts appointed by the ECCC assessed the various death toll estimates of the Khmer Rouge period, finding that the "most likely" number of excess deaths during the Khmer Rouge period ranges from 1.747 to 2.2 million individuals. EWA TABEAU & KHEAM THEY, KHMER ROUGE VICTIMS IN CAMBODIA, APRIL 1975 - JANUARY 1979: A CRITICAL ASSESSMENT OF MAJOR ESTIMATES 70 (2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D140_1_1_Public_Redacted_EN.PDF [https://perma.cc/TKP2-3J63] (last visited Sept. 24, 2018).

216. *See, e.g.*, *IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version); DeFalco, *supra* note 163 at 56-57; CIORCIARI & HEINDEL, *supra* note 13 at 176-177.

217. This is not to suggest that this conclusion is universally shared. For example, ECCC defense counsel Michael Karnavas, argue that the position that a good-faith comparison of the Case 003 and 004 suspects with Duch requires a finding that such suspects be legally characterized as "most responsible" amounts to an improper usurpation of the judicial function. Karnavas contends that the argument that Duch's prosecution demands, in a legal sense, that the Case 003 and 004 suspects be tried, amounts to "[p]olicy-driven arguments grounded in situational ethics and based on emotional reasoning masquerading as rational legal analysis [which] may assuage our base desire for the ends to justify the means even if the means are illegitimate, but they have no business in being the driving force or legal bases for judicial decisions." Karnavas, *But Duch*, *supra* note 206. However, this argument, when carefully dissected, can be accused of the very same outcome-based reasoning of which Karnavas complains, as the argument frames the judicial function as one of essentially unfettered discretion, including inconsistent interpretation and application of the law, thus demonstrating how vague legal language facilitates political interference in legal processes.

remaining Case 003 and 004 suspects, is illustrative in this regard. In 2015, Im Chaem was formally charged with a variety of domestic and international crimes, including the crimes against humanity of extermination, murder, enslavement, persecution, imprisonment, and other inhumane acts (in the form of enforced disappearances and attacks against human dignity resulting from deprivation of adequate food).[218] These charges were based on her alleged supervisory role at the Phnom Trayoung prison and execution site, the Spean Sreng worksite, and the cooperatives within the Preah Net Preah district in Northwest Cambodia from mid-1977 to 1979.[219] During this time Im Chaem, according to her own statements and the findings of the Co-Investigating Judges, exercised local authority over the Preah Net Preah district.[220] It is impossible to know, with any specificity, how many victims were killed in the areas under Im Chaem's authority between 1977 and 1979. This unknowability is unsurprising, given that no systematic forensic survey of Cambodia's numerous mass grave sites has ever been conducted, and it is therefore impossible to know the precise number of victims killed at any specific location.[221] Moreover, efforts at such "body counting" fail to account for the vast number of Cambodians who were not imprisoned or executed, yet were still victims of serious crimes at the worksites, prisons, and cooperatives allegedly under Im Chaem's authority from 1977 to 1979. These victims were overworked at forced labor sites, denied minimally

218. *See IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version), at ¶ 4.

219. *See id.,* at ¶¶ 158-60.

220. *See id.* For examples of Im Chaem's own statements acknowledging that she was placed in charge of Preah Net Preah district during this time period, *see* Interview with Im Chaem, District Chief of Preah Net Preah, Banteay Meanchey Province, with VANTHAN Peou Dara, in O-Angre Village, Oddar Meanchey Province (Mar. 4, 2007), http://www.d.dccam.org/Archives/Interviews/Sample_Interviews/Former_Kh_Rouge/Im%20Chem.htm [https://perma.cc/Y4LH-VDCQ] (last visited Sept. 24, 2018); Wallace, *Bucolic Life*, *supra* note 188.

221. One estimate places the number of victims killed at Phnom Trayoung prison at roughly 40,000 victims, most of which being killed from 1977 onwards, when the area was internally purged on orders of the Khmer Rouge leadership. *IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) at ¶ 127. However, this report is at best, a rough estimate. *See id.,* at ¶¶ 127-35. Nonetheless, there is clear evidence that mass killings occurred in the area, and together with Yim Tith, high estimates are that Im Chaem may be responsible for up to 560,000 deaths. *See, e.g.*, Wallace, *Bucolic Life*, *supra* note 188. While these estimates may be on the high end, in terms of total number of victims, even if reduced by half or more, the resulting number of victims remains in the many thousands and significantly higher than the number of victims killed at *Tuol Sleng*.

adequate sustenance, and subject to the constant threat of being beaten or executed.[222]

Numerous statements of survivors still living in the Preah Net Preah area suggest both that Phnom Trayoung prison was a large operation involving mass executions and that Im Chaem was heavily involved in its day-to-day operations from 1977 to 1979. For example, in an interview with the Documentation Center of Cambodia's Promoting Accountability project team, Khmer Rouge period survivor Thip Samphatt, who was detained at Phnom Trayoung prison in August 1978, claims to have been shown a letter by the prison warden, a man named Soeun.[223] According to Samphatt, the letter, which he remembers being stamped and signed by Im Chaem herself, stated that Samphatt and two of his friends had "betrayed the revolution and therefore had to give their blood to the revolution" (i.e. were to be executed).[224] Samphatt only survived because he was on friendly terms with Soeun, who reassigned him and his friends, rather than having them executed.[225] Samphatt also saw Im Chaem herself visit the prison on several occasions, and described her as being visibly pregnant and using a specific motorbike—which were rare during the Khmer Rouge regime.[226] He also described witnessing mass executions firsthand.[227] Samphatt's seemingly damning evidence is just one example of numerous survivor accounts that strongly indicate both that Im Chaem had authority over the Phnom Trayoung prison, and that she had the specific authority to decide who was to be executed. Moreover, the more general, uncontroverted fact remains that Im Chaem's arrival in the area coincided with a massive increase in arrests and executions.[228]

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222. *See generally IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version); KIERNAN, *supra* note 61 at 237 *et seq*.

223. Dany Long, *Promoting Accountability Field Trip Note* (2011), DC-CAM http://www.d.dccam.org/Archives/Interviews/Sample_Interviews/Former_Kh_Rouge/PA_field_trip_note_in_Banteay_Meanchey.pdf [https://perma.cc/T54P-X59Z].

224. *Id.*

225. *Id.*

226. *Id.* The Khmer Rouge used very little in the way of mechanized machinery or transport while in power. No one except for relatively important regime members would have had access to a motorbike. *See generally* KIERNAN, *supra* note 61; HINTON, WHY DID THEY KILL?, *supra* note 49; Dy, *supra* note 64; CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY, *supra* note 58, at 236–72.

227. *Id.*

228. *See generally* Prosecutor v. IM Chaem, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) (Office of the Co-

Nonetheless, in July 2017, the Co-Investigating Judges issued a Closing Order dismissing all charges against Im Chaem, holding that she does not qualify as a "most responsible" person and therefore falls outside the personal jurisdiction of the ECCC.[229] In the decision, the Co-Investigating Judges, noting that civil law jurisdictions do not follow a strict policy of *stare decisis*, disagreed with the Supreme Court Chamber's holding that the terms "senior leaders" and "most responsible" do not represent a true limit on the Court's personal jurisdiction.[230] Instead, in the view of the Co-Investigating Judges, such language *is* truly jurisdictional in nature, although it "entails a wide but not entirely non-justiciable margin of appreciation".[231] The Co-Investigating Judges also interpreted various fair trial legal maxims, such as those of *in dubio pro reo* and *nullum crimen sine lege*, as militating towards a narrow view of who qualifies as a "most responsible" person.[232] In terms of the factual determination of whether a suspect qualifies as most responsible, they were of the view that "the degree to which the offender was able to contribute to or even determine policies and or their implementation" represents an "important" yet non-determinative assessment factor.[233]

While the publicly available version of the Co-Investigating Judges' Closing Order is heavily redacted,[234] the two Judges quite clearly found that Im Chaem held a significant degree of localized power, including direct authority over Phnom Trayoung prison. They also found that Im Chaem "was in overall charge of [the Preah Net Preah] district, including its communes and villages" along with relevant security centers (i.e. prisons) and worksites.[235] Not only did

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Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, July 10, 2017); KIERNAN, *supra* note 61, at 237.

229. *See generally IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version).

230. *Id.* at ¶ 8.

231. *Id.* at ¶ 10.

232. *See id.* at ¶¶ 23, 28-33.

233. *Id.* at ¶ 39.

234. In June, 2018, the ECCC Pre-Trial Chamber ordered that a more fulsome version of the Closing Order be publicly released. *See* Press Release, *The Pre-Trial chamber orders the publication of the Closing Order in case 004/1*, ECCC (June 8, 2018), https://www.eccc.gov.kh/sites/default/files/media/Press%20release%20PTC%20on%20publication%20of%20closing%20order%20in%20Case%2000401%20english.pdf [https://perma.cc/V8LN-MGDD]. At the time of writing the document was not yet publicly available.

235. *IM Chaem*, Case File No 004/1/07-09-2009-ECCC-OCIJ, Doc. No. D308/3, Closing Order (Reasons) (Public Redacted Version) at ¶ 174.

Im Chaem exercise such general authority in the area, but the Co-Investigating Judges further found that she had the discretionary authority to directly order arrests and executions throughout the district.[236]

While the remainder of the Closing Order reasons are mostly redacted, the basic facts that Im Chaem exercised direct authority over Phnom Trayoung prison *and*, unlike Duch, had the apparent authority to choose who was to be arrested, imprisoned, and executed, seems to make her degree of relative responsibility for the atrocities of the Khmer Rouge period at least roughly equivalent to, if not significantly greater than, that of Duch. While somewhat speculative, this very point has been made by various commentators, many of whom have argued that the non-redacted portion of the Closing Order provides insufficient reasoning to warrant dismissal of the charges against Im Chaem on jurisdictional grounds.[237]

Current ECCC International Co-Prosecutor Nicholas Koumjian unsuccessfully appealed the decision dismissing the charges against Im Chaem to the ECCC Pre-Trial Chamber, which, in a 3-2 decision split along national/international lines, upheld the Co-Investigating Judges' highly questionable finding that Im Chaem does not legally qualify as a "most responsible" individual.[238] While the Chamber largely agreed on a number of matters immaterial to the ultimate disposition of the question of whether Im Chaem would be tried or not, the national and international judges sharply disagreed in their respective analyses of both the methods through which the Co-Investigating Judges assessed whether Im Chaem qualified as a most responsible individual, and their ultimate outcome that she did not.[239] In considering this fundamentally important question, the Pre-Trial Chamber's three Cambodian judges, Prak Kimsan, Ney Thol, and Huot Vuthy, assessed the issue and upheld

236. *Id.* at ¶ 175.

237. *See* Erin Handley, *Tribunal's Edited Decision on Im Chaem Draws Ire*, PHNOM PENH POST (July 12, 2017), http://www.phnompenhpost.com/national/tribunals-edited-decision-im-chaem-draws-ire [https://perma.cc/MJ99-ECUL] (quoting experts including former ECCC investigator Craig Etcheson, Professor John Ciorciari and Open Society Justice Initiative legal expert Heather Ryan, all of whom were unable to understand the reasoning of the Closing Order based on its un-redacted content).

238. Prosecutor v. IM Chaem, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 004/1/07-09-2009-ECCC/OCIJ(PTC50), D308/3/1/20, Case 002/01, ¶ 325 (Pre-Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, June 28, 2018).

239. *See id.*

the order to dismiss the charges against Im Chaem in a mere ten paragraphs.[240] This brief analysis failed to engage, in any substantive sense, the question of whether Im Chaem should be tried as a most responsible individual, or to even scrutinize the means and arguments through which the Co-Investigating Judges arrived at the conclusion that she is not a most responsible individual.

In contrast, Pre-Trial Chamber international judges Judge Olivier Beauvallet and Judge Kang Jin Baik engaged in a thorough and, at times, scathing analysis of both the processes through which the Co-Investigating Judges assessed Im Chaem's relative responsibility and their ultimate outcome.[241] Judges Beauvallet and Baik chastised the Co-Investigating Judges' overly formal approach to evidentiary assessment, wherein the Co-Investigating Judges repeatedly dismissed evidence of mass killings and abuse in situations where a relatively precise number of total victims could not be accurately estimated. To the contrary, Beauvallet and Baik pointed out that while it may be impossible to know how many victims were killed at a particular site, this in no way refutes the basic fact that numerous victims were, in fact, killed.[242] Judges Beauvallet and Baik concluded that "the scale scope and impact of the crimes for which IM Chaem could be held responsible when her criminal conduct is considered in full are significantly greater than what was taken into account in the Co-Investigating Judges' assessment of gravity."[243] Rather, the two Judges found that the "evidence further sufficiently supports under the requisite probability standard the conclusion that not less than tens of thousands of people were victims of crimes at charged and uncharged sites, for which IM Chaem could be held responsible."[244]

While this decision likely spells the final conclusion of proceedings against Im Chaem, the sharp disagreement between the national and international Pre-Trial Chamber judges can only stoke arguments that the ECCC is being manipulated by the CPP just like domestic Cambodian courts routinely are.

Given the outcome of the case against Im Chaem, the CPP's perceived opposition to the cases, and the fact that the Co-Investigating

240. *Id.* at ¶¶ 82-92 (Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy).
241. *Id.* at ¶¶ 93-338 (Opinion of Judges Baik and Beauvallet).
242. *Id.*
243. *Id.* at ¶ 329.
244. *Id.* at ¶ 330.

Judges have already floated the idea of issuing a permanent stay for all Case 003 and 004 proceedings due to funding shortfalls and resultant fair trial concerns,[245] it remains highly doubtful that the cases against Ao An, Yim Tith or Meas Muth will ever go to trial. Given the seeming inevitability that neither Case 003 nor 004 will ever produce a trial, how the cases conclude and what justifications are provided for ending them without trials, has become important to the ECCC's legacy, including in terms of its relationship to the rule of law in Cambodia. Arguments grounded in the rule of law have been central to assessments of the treatment of Cases 003 and 004.[246] Those critical of the likely shutdown of the cases prior to trial have made arguments grounded in notions that the law must be applied in an evenhanded, clear, and transparent manner.[247] Those who have welcomed the dismissal of the cases–thus far, primarily the CPP and ECCC defense counsel–have made rule of law-based arguments citing the need to respect judicial independence, to protect fair trial rights, and to avoid the insertion of emotional, moral, or ethical reasoning into legal argumentation and decision-making.[248]

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245. Ultimately, Co-Investigating Judges Bohlander and You deferred the decision as to whether to dismiss the cases based on budgetary concerns. Case File No. 004/2/07-09-2009-ECCC-OCIJ, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004 and 004/2 and Related Submissions by the Defence for Yim Tith, Doc. No. D349/6, ¶ 69 (Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, Aug. 11, 2017) (holding that the judges "defer the decision on stay for the time being but will remain actively seised of the matter until the last closing order has been issued"); *see also* Erin Handley, *Tribunal Ruling to Keep Cases Open Welcomed, 'Threats' Decried*, PHNOM PENH POST (Aug. 14, 2017, 6:54 ICT), http://uat.phnompenhpost.com/national/tribunal-ruling-keep-cases-open-welcomed-threats-decried [https://perma.cc/LL6S-59Z2] (last visited Sept. 24, 2018); RECENT DEVELOPMENTS (2017), *supra* note 180 at 4 ("All current indications are that, even with adequate funding, none of [Cases 003 and 004] will be tried at the ECCC.").

246. *See, e.g.*, THE FUTURE OF CASES 003/004, *supra* note 161, at 5 (calling for "an impartial, judicial and non-political disposition of Cases 003/004, through genuine, credible, and thorough investigations into all allegations").

247. *See* Wallace, *Bucolic Life*, *supra* note 188; Erin Handley, *Im Chaem Filing Short on Reasoning*, PHNOM PENH POST (July 11, 2017), http://www.phnompenhpost.com/national/im-chaem-filing-short-reasoning [https://perma.cc/2D5J-DLP9]; THE FUTURE OF CASES 003/004, *supra* note 161, at 5.

248. For example, ECC defense counsel Michael Karnavas, in his personal blog argues that the dismissal of Im Chaem's charges is rule of law victory for the ECCC. However, Karnavas' arguments are based on an alternate set of assumptions concerning the motivations of the Co-Investigating Judges in terms of their approach to protecting fair trial rights. *See* Karnavas, *But Duch*, *supra* note 206; Michael G. Karnavas, *The ECCC Co-Investigating Judges on Ensuring Respect for Procedural Safeguards in Cases 003, 004, AND 004/2*, INT'L CRIM. L. BLOG (Aug. 16, 2017), http://michaelgkarnavas.net/blog/2017/08/16/eccc-respect-procedural-

Presently, there are several potential outcomes for Cases 003 and 004. First, though seemingly unlikely at this juncture, the United Nations and donor communities might ultimately successfully pressure the Cambodian government to move the cases forward to trial. Second, the Co-Investigating Judges could conclude that none of the remaining suspects qualify as senior leaders or most responsible individuals falling under the Court's personal jurisdiction and dismiss the charges against all of them.[249] Third, the Court itself could simply close prior to trial due to lack of funding. Fourth, the United Nations and donor countries could end their support of the ECCC due to the Cambodian government's clear interference. Fifth, the Co-Investigating Judges or Pre-Trial Chamber could find that the appearance of outside interference and/or fair trial concerns related to the actual conduct of the relevant investigations necessitates a stay of proceedings in the two cases.

Each of these potential outcomes entails mixed, even potentially conflicting, domestic rule of law ramifications. First, should the cases be dismissed based on a finding of a lack of personal jurisdiction, this outcome will surely be interpreted as a product of the CPP's interference in the work of the ECCC. This interpretation appears inevitable regardless of whether the two Co-Investigating Judges themselves, or other relevant ECCC actors, subjectively believe that such a finding is wholly grounded in "objective" legal reasoning. Absent the publication of public decisions outlining compelling reasons why available evidence does not support a finding of the suspects as "most responsible," any decision to this effect is bound to be viewed as a mere pretext. That the CPP regularly manipulates domestic courts, that Hun Sen has repeatedly explicitly and implicitly stated the CPP's opposition to Cases 003 and 004,[250] that there is

safeguards/ [https://perma.cc/9MX3-XH63] [hereinafter Karnavas, *ECCC Co-Investigating Judges*]; Erin Handley, *Im Chaem Defence Lauds Decision*, PHNOM PENH POST (July 13, 2017) http://www.phnompenhpost.com/national/im-chaem-defence-lauds-decision [https://perma.cc/7T5G-2PVU] (*quoting* Im Chaem's defense lawyers in the media, claiming that the dismissal demonstrates that "[T]he International Co-Prosecutor's assessment [that Im Chaem was amongst those "most responsible" for Khmer Rouge era atrocities] was flawed and ultimately wrong.").

249. This outcome would likely trigger further appeals by the International Co-Prosecutor, the outcome of which would be in the hands of the Pre-Trial and potentially Supreme Court Chambers.

250. It is likely true that, as some commentators have argued, the CPP's stance concerning Cases 003 and 004 has fluctuated and is not necessarily one of complete opposition. *See*

division within the ECCC itself between Cambodian staffers and their international counterparts concerning the cases, and rumors that certain suspects in the cases have received "assurances" from the Cambodian government that the cases would not proceed,[251] all create a familiar picture of selective, highly politicized impunity in Cambodia. This interpretation is buttressed by the implicit agreement of all relevant parties (*both* Co-Prosecutors, *both* Co-Investigating Judges, and the judges of the Pre-Trial, Trial and Supreme Court Chambers) that Duch qualifies as "most responsible."[252]

The second potential outcome, signaled by the Co-Investigating Judges' consideration of staying the charges against Ao An, Yim Tith and Meas Muth due to funding shortfalls,[253] is that concerns for the fair trial rights of the suspects in the cases will be used to legally justify not moving forward with trials. While fair trial rights are undoubtedly a core aspect of the kind of human rights-based conception of the rule of law espoused by transitional justice and ICL advocates, this approach is also unlikely to set a positive rule of law example, at least the way such concerns have been formulated thus far. Regardless of how narrowly the Co-Investigating Judges, or for that matter, other ECCC judicial chambers, interpret the ambit of the ECCC's personal jurisdiction, unless they are willing to revisit the decision to move forward with the trial of Duch, grounding any personal jurisdictional decision in fair trial rights will appear to most observers, especially Cambodians well-acquainted with similar machinations at the domestic

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Karnavas, *ECCC Co-Investigating Judges*, *supra* note 248. However, it is this public perception of the CPP's stance that is critical in terms of how any shutdown of the cases is interpreted, especially within Cambodia, where the public is well attuned to the way in which the CPP wields power through, at times, conflicting public statements.

251. For example, in a Phnom Penh Post article, So Mosseny, one of Yim Tith's defense counsel, is quoted as stating that "[t]he Cambodian government already provided clear and confident [assurances] that the case [against Yim Tith] would not be brought." Andrew Nachemson & Erin Handley, *Staying Khmer Rouge Tribunal Cases Mulled*, PHNOM PENH POST (May 8, 2017), http://www.phnompenhpost.com/national/staying-khmer-rouge-tribunal-cases-mulled [https://perma.cc/S33A-79QZ].

252. *See* Prosecutor v. Kaing Guek Eav alias "Duch," Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC, 43 (Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, Feb. 3, 2012).

253. *See* Case File No. 004/2/07-09-2009-ECCC-OCIJ, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004 and 004/2 and Related Submissions by the Defence for Yim Tith, Doc. No. D349/6, ¶ 69 (Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, Aug. 11, 2017)*; see also* RECENT DEVELOPMENTS (2017), *supra* note 180.

level, to be a pretext for the decision not to move forward with trials that the CPP publicly opposes.

This is not to suggest that there may not be ample grounds for discontinuing the cases based on violations of the suspects' fair trial rights. There is significant evidence that the integrity of the Case 003 and 004 investigations has been significantly compromised. International ECCC staff have quit over what they viewed as irregularities in these investigations, and various reports and rumors of government interference and ECCC staffers blocking or otherwise interfering with the investigations have emerged in the nearly decade since the investigations started.[254] While many of these problems have been attributed to efforts by the CPP (and national ECCC staff members working to effectuate the perceived wishes of the CPP) to undermine the investigations, the Co-Investigating Judges, or the United Nations itself, could determine that the integrity of the cases has been so compromised as to preclude any way forward in accordance with fair trial standards.[255] For such an outcome to be legitimated however, the judges, or the United Nations itself, would need to explicitly acknowledge the ECCC's clear failure in these cases and to openly discuss relevant findings concerning how the cases were undermined.

This outcome, pre- or mid-trial, would, from a rule of law perspective, be perhaps the most desirable one. If maintaining scrupulous adherence to the rule of law principles the United Nations itself espouses, including fair trial standards, and setting a positive example in this regard, were top priorities of the ECCC, the Court would need to openly assess its own shortcomings in adhering to the requirements of the rule of law. If the investigations were so interfered with and flawed as to be fundamentally compromised, then Court actors, such as the Co-Investigating Judges, could acknowledge this and explain how this process happened. This would likely involve calling out the CPP for failing to fully cooperate with the Court and for publicly stating the government's opposition to Cases 003 and 004. It would also likely involve the exposure of potentially embarrassing failures on the part of the United Nations and the ECCC's international

254. *See, e.g.*, KASPER-ANSERMET, *supra* note 179; PERFORMANCE AND PERCEPTION, *supra* note 15 at 26-27; DeFalco, *supra* note 163, at 46-47; CIORCIARI & HEINDEL, *supra* note 13, at 167-201.

255. *See, e.g.*, CIORCIARI & HEINDEL, *supra* note 13, at 167-201.

staff to move the investigations forward while maintaining their integrity. Given the allegations made against select international staff, such as former Co-Investigating Judge Siegfried Blunk,[256] such a process could also involve uncomfortable admissions of the United Nations and the international community's own failings in ensuring that the ECCC abides by the rule of law. Moreover, defense teams at the ECCC, including in Cases 001 and 002, have repeatedly argued that government interference and irregularities at the Court have compromised their clients' fair trial rights.[257] The United Nations has reportedly maintained a firm position that the verdicts in Cases 001 and especially 002 must be preserved at all costs and, as such, largely because an investigation into government interference into the Case 003 and 004 investigations could "open the door" to defense challenges in Case 002, the United Nations declined to conduct such an investigation in 2011.[258]

Such an honest process of critical reflection of the ECCC's rule of law shortcomings is perhaps the least likely outcome. The United Nations and donor states have shown little interest in conducting thorough, transparent investigations into prior allegations of malfeasance and political interference at the ECCC, and there is little reason to think this will change. After years of protracted negotiations to create the ECCC and many hundreds of millions of dollars spent on the Court since it began operations,[259] those invested in the ECCC are likely interested in fostering a positive narrative of the Court and its legacy for Cambodia. Investigating impropriety and political interference at the Court or shutting it down abruptly due to investigatory irregularities, are apt to be seen as outcomes that would

256. For an overview of the controversy surrounding the actions of Judge Blunk and the allegations made against him of complicity in various improper actions, such as failing to interview a sufficient number of witnesses and inserting pages from the Case 002 case file into the case 003 case file in order to create the appearance of having conducted a more thorough investigation, *see* CIORCIARI & HEINDEL, *supra* note 13, at 179-81.

257. *See, e.g.*, Bridget Di Certo, *Defence sees 'prejudice' trend*, PHNOM PENH POST, (Feb. 14, 2012), https://www.phnompenhpost.com/national/defence-sees-%E2%80%98prejudice%E2%80%99-trend [https://perma.cc/LA8T-67S6]; Stuart White, *Lawyers fire back at Nuon Chea defence*, PHNOM PENH POST (Oct. 14, 2014), https://www.phnompenhpost.com/national/lawyers-fire-back-nuon-chea-defence [https://perma.cc/D3LU-D9P3].

258. CIORCIARI & HEINDEL, *supra* note 13, at 200.

259. The ECCC began operations in 2006. The Court's most recent two year (2018-2020) budget request was for a total of US$46.12. *See* EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, PROPOSED BUDGET FOR THE BIENNIUM 2018-2019 (2017).

tarnish the ECCC's already uncertain legacy. It is also unlikely that the ECCC itself will engage in any form of thorough and transparent analysis of its own shortcomings. As the Court's primary investigative organ, the Office of the Co-Investigating Judges is best-positioned to examine investigatory irregularities, and other such actions. However, most allegations and rumors of such irregularities focus on the work of the Co-Investigating Judges themselves,[260] making such an outcome highly unlikely.

The choice to prioritize ensuring the finality of the Case 001 and 002 verdicts at the cost of Cases 003 and 004 is, to some degree, quite understandable. The ECCC issuing zero final judgments would surely raise the ire of many survivors and be perceived as a waste of money by donors. It does however, entail significant opportunity costs related to the Court's rule of law implications, including domestically in Cambodia. First, should Cases 003 and 004 be dismissed prior to trial, this outcome will be broadly interpreted, especially within Cambodia, as yet another example of the CPP wielding its influence to determine who will and will not be criminally prosecuted. The United Nations and the Court's donors risk implicating themselves in this process, and in doing so, suggesting that the rule of law consists solely of procedural requirements that can be conveniently manipulated to serve the interests of power. More specifically, absent the release of compelling, public reasons why Cases 003 and 004 should not proceed, the dismissal of these cases would suggest that the rule of law can tolerate selective application of the law and the inconsistent, seemingly conflicting interpretation of vague provisions, such as the determination of whom is to be deemed legally "most responsible" for crimes. The rule of law, at least as conceived of by Fuller and in the UN Secretary-General's 2004 report, cannot tolerate such selectivity, lack of clarity, internal contradiction, and incongruence between the substance and application of the law.[261]

If Cases 003 and 004 proceed to this likely conclusion, the ECCC may not only lend legitimacy to the CPP's extremely narrow, proceduralist view of the rule of law, but may also build the capacity of Cambodian legal actors working at the Court to construct more

260. *See, e.g.*, CIORCIARI & HEINDEL, *supra* note 13, at 167-201.

261. *See generally* FULLER, *supra* note 27; *The Rule of Law* (2004), *supra* note 26; *The Rule of Law* (2011), *supra* note 26.

convincing legal façades, or in the words of Dyzenhaus, "pretenses" of legality.[262] This danger has been recognized by ECCC defense counsel Michael Karnavas, who John Ciorciari and Anne Heindel quote as rhetorically asking "[a]re we not teaching additional skills to our local counterparts on how to avoid the application of the rule of law? I think this is going to be the darkest part of [the ECCC's] legacy."[263] A Cambodian ECCC staffer put this risk more succinctly, observing that "[w]hen you give them a knife, they can use it," referring to the Cambodian government's savvy wielding of legal and other tools against its opponents.[264] These fears appear to be at risk of materializing because of the United Nations' and donor community's desire to protect the Cases 001 and 002 verdicts at all costs, itself an example of what McAuliffe refers to as an emphasis on "outcomes" over "processes" at ICL institutions, which undermines their rule of law effects.[265] This emphasis, and the corresponding perceived need to avoid ECCC defense counsel from having a "field day" with the mere existence, let alone results, of any inquiry into interference with Cases 003 and 004,[266] has led to a situation wherein the Court risks contributing to the further erosion of the rule of law in Cambodia, rather than serving as a catalyst for true rule of law reform. While the Court's mere existence, and its publication of Khmer-language legal texts and decisions discussing fair trial and due process rights, may, in the long run, serve as an important resource for rule of law reform efforts in Cambodia, in the near term, the Court is at risk of being pulled into the empty cycles of legality that currently abound in Cambodia, whereby the rule of law is subverted through pretenses of legality.

V. CONCLUSION

This Article has demonstrated the falsity of the widespread assumption that the relationship between international criminal justice

262. Dyzenhaus, *Dignity in Administrative Law*, *supra* note 39, at 98.

263. CIORCIARI & HEINDEL, *supra* note 13, at 256. Coincidentally, Karnavas has also lauded the Co-Investigating Judges' decision to dismiss the charges against Im Chaem, and to consider a stay for the remainder of the Case 003 and 004 proceedings on his personal website. Karnavas, *But Duch*, *supra* note 206; Karnavas, *ECCC Co-Investigating Judges*, *supra* note 248. It is unclear the degree to which these opinions operate as a form of advocacy, as Karnavas is currently a member of Case 003 suspect Meas Muth's defense team.

264. CIORCIARI & HEINDEL, *supra* note 13, at 256.

265. MCAULIFFE, *supra* note 2, at 180-223.

266. *See* THE FUTURE OF CASES 003/004, *supra* note 161, at 4, 13 (internal citations omitted).

and the domestic rule of law in post-atrocity states is necessarily a positive one. While the argument that this relationship may be quite complicated is not especially novel or new, using the ECCC experience in Cambodia as a case study, this Article highlights the typically ignored possibility that ICL prosecutions may actually have a mix of positive, nil, *and negative* effects on the domestic rule of law, at least in the short run. In the Cambodian context, this risk is quite real and, arguably, in the process of being realized. The unwillingness of the United Nations, donor states, and the international staff at the ECCC to directly acknowledge and grapple with the consequences of the Cambodian government's repeated politicization of, and interference with, the Court's work, including in relation to Cases 003 and 004, has produced potentially harmful consequences to the rule of law in Cambodia. These consequences are most visible when viewed in light of the particularities of Cambodia's current rule of law deficit, which increasingly stems from government practices of subverting the rule of law through means obscured behind façades of legality. The ECCC's tacit toleration of the CPP's apparent interference with the Court's investigations, proceedings, and judicial decision-making risks legitimating the notion that the rule of law is mere window dressing, rather than anything of substance in even the most basic, procedural sense.

Perhaps the only course of action to be taken by the Court, its international backers, and the United Nations to promote the rule of law in Cambodia is a policy of extreme transparency; one that lays bare the Court's own rule of law shortcomings, presents them as unacceptable, and carefully explains how they impair the rule of law. However, given the investments that the United Nations, donor countries, international staff, and backers of the ECCC have made in the Court thus far, the likelihood of such an honest, fulsome admission is remote. As such, there exists a real danger that the ECCC may have a *negative* rule of law legacy within Cambodia, by ignoring government interference and tolerating the selective, incoherent application of relevant laws, while also building the capacity of Cambodian legal actors to construct more convincing façades of legality to obscure the illegality of such processes. Only time will tell whether protecting the ECCC's convictions of Duch, Nuon Chea and Khieu Samphan will ultimately be worth such deep rule of law compromises.