

Working Paper

Upholding the Right to Lawyer:

Lessons Learned from the Extraordinary
Chambers in the Courts of Cambodia

Cambodia Working Paper Series

Kimsan SOY & Vandamet HING

Abstract

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has an important function as a role model for the reform of the Cambodian legal system. This function can only be genuinely realized through legitimate and just trials. Defense counsels at the ECCC have contributed to that objective by protecting their client's fair trial rights during all phases the proceedings. However, fair trial rights are hardly addressed in domestic criminal proceedings due to a weak justice system and rule of law. Cambodian lawyers are reluctant to explain what the law says concerning fair trial rights due to limited capacity, corruption, fear of political intimidation and public misconception concerning their roles.

This study therefore raises the question of to what extent has upholding the right to effective legal representation at the ECCC had an impact on improving fair trial rights in domestic courts. The methodology in this study mainly relies on textual analysis of international and national legal frameworks related to fair trial rights, particularly the right to effective legal representation. It draws from a number of in-depth interviews with Cambodian legal professionals, especially lawyers, to assess how the ECCC practices in ensuring fair trial rights had an impact on their perceived roles in domestic practices. The main finding of this study is that the effective legal representation practice at the ECCC contributes to the positive development of these rights in domestic courts.

Keywords: Cambodia, fair trial, ECCC, defense lawyer, criminal justice, hybrid court

Imprint

Acknowledgments

The editors of this Working Paper series on Cambodia, Julie Bernath and Ratana Ly, would like to thank the Embassy of Switzerland in Thailand for their generous support to this publication project. They are also very grateful to Phalthy Hap, Christoph Sperfeldt, Rachel Killean, Natalia Szablewska and Kosal Path for providing important advice and support to authors, and to Alice Williams for proofreading this collection of papers. At the Center for the Study of Humanitarian Law, they warmly thank Champa Sy for her assistance. At swisspeace, they thank the team of the Working Paper series for their support of this project: Joschka Philipps, Elisabeth Mesok and Amélie Lustenberger.

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ISBN 978-3-906841-16-8
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List of Acronyms

ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OCIJ	ECCC Office of Co-Investigating Judges
RPEs	Rules of Procedure and Evidence
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTAC	United Nations Transitional Authority in Cambodia

Foreword to the Working Paper Series on Cambodia

Julie Bernath and Ratana Ly, editors of the Cambodia series

The year 2019 was an important milestone for transitional justice in Cambodia. It marks both 40 years after the end of the Khmer Rouge regime in early 1979, and 15 years after the establishment in 2004 of the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge tribunal.

On this occasion, this Working Paper series brings together a collection of papers by Cambodian early career researchers to reflect upon the transitional justice process in Cambodia. It is the result of a one-year publication project of the Center for the Study of Humanitarian Law at the Royal University of Phnom Penh and swisspeace, supported by the Embassy of Switzerland in Thailand. This series aims to give more visibility to Cambodian researchers in academic writings on transitional justice. As such, it is an attempt at working against the problematic politics of knowledge production that exist in the field of transitional justice. Although transitional justice scholarship has increasingly questioned the marginalization of local voices and perspectives when it comes to policy-making and practices of transitional justice, researchers from contexts in the Global South in which transitional justice processes take place still have less visibility in, and access to, academic debates on transitional justice in comparison to their peers from the Global North.

This set of papers highlights the important achievements made in pursuing justice, accountability and reconciliation in Cambodia. It also illustrates the vast experiences that Cambodian practitioners and researchers alike have gained in the transitional justice field in the last decade and more. At the same time, the papers reflect the ways in which transitional justice inherently constitutes a long-term process. Fifteen years after the establishment of the Khmer Rouge tribunal, the authors discuss the many challenges that remain in order for the transitional justice process to truly unfold its emancipatory and transformative aspirations.

Taken together, this collection of papers speaks to key issues that, beyond the case study of Cambodia, have become central in transitional justice scholarship ever since it has taken a critical turn. The papers identify the difficulties for transitional justice processes to contribute to long-term socio-political change, at the structural level, in order to guarantee the non-recurrence of human rights violations. They highlight the need to attend to the specific socio-political contexts in which transitional justice processes unfold. The papers also point to the selectivity of formal, state-sanctioned transitional justice processes, which contrast with continuities of violence and discrimination across time that parts of the population may experience, for instance women. They shed light on the diversity of actors involved in transitional justice processes, which cannot neatly be captured by a binary distinction of international versus local, and which include not only state actors or legal professionals, but also civil society actors or donors.

Transitional Justice in Cambodia: Fifteen Years After the Establishment of the ECCC

The Khmer Rouge regime was arguably the most totalitarian of the 20th century (Bruneteau 1999). Between April 17, 1975 and January 6, 1979, the Communist Party of Kampuchea, known as the Khmer Rouge, held power over the national territory. The Khmer Rouge aimed at creating a new people and a communist agrarian utopia within the timeframe of a single generation, in a surpassing of Mao Tse Tung's policies in communist China (Ibid). Under the rule of the Khmer Rouge, an estimated 1.5 to 2.2 million people died from starvation, torture, execution, forced labour and malnutrition — at least one in five of the 1975 population (Kiernan 2003).

Given the geopolitical context of the Cold War, the involvement of foreign countries in the conflicts in Cambodia and the political interests of the regimes succeeding the Khmer Rouge, it was only in 1997 that negotiations started between the United Nations and the Royal Government of Cambodia regarding accountability for crimes committed under the Khmer Rouge regime. After protracted negotiations, the ECCC was established in 2004 with the mandate of trying the senior leaders and those most responsible for crimes committed between April 17, 1975 and January 6, 1979 in Cambodia.

Ever since its establishment, the ECCC has attracted a lot of international attention from researchers, policy-makers and practitioners. It displays unique features as a transitional justice process. First, it is a hybrid tribunal or mixed tribunal, i.e. a court of mixed staff, which applies international and Cambodian law. While several hybrid tribunals were established elsewhere, the ECCC arguably represents the most national of all (Petit 2010, 195). Second, although the scope and form of victim participation has been significantly reshaped over time at the ECCC, it grants victims the right to formally participate as parties — a first in the history of international criminal justice (Ciorciari and Heindel 2014). Victims can indeed participate at the ECCC not only as witnesses or complainants, but also as civil parties. Finally, the ECCC's mandate also includes the provision of moral and collective reparations. While the exclusion of individual and financial reparations led to frustrations from civil parties (see e.g. Williams et al. 2018, 109-120), the ECCC's provisions on reparations significantly expanded over time to include non-judicial measures developed and implemented by the ECCC's Victims Support Section with governmental and non-governmental partners.

At the time of writing, three accused persons have been tried and sentenced in separate legal proceedings at the ECCC. In Case 001, the Supreme Court Chamber sentenced Kaing Guek Eav alias Duch, the former deputy and chairman of the security centre S-21, to life imprisonment for crimes against humanity, grave violations of the Geneva Convention, murder and torture (see Soy 2016). Case 002 consists of charges against former senior Khmer Rouge leaders. In light of its complexity and the advanced age of the accused, the Case was split in two to expedite the trial proceedings. The first portion of the trial, Case 002/01, focused on a set of crimes committed during the early stages of the Khmer Rouge regime: forced transfers of the population and the

execution of soldiers of the regime preceding the Khmer Rouge. This Case was completed in November 2016, however two of the accused died prior to its completion: the former Minister of Foreign Affairs, Ieng Sary, and the former Minister of Social Affairs, Ieng Thirith. Case 002/02 examines far-ranging charges related to key policies of the Khmer Rouge, including forced labour, security centres, forced marriages and treatment of minorities. The Trial Chamber judgment handed in November 2018 is currently under appeal. One of the two remaining accused, Nuon Chea, died in August 2019 at the age of 93 before the pronouncement of the Supreme Court Chamber judgment (see Kum 2019). The former Head of State of the Khmer Rouge regime Khieu Samphan, born in 1931, is the only accused in Case 002 now still alive.

Four suspects have additionally been indicted in Cases 003 and 004. However, the national and international side of the ECCC mostly disagreed on whether these cases should move to trial, with the national side arguing that the accused do not fall under the category of 'most responsible' of the ECCC's mandate (see e.g. Naidu 2018). Since the Cambodian ruling party has repeatedly voiced their opposition to these cases (Ciorciari & Heindel 2014, 177), they have become the focus of allegations of political interference (see e.g. OSJI 2010).

Besides the ECCC, civil society actors have significantly shaped the transitional justice process in Cambodia. Their work has been complementary to the ECCC, in particular when it came to victim participation, legal services, psychosocial support and outreach, as civil society organisations provided many key services for the ECCC due to the tribunal's limited funding or mandate in this field (Ryan and McGrew 2016; Sperfeldt 2012). Civil society organisations have also been key in designing and implementing reparations and non-judicial measures. Over time, many creative and artistic initiatives have emerged. NGOs were able to make use of the attention of the international donor community on transitional justice in Cambodia that arose with the establishment of the ECCC (Un 2013), although they have now for the past few years faced significant 'donor fatigue' (Sperfeldt 2012).

The establishment of the ECCC thus initiated a diverse process of transitional justice in Cambodia focusing on the Khmer Rouge regime. This process is also characterized by a significant transnational circulation of practices, since the ECCC was established in a time during which transitional justice had become institutionalized and professionalized as a field of policy-making, research and practice (see e.g. Sharp 2013; Rubli 2012). Several cohorts of international practitioners sojourned in Cambodia, including not only international criminal justice professionals — some of whom Kent (2013) described as 'tribunal hoppers', given their high mobility across internationalized tribunals — but also practitioners from the fields of civilian peacebuilding, media, arts and memory work.

Today, a rich and increasingly diverse body of scholarship also exists on transitional justice in Cambodia, with works from various disciplinary perspectives. This includes not only the dominant field of law (e.g. Werner and Rudy 2010; McGonigle 2009) but also socio-legal studies (e.g. Killeen 2018; Ly

2017; Manning 2012), political science (e.g. Path 2017; McCargo 2015), anthropology (e.g. Hinton 2014; Kent 2013), geography (Sirik 2016; Hughes 2015), psychiatry (Chhim 2014) or history (Gidley 2019). As elsewhere in the field of transitional justice, this scholarship is also characterized by numerous publications of authors who have themselves been closely involved in the transitional justice process in various functions (e.g. Jarvis 2014, Lemonde 2013, Studzinsky 2011, Mohan 2009).

Ever since the establishment of the ECCC, the literature has discussed its relevance as a transitional justice institution. Some analysts highlighted that the tribunal was important and better than none (see e.g. OSJI 2006). Others argued that given the political context, and most importantly the political control of the national judiciary in Cambodia, a hybrid tribunal would only lead to a flawed accountability process (see e.g. Human Rights Watch 2014). The ECCC's extremely limited temporal scope has also been subject to much discussion. The tribunal's mandate only focuses on the Khmer Rouge regime, although this period is embedded in decades of political violence, war and authoritarian rule. Civil society organisations, while complementing the ECCC's limitations in diverse ways, arguably reproduced to an important extent the focus on the Khmer Rouge period in their transitional justice work.

Today, given current political developments in Cambodia, reflecting upon the transitional justice process and its long-term, transformative potential is of particular relevance. With the dissolution of Cambodia's main political opposition party in 2017 and its exclusion from the 2018 election (see e.g. KOFF 2018), the country has moved further away from its scheduled trajectory towards democracy. In an increasingly authoritarian context, civil society organisations, journalists but also researchers working on human rights advocacy face significant difficulties to conduct their work in an independent manner, free from political pressure. Debates over the impact of international interventions in Cambodia have thus re-emerged, most notably over the UN peacebuilding mission of 1992-93. But the political situation in contemporary Cambodia also raises questions regarding the legacies of the ECCC and the transitional justice process.

Overview on the Collection of Working Papers on Cambodia

This collection of papers contributes to these discussions. It brings together the perspectives of eight authors with various disciplinary backgrounds, including law, social sciences, development studies and international affairs. Many of these authors also draw from their previous experiences and insights as practitioners in Cambodia's transitional justice process.

A first group of authors discusses how far the transitional justice process has gone in Cambodia, and what has been achieved in terms of the goals initially set for this process.

In their paper, Kimsan Soy and Vandanet Hing examine how the ECCC has contributed to improving fair trial rights in the national judiciary. One of the main hopes associated with hybrid tribunals has been that these tribunals

would contribute to strengthening the national judiciary, as they are set in the country where the crimes have taken place and employ national staff. This was also one of the strong aspirations shared by actors involved in the establishment of the ECCC. Fifteen years later, Soy and Hing ask how defense counsels and experiences of legal representation at the ECCC have contributed to developments in the national justice system. Drawing from qualitative interviews conducted with Cambodian legal professionals, they argue that although the ECCC clearly demonstrates international fair trial standards, in particular the right to effective legal representation, the greatest challenge standing in the way of positive legacies for the domestic judicial system remains political control of the judiciary.

In her paper, Sotheary You also reflects on the impact of transitional justice on contemporary Cambodia, but with a focus on sexual and gender-based violence against women. In order to do so, she draws from the concept of guarantees of non-recurrence and from feminist scholarship on gender justice. You discusses how the ECCC has addressed sexual and gender-based violence so far, in the legal proceedings and in the reparations projects endorsed by the ECCC. She also examines measures taken by the Cambodian government to address the non-recurrence of sexual and gender-based violence. She argues that in light of the ongoing discrimination against women in Cambodia, the transitional justice process has failed to effectively address the issue. She proposes policy recommendations and the adoption of a comprehensive approach, beyond the remit of the ECCC, to ensure the non-recurrence of sexual and gender-based violence against women.

In his paper, Sovann Mam reflects on to what degree reconciliation has been achieved in Cambodia after the Khmer Rouge regime. Drawing from qualitative interviews conducted in Anlong Veng, the former Khmer Rouge stronghold in the North-West of Cambodia, he argues that reconciliation is still missing at the community level. Mam thereby questions the prevalent political narrative in Cambodia that reconciliation has been fully achieved since the end of the 1990s. He shows that while the policies of the Cambodian government in the 1990s secured stability and negative peace, they also delayed the quest for justice and the establishment of the ECCC. Based on his field research in Anlong Veng and interviews with civil society actors working on reconciliation, Mam suggests that more attention should be paid to facilitating processes of acknowledgment and empathy between victims and perpetrators.

In addition to these three papers reflecting on the achievements and limitations of the transitional justice process in Cambodia, the second group of authors focuses on the roles and views of various actors.

In her paper, Samphoas Huy reflects upon the role of intermediary organisations in facilitating, implementing and shaping victim participation at the ECCC. She conceptualizes the role of Cambodian civil society organisations as 'vernacularizers', or actors intimately involved in the translation of international transitional justice norms into the Cambodian context. She analyses this process of vernacularization in various, rich examples of outreach

and inreach that have taken place around the ECCC over the past years. Huy argues that through this process of translation and appropriation, which similarly to previous human rights work in Cambodia significantly draws upon Buddhist understandings, local actors created a transnational space that allowed for meaningful victim participation. But her paper also shows that this process was not without creating 'frictions': actors involved faced challenges in translation but also difficulties related to questions of representation, agency and voice in victim participation.

In her paper, Somaly Kum focuses on donors – a group of actors that is not researched enough in the field of transitional justice, although being key in shaping transitional justice interventions. She provides an overview of the various types of donors that have been funding transitional justice in Cambodia – state donors; non-state donors; multilateral donors. She asks what their role has been in shaping the transitional justice process, both directly and indirectly, through funding the ECCC and civil society projects. Kum draws from qualitative semi-structured interviews conducted with current and former donor representatives, as well as transitional justice practitioners. She discusses how donors reflect upon their roles and societal impact 15 years after the establishment of the ECCC, and shows that one of the main motivations mentioned by her respondents for funding transitional justice, besides contributing to justice and accountability, was to contribute to the rule of law and capacity building.

Finally, Boravin Tann and Khuochsopheaktra Tim discuss the perspectives of an important segment of the Cambodian population: the younger generations born after the Khmer Rouge regime. Although representing the majority of the population today, this group has been rather sidelined in transitional justice discussions in comparison to the elder generations of direct victims. Drawing from rich empirical data, including a recent quantitative survey and focus group discussion, Tann and Tim describe how their respondents, keen to learn more about the Khmer Rouge past, deplored the limitations of information on this matter. They analyse how they view the memorialization processes on the Khmer Rouge regime. They also discuss the existing scope for youth participation in Cambodia's transitional justice process and the intersections between memorialization, the ECCC and the non-recurrence of human rights violations.

Taken together, these papers show avenues for further research and initiatives on transitional justice in Cambodia, from the perspective of Cambodian authors. They also illustrate the relevance of the Cambodian case study for the broader field of transitional justice today. Fifteen years after the establishment of the ECCC, these papers examine from various academic perspectives whether, how and to what extent the transitional justice endeavors in Cambodia have created change. They thereby speak to questions of agency, power and representation that are at the core of critical transitional justice scholarship, and to the long-term emancipatory and transformative aspirations that continue to shape the field.

1 Introduction

The work of international criminal courts must be evident and exhibited to the victims of the atrocity crimes, to the international community and to the perpetrators, so that justice will be seen to be served and prevail. This goal must be realized through fair and just trials. International criminal courts should demonstrate a model of justice, operating independently against external influences and pressures, especially those pressures that involve victors' justice. Only the guarantee of a fair and just trial can allow a state to truly declare that it has a high regard for the rule of law (Tuinstra, 2009: 1-2). Hybrid tribunals have the ability to demonstrate a credible model for local rule of law reform if they meet the basic international fair trial standards (Ryan and McGrew, 2016: 51).

In criminal proceedings the accused generally faces a high risk of losing individual rights and liberties, owing to the fact that their adversary is the prosecutor, who represents a powerful state. In international criminal proceedings, the risk is greater when the prosecutors represent the international community. International criminal proceedings are complex because of the scale and nature of the alleged crimes and the fact that the accused is likely to be found guilty of the crimes committed by other individuals or subordinates. The right to a fair trial is universally recognized as one of the fundamental norms of international human rights law. It is designed to safeguard individuals charged with a criminal offense from being arbitrarily curtailed or deprived of their basic rights and freedoms (Pejic and Lesnie, 2000). One of the most important preconditions of the right to a fair trial is the right to effective legal assistance (Tuinstra, 2009: 1-2). It is therefore essential for the accused to have a competent defense counsel who can provide the accused with legal advice on available defense tactics as a counterbalance to the state prosecutor or prosecutor representing the international community.

The appointment of a defense counsel alone cannot guarantee effective defense. Defense counsels are aware of political interference as one of the key challenges in international criminal justice but this cannot be a mere excuse for them not to advocate their case effectively (Mégret, 2002: 1261-62). When counsels defend perpetrators of heinous crimes, they often face a negative stigma of amorality from the public (Tuinstra, 2010: 466-69) and are perceived to be obstructing the administration of justice (Solomon 1988, 89). This is significant for Cambodia where most Cambodian lawyers are hesitant to explain what the laws say regarding the right to effective legal assistance even in typical criminal cases due to a lack of experience, fear of political intimidation and public misconception concerning their role (Ryan & McGrew, 2006).

Cambodia and the United Nations (UN) reached an agreement in 2003 to establish the ECCC to bring to trial the senior leaders and those most responsible of the Khmer Rouge, the brutal regime that summarily executed about 1.7 million people between 1975-1979, thereby wiping out a quarter of Cambodia's population (McCargo, 2011: 613), and thus to uphold their accountability for international crimes.¹ The ECCC is expected to provide a stimulus for genuine progress towards legal and judicial reform. Some of the key mandates

¹ See official website of the ECCC: <https://www.eccc.gov.kh/en>. Accessed May 4, 2019. <https://www.eccc.gov.kh/en/introduction-eccc>

² See 2003 Agreement between the UN and Cambodian Government; and 2004 Law on ECCC, article 1. Available at <https://www.eccc.gov.kh/en/document/legal/agreement> and <https://www.eccc.gov.kh/en/document/legal/law-on-eccc> respectively. Accessed November 22, 2019.

for the ECCC are to end the culture of impunity through accountability, to promote national reconciliation and to demonstrate a model court for long-term efforts at judicial reform in Cambodia.²

The ECCC has arguably upheld a number of fair trial rights, such as presumption of innocence, equality of arms, procedural transparency and consistency, protection from political interference, judicial independence and impartiality and pre-trial detention issues. According to Ciorciari and Heindel (2014) defense counsels at the ECCC have been recognized to have upheld all of these concepts of fair trial rights by tirelessly representing their clients and challenging the credibility of the ECCC at all phases of the proceedings. These fair trial rights rarely occur in Cambodian domestic practice (Ciorciari and Heindel, 2014: 70) and are not likely to improve anytime soon. There are reasons for this. The ECCC will not address all the problems, especially concerning fair trial rights in the current judicial and legal system that is highly prone to political interference and corruption. The ECCC has introduced best practices and developed professional legal skills of its national staff, but the new practices and skills may not be relevant to the actual practices in domestic courts as capacity and resources in the Cambodian justice system remain seriously deficient. The ECCC is far from immune to political interference and alleged corruption, which undermine its status as a model for domestic courts; thereby, affecting the public's optimism, especially the new generation of legal professionals (Ryan and McGrew, 2016: 59-68).

The objective of our study is to understand the international standards of the right to effective legal assistance in relation to the role of the defense counsel and to what extent the ECCC abides by it, in order to set the benchmark for local capacity building and practices. This study reassesses and updates the progress of the ECCC's fair trial legacy by reflecting upon 15 years of its operation. Regardless of several factors undermining the defense lawyers' role in the Cambodian court system, it strongly argues that upholding fair trial rights and the promotion of a strong judicial system in Cambodia must start with lawyers and the enhancement of their strength, competency and responsibility and the encouragement of other actors of the courts to also strongly uphold fair trial rights. This study further seeks to provide assistance by encouraging lawyers to enhance their profession and to advocate their case as much as they can in line with the principles of fair trial rights by drawing on the good practice demonstrated by defense lawyers at the ECCC. The study also helps to raise awareness among judicial officials, including legal practitioners, law students and the general public, of the importance of the right to effective legal assistance as an important means to ensure a functioning criminal justice system as well as respect of the rule of law in Cambodia.

The research methodology in this study adopts a socio-legal study in comparative law that generate in-depth discussion about "rule of law, law and development and legal harmonization" (Riles, 2006: 8). The comparative law approach helps this study analyze legal standards due to the presumption that international criminal courts and other human rights courts must comply with international standards of fair trial rights, including the right to effective

legal assistance, in order to maintain their legitimacy and jurisprudence. The socio-legal approach in this study examines the issue beyond legal instruments from various other perspectives such as institutions, cultures and experiences (Arthurs and Bunting, 2014: 487). In this regard, we conducted semi-structured in-depth interviews with eight members of the legal profession between May and August 2019. We selected three categories of respondents: 1) legal professionals (prosecutors and lawyers) in the Cambodian judicial system who have experience with the ECCC; 2) legal professionals (a judge, lawyers, and a court clerk) in the Cambodian judicial system who do not have experience with the ECCC; 3) international legal professionals who do not practice in the Cambodian judicial system but have experience with the ECCC. The respondents' views expressed in this paper are his or her own and do not necessarily represent the views of his or her institution. This paper is divided into three parts: first, the paper discusses the legal framework of the right to legal representation (section 2). Then the paper discusses the challenges facing Cambodian lawyers in ensuring the accused's right to a fair trial in Cambodia (section 3). The last section discusses the achievements of defense lawyers at the ECCC in promoting criminal justice and the rule of law (section 4).

2 Legal Framework of the Right to Legal Representation

- 3 ICCPR General Comment No. 32, § 13.
- 4 Common Article 3(d) of Geneva Convention 1949; Article 75.4(a) of Additional Protocol I and Article 6.2(a) of Additional Protocol II to the Geneva Conventions.
- 5 Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.I.29, doc. 4 (Sept. 7, 2007), § 7.
- 6 *Airey v. Ireland*, 32 European Court of Human Rights (ser. A) (1979).
- 7 *Ibid.*, 12.
- 8 *Steel & Morris v. United Kingdom*, 41 European Court of Human Rights (pt. 3) at 403. (2005)
- 9 *Ibid.*, 427.
- 10 Article 21(4) of the ICTY Statute; Article 20(4) of the ICTR Statute; Article 67(1) of the ICC's Rome Statute.
- 11 *Ibid.*
- 12 Article 18(3) of the ICTY Statute; Article 17(3) of the ICTR Statute; Article 43(6), 55(2), 61 of the ICC Statute.
- 13 Rules 63(A) of the ICTY RPE and ICTR RPE provide a right to counsel for the accused during the questioning.
- 14 Rules 42 of the ICTY RPE and ICTR RPE.
- 15 Rules 44-46 of the ICTY RPE; Rules 44-46 of the ICTR RPE; Rules 20-22 of the ICC RPE.

The right to legal assistance or right to legal representation in criminal proceedings is widely recognized as one of the most vital prerequisites of the right to a fair trial in criminal justice. The Universal Declaration of Human Rights (UDHR, Article 11.1) and the International Covenant on Civil and Political Rights (ICCPR, Article 14.1) acknowledge both fairness and equality before independent and impartial courts. This has been repeatedly interpreted by the UN Human Rights Council in its General Comment 32 to include the right to legal assistance in order to ensure the accused's right to procedural fairness (Davis, 2009: 147 and 162). In particular, the UN Human Rights Council further explains that the right to counsel is necessary for the realization of 'the principle of equality between parties', which requires that '[...] each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.³

The right to legal assistance is also endorsed in humanitarian law treaties.⁴ In the common-law adversarial system it is traditionally regarded as one of the constitutional rights to safeguard human life and liberty (Kerr, 2005: 1229). The United States acknowledges the right to 'Assistance of Counsel' in the Sixth Amendment to its Constitution. This universal recognition through various leading human rights instruments gives the right to legal assistance further recognition as customary international law (Fletcher, 2004: 124).

Notably, the Inter-American Commission on Human Rights often emphasizes the need to remove barriers to access to justice, including the provision of access to legal assistance, especially for indigent accused persons.⁵ In *Airey v. Ireland*⁶ in 1979, the European Court of Human Rights (ECtHR) set the standard for European countries regarding the right to legal assistance by demanding that Ireland provides legal counsel to Ms. Airey (she was initially denied such rights under Irish law) and to set up a legal aid system that would guarantee access to legal assistance (Johnson, 2010: 164-66). The ECtHR relied on Article 6 of the European Convention on Human Rights (ECHR) and explained that the intention of ECHR is 'to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.⁷ The ECtHR reaffirmed its position on the practical and effective right to legal assistance in *Steel & Morris v. United Kingdom*⁸ and repeatedly stressed in its reasoning the importance of such rights for a functioning democratic society.⁹

Provisions for the right to legal assistance found in the Statutes of international criminal courts¹⁰ bear a close resemblance to related provisions for such rights in the aforementioned human rights treaties. The Statutes of international criminal courts provide that an accused is guaranteed to have a legal representative 'in any case where the interest of justice so requires, and without payment by him in any such case if he does not have sufficient means to pay for it'.¹¹ This right is also extended to suspects and witnesses who might be called to testify.¹² Moreover, the Rules of Procedure and Evidence (RPEs) of international criminal courts reaffirm the right to legal assistance for the accused¹³ and suspects.¹⁴ The RPEs provide further provisions for the process to appoint a lawyer including the qualification requirement, roles and responsibilities under the legal aid system and rules of professional conduct.¹⁵

2.1 General Principles Regarding the Guarantee of Competent Defense Counsel

According to the UN Basic Principles on the Role of Lawyers, lawyers are entrusted with a dignified duty as 'essential agents of the administration of justice'.¹⁶ It is a fair implication that a competent, independent and committed defense team is indispensable to assist any criminal court in ensuring that the accused's rights are respected, that evidence against the accused is fully tested and that legal principles are appropriately applied to the alleged crimes. In the adversarial criminal systems, the principle of partisanship requires counsels to represent their clients zealously (Dare, 2009: 5). This principle demands that counsels work diligently, exhausting all legal means to ensure that their client's right to a fair trial is respected by state prosecutors (Kerr, 2005: 1229). Therefore, lawyers are regarded and required to be highly competent and experienced so that they are able to provide effective legal assistance and advice to their clients (Tuinstra, 2010: 463).

Under Article 6(3)(c) of the ECHR, defendants have 'the right to an adequate defense'.¹⁷ In *Imbrioscia v. Switzerland*, the ECtHR held that 'assigning a counsel does not in itself ensure effectiveness of the assistance'. In *Öcalan v. Turkey*, the ECtHR argued that 'skilled legal assistance' is necessary for the defendant to obtain an effective defense.¹⁸

In *Akayesu* at the International Criminal Tribunal for Rwanda (ICTR), the Appeal Chamber judges ruled that an accused, particularly indigent accused, is entitled to a competent counsel.¹⁹ Through this channel, the Appeal Chamber in *Akayesu* found that 'the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defense, in particular the principle of equality of arms'.²⁰ A Trial Chamber at the ICTR claimed that the assigned counsel must have 'relevant and extensive expertise at a high level' in order to ensure 'an effective defense of the accused' and that it is crucially important for counsels to meet a number of qualification requirements.²¹ Counsel qualification undoubtedly affects the credibility of the court (Ellis, 1997: 522-24).

2.2 Qualification Requirements for Defense Counsel at International Criminal Courts

In international criminal courts the defense counsel is normally required to have a minimum number of years of experience. The RPE of the International Criminal Tribunal for the Former Yugoslavia (ICTY) did not demand assigned counsels to have a certain number of years of experience until its amendment in 2004, in which it requires 'at least seven years of relevant experience'.²² As for the ICTR, the assigned counsel is required to have 'at least ten years of relevant experience', although the RPE and the Directive of the ICTR do not specify this.²³ At the International Criminal Court (ICC) assigned counsels

- 16 Principle 12 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
- 17 *Imbrioscia v. Switzerland* (Appl. No. 13972/88), 24 November 1993.
- 18 *Öcalan v. Turkey* (Appl. No. 46221/99), 12 March 2003.
- 19 ICTR Appeal Chamber Judgement, *Akayesu*, § 78.
- 20 *Ibid.*, § 76.
- 21 ICTR Decision on the Motion of the Defense, *Ntakirutimana*, § 17.
- 22 Rule 45 was amended 28 July 2004 and these amendments were included in ICTY RPE Rev. 32, 12 August 2004.

- 23 Rule 45(A) ICTR RPE (8 June 1998 et seq.); see also Article 13 of the ICTR Directive (2004).
- 24 Rule 22 of the ICC RPE and Regulation 67 of the ICC Regulations of the Court.
- 25 Regulations 140-142 of the ICC Regulations of the Registry.
- 26 Regulations 140-142 of the ICC Regulations of the Registry. Examples of national and international associations of defense counsels are: International Criminal Court Bar Association (ICCBA), Association of Defense Council, International Bar Associations (IBA), International Criminal Defence Attorneys Association, United Nations Interregional Crime and Justice Research Institute.
- 27 Rule 44(A) of the ICTY RPE (Rev. 39); Regulation 67(2) of the ICC Regulations of the Court; Article 13(B)(vi) of the SCSL Directive on the Assignment of Counsel.
- 28 ICTY Trial Chamber, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, Kunarac et al. (Case No. IT-96-23&23/1), 14 March 2000, § 13 § 14.
- 29 Decision on the Request of the Accused Radomir Kovac, Kunarac et al., § 18.
- 30 The ICC Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1), Article 13(2)c.
- 31 ICTY Appeal Chamber, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, Tadic (Case No. IT-94-1), 15 October 1998, (Tadic) § 65.
- 32 Tadic, § 48-50.

should have more than ten years of relevant experience with established competence in international criminal law and procedure and must be practicing criminal law as a lawyer, prosecutor or judge.²⁴

The ICTY requires the defense counsel to be knowledgeable about both adversarial and inquisitorial systems (Ellis, 1997: 522-24). In Tadic, an English barrister familiar with the adversarial system was asked to provide assistance in conducting cross-examination of witnesses for the prosecution because the Dutch counsel for Tadic was from a civil law system. In civil law inquisitorial systems, the defense counsel does not conduct its own investigations or prepare witnesses for testifying before the court. At the ICTY a majority of the defense counsels may face many challenges when working in the legal environment predominated by an adversarial system because they are from the former Yugoslavia, which had adopted a civil law system. Consequently, trials before the ICTY have taken longer than expected. There are only a few defense counsels who have professional experience in both common-law and civil law systems.

To prevent this disadvantage, assigned counsels before international criminal courts should be trained in both theoretical and practical aspects of carrying out an effective defense in international criminal cases. At the ICC, the Registry is tasked with organizing trainings for the defense counsel.²⁵ There are various international and national associations of defense counsels who participate in organizing training sessions for lawyers interested in representing criminal cases before international criminal courts.²⁶

A counsel should be of good standing and not have been involved in criminal or disciplinary proceedings. Such integrity is necessary to avoid the undermining of the administration of justice.²⁷ In Kunarac et al., the ICTY prevented an accused from obtaining legal assistance from a pro bono counsel because that counsel had previously committed misconduct in contempt of the ICTY.²⁸ In this case, to protect the interests of the accused and the administration of justice, the Trial Chamber denied audience to the counsel.²⁹

According to the ICC Code of Professional Conduct, the counsel is required to refuse to represent an accused if they believe that they do not have 'the requisite expertise'.³⁰ In case of incompetence of counsel alleged by the accused, the accused must prove it on the basis of compelling arguments and relevant facts. In Tadic, the ICTY Appeals Chamber argued that the counsel is presumed competent, even if the counsel acts against the wishes of the accused, unless the accused raises awareness of counsel incompetence to the court.³¹ A counsel would be considered as incompetent when the accused suffers injustice as a result of established gross negligence on the part of counsel.³²

The ICTR adopted a similar position on the assumption of counsel competency unless 'rebutted by evidence to the contrary'.³³ The ICTR established that the

failure of counsel to address important issues does not, in itself, constitute evidence of counsel incompetence because it may be a problem of the defense strategy agreed to by the accused.³⁴

2.3 The Right to Legal Representation under Cambodian law and ECCC

Regarding the status and application of these human rights instruments related to legal representation, the Constitutional Council has decided that international treaties can be directly applied in the domestic court jurisdiction.³⁵ The Constitution is considered as the highest law in Cambodia, and all laws and regulations must be enacted, interpreted and applied in such a way as to not contradict the Constitution. Since the Constitution acknowledges international human rights treaties, it is implied that these human rights treaties are expected to have similar privilege as the Constitution when compared to domestic laws (Meas, 2016).

In the case of the right to legal representation under the Cambodian law, as it applies to the ECCC, as part of Cambodian domestic courts.³⁶ An individual charged with a criminal offense has the right to legal assistance of his own choosing under Cambodian law.³⁷ If the accused cannot afford to hire his own lawyer, he may submit a 'request to have a lawyer appointed for him in accordance with the Law on the Bar Association of the Kingdom of Cambodia' (The Bar Association n.d.).³⁸ The assistance of legal representation is mandatory if the case involves a felony or an underage accused.³⁹ In addition, the Constitution (Article 38) explicitly acknowledges the right to legal assistance, providing that 'Every citizen shall enjoy the right to defense through judicial recourse'. The Constitution (Article 31) also incorporates key international human rights treaties, to which Cambodia is a party, which provides an accused with the right to legal representation of their own choosing and free legal assistance for an indigent accused where the interest of justice so requires.⁴⁰ The Bar Association has responsibilities to ensure that the right to legal assistance of the indigent accused is fully respected. Furthermore, assigned lawyers for indigent accused are still obliged to represent their poor client zealously in the same manner that they would represent fee-paying clients.⁴¹ The Internal Rules also provide that the Bar Association is responsible for funding and maintaining legal staff to provide legal services to the poor.⁴²

- 33 ICTR Appeal Chamber Judgment, Akayesu, (Akayesu) § 78.
- 34 Akayesu, § 83.
- 35 Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, dated July 10, 2007.33 ICTR Appeal Chamber Judgment, Akayesu, (Akayesu) § 78.
- 36 See Law on the establishment of the Extraordinary Chamber in the Court of Cambodia, 2004.
- 37 Article 300 of the Code of Criminal Procedure of the Kingdom of Cambodia (CCP).
- 38 Article 300 of the CCP.
- 39 Article 301 of the CCP.
- 40 Cambodia ratified the ICCPR and it entered into force on 26 August 1992. See Article 14(3)(d) of the ICCPR.
- 41 Article 300 of the CCP.
- 42 Article 24 and 24 of the Internal Rules of the Cambodian Bar Association; Article 30 of the Law on the Bar

3 Challenges Facing Cambodian Lawyers in Ensuring Fair Trial Rights

43 ECCC Trial Chamber, Judgment on Case 001. ECCC Document E188 (26 July 2010). Accessed October 31, 2019. <https://www.eccc.gov.kh/en/document/court/judgement-case-001>.

44 Constitution of the Kingdom of Cambodia, adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993 at its 2nd Plenary Session.

Despite the existence of this legal framework regarding the right to legal representation in Cambodia, lawyers still face numerous challenges in ensuring the right to a fair trial.

3.1 Cambodia's Weak Legal System

Following the collapse of the Khmer Rouge regime there were only six to 12 surviving lawyers out of an estimated 400 to 600 legal professionals (Linton, 2007: 5). The Khmer Rouge publicly announced their purging campaign against professionals, intellectuals and educated people, who they saw as a major threat to the communist party (Linton, 2007: 5). The brutal regime completely abolished the judicial system and left Cambodia without any courts, judges, prosecutors or lawyers.⁴³

After toppling the brutal Khmer Rouge regime, the Vietnamese government took control of Cambodia as an occupying power and helped set up a legal system. This was according to the Communist model in which courts were considered as agents of the state meant to protect the policies of the government (Dunlap, 2014). Due to the shortage of legal professionals required for the courts to function efficiently, the Vietnamese government provided a three-month legal training course to a number of communist party members (Dunlap, 2014).

In 1993, the United Nations Transitional Authority in Cambodia (UNTAC) was established to restore peace and security to Cambodia based on the 1991 Paris Peace Agreement, adopting transitional criminal law and procedure (Dunlap, 2014). UNTAC provided legal training to 60 laymen, the first independent legal services since the Khmer Rouge regime (Neilson, 1996: 20). The Cambodian Defenders Project, sponsored by the United States Agency for International Development, subsequently provided another nine-month legal training course. Twenty-five laymen graduated in 1995, the first graduate law class in criminal law areas (Dunlap, 2014). Later, the government provided an eight-month training course for lawyers and set up the Bar Association staffed by graduates from this training (Dunlap, 2014). There are currently about 1,346 practicing lawyers in Cambodia (Bar Association n.d.) in a country with a total population of approximately 16 million (CIA, 2019).

Defense counsels in criminal proceedings in Cambodia face many difficulties in fulfilling their duties for the protection of their client's right to a fair trial. One of the key challenges is the deficiency in the justice system. Articles 128 and 51 of the Cambodian Constitution acknowledge the independent role of the judiciary through the principle of separation of powers.⁴⁴ It dictates that no single body has more authority or influence than another. Unfortunately, the ruling party in Cambodia has managed to consolidate its power through the politicization of the legislative and the judiciary (CHRAC, 2009: paras. 9-11). Judges are members of the ruling party, and they make public their connection with the ruling party (CHRAC, 2009: paras. 9-11). Other

major judicial bodies such as the Supreme Council of Magistracy, tasked with upholding judicial independence, and the Constitutional Council, responsible for safeguarding the constitutionality of legislation, are universally perceived as active henchmen of the ruling party (CHRAC, 2009: paras. 9-11).

In 2001, the government declared they would set a short-term and a long-term plan for legal and judicial reform; unfortunately, the pace has been lagging. Three judicial laws were subsequently drafted: the Law on the Statute of Judges and Prosecutors, the Law on the Organization and Functioning of the Supreme Council of the Magistracy and the Law on the Organization and Functioning of the Courts. The three judicial laws are fundamentally important to ensure the true independence of the courts, to increase the transparency and competency in the courts, and to ensure the proper functioning of the courts. In May 2014, the three draft judicial laws were passed by the National Assembly and subsequently by the Senate. This received criticism from national and international rights groups because they claimed that these laws give more power to the executive to control the judiciary (West, 2019) and because it was done unilaterally by the ruling party without any input from the opposition party and rights groups (Sokheng, 2014).

In the absence of judicial independence, the respect of fair trial rights cannot be expected. Defense counsels in Cambodia are discouraged from performing their proper roles when they understand the risks involved in challenging the judges.

3.2 Lawyer Recruitment and Shortage of Lawyers

In addition to these challenges, there are also difficulties relating to lawyer recruitment and the shortage of lawyers. The Bar Association is deemed to be an independent legal institution and to play a wide range of roles in the upholding of legal systems. The Bar Association should safeguard their members' interests and lawyers in general, including their dignity and integrity in providing legal services to society.⁴⁵ The Bar Association is responsible for promoting lawyers' competence and skills through organizing legal training sessions, adopting professional ethical rules and monitoring the professional conduct of lawyers.

Although the Khmer Rouge's legacy included a severe setback to the judicial system and legal profession, it is not a valid reason, after more than 30 years since the collapse of the regime, for the current shortage of lawyers. Today, thousands of law students, including many with a master's degree, graduate each year (Austermiller, 2012: 182). However, the Bar Association admits only around 50 lawyers annually through the Bar exam. Alternatively, Article 32 of the Law on the Bar provides a waiver to obtain the certificate of lawyer for those (a) who have a Bachelor of Law degree and more than two years of legal experience, (b) who are admitted to the Bar in a foreign country or (c) who hold a Doctorate of Law.⁴⁶ The number of lawyers admitted in

45 Council of Europe, Recommendation No. R. 2000. 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer [Rec(2000)21E], adopted on 25 October 2000.

46 Article 32 of the Law on the Bar.

47 Principle 3 of the Basic Principles.

48 Principle 4 of the Basic Principles.

49 Unofficial interviews, Phnom Penh, 28 April, 16 May, and 28 May 2019. Translated into English by the authors.

accordance with article 32 is uncertain. Therefore, law graduates have very little chance to become lawyers, which arguably restricts access to the right to counsel.

3.3 Insufficient Funding for Legal Aid in Cambodia

Finally, there is neither a clear state budget allocation for legal aid nor a unity mechanism in place for all relevant stakeholders to comply with. Annually, the Ministry of Justice provides financial support to the legal aid system through the Bar Association. Based on the UN Basic Principles, the Bar Association should assist the government in the establishment of the legal aid system for indigent persons.⁴⁷ The Bar Association also has an obligation to inform the general public of the importance of the role and duties of lawyers.⁴⁸ More importantly, the Bar Association plays a vital role in developing and strengthening the legal system by providing legal commentary on the role of lawyers and other outreach programs to law students and other legal practitioners.

The competent and diligent defense counsel demonstrated in the ECCC proceedings has influenced the domestic judicial system, particularly when the accused cannot afford a lawyer. Interviews with Cambodian lawyers revealed that they believe that if the lawyer is assertive the judge tends to listen more and give due consideration to their motions in favor of their client's rights. The interviewed lawyers expressed concern regarding the insufficient funding of legal aid in addition to their workloads. They understood the importance and purpose of the legal aid and pro bono services offered by lawyers to the poor but pointed out that at the current stage more support is needed to fully implement this service efficiently.⁴⁹

4 Roles of Defense Lawyers at the ECCC

After the previous section discussed the challenges defense lawyers face in promoting criminal justice and ensuring the accused's rights to a fair trial in Cambodia, this section now analyses the achievements of defense lawyers at the ECCC in promoting criminal justice and rule of law beyond complying with the fair trial standards. It argues that defense lawyers at the ECCC play a significant role in national capacity building, ensuring fair trial rights, pushing for independent and impartial court proceeding by challenging all forms of alleged corruption and interference in the administration of justice.

The ultimate goal of the defense counsel is to protect and uphold their client's rights to a fair and just trial. To that end, the defense counsel at the ECCC has been considered to represent their clients with great fervor (Jackson, 2010: 8). Regardless of the outcomes of their advocacy for their clients, their actions most likely have led to greater scrutiny and questioning of the ECCC's credibility and legitimacy through corruption allegations, scrutinizing the investigations, and improving detention conditions for their clients.

4.1 Standards for Fair Trial Rights

Since its inception the ECCC has been a positive and important influence in relation to the respect and practices of fair trial rights in the Cambodian justice system. All the ECCC documents such as judgments and parties' submissions will help improve Cambodian jurisprudence and establish good practice for developing fair trial rights in Cambodia. There are certain practices of fair trial rights at the ECCC which provide good lessons for the Cambodia judiciary. For example, the Internal Rules (Rule 21(d)) recognize the right to remain silent, while this right is not clearly safeguarded under Cambodian law.⁵⁰ In Case 002 the accused persons exercised their right to remain silent and the court fully respected their right despite the many challenges in seeking the truth as well as ensuring the effectiveness and efficiency of the proceedings.

Due to the importance of the protection of fair trial rights at the ECCC, the defense counsel becomes indispensable in its role to fulfil the accused's right to legal representation. Accordingly, the right to legal representation is embedded in Article 13 of the Agreement between the UN and the Cambodian government and Article 35 of the Law on the ECCC. The Internal Rules (Rule 22) also guarantee the right to legal representation by providing a list of lawyers prepared by the Defense Support Section and the Bar Association so that the accused can select one lawyer from the list free of charge.

The potential positive influence of the ECCC on the domestic courts is illustrated by the Trial Chamber's recognition in its verdict of the excessive period of pre-trial detention of Kaing Guek Eav, called Duch, in Case 001. The Trial Chamber found that Duch was illegally detained by the Cambodian Military Court for almost eight years before he was transferred to the ECCC in 2007.⁵¹ As a result, the Trial Chamber decided that Duch was entitled to a legal remedy for violation of his basic rights concerning illegal detention. The Trial Chamber granted Duch a five-year mitigation to his sentence. The Trial

50 See ECCC Internal Rules at <https://www.eccc.gov.kh/en/document/legal/internal-rules>. Accessed November 22, 2019.

51 ECCC Trial Chamber, Judgment on Case 001. ECCC Document E188 (26 July 2010), p. 216.

- 52 ECCC Trial Chamber Decision on the Appointment of Court Appointed Counsel for Khieu Samphan. ECCC Document E320/2 (21 November 2014), p. 5. Accessed October 31, 2019. <https://www.eccc.gov.kh/en/document/court/decision-appointment-court-appointed-counsel-khieu-samphan>
- 53 ECCC Trial Chamber Judgment on Case 002/02. ECCC Document E465 (16 November 2018). Accessed June 23, 2019. <https://drive.google.com/file/d/1LA9tt07C4fgC1aSb1cAoe9ofzwDuERx5/view?ts=5c9c9bb0>
- 54 Rule 11 of the ECCC Internal Rules.
- 55 See ECCC Defense Support Section, <https://www.eccc.gov.kh/en/organs/defence-support-section> (Accessed November 22, 2019).

Chamber further reduced Duch's sentence by 11 years in total due to his time spent in detention under the authority of the Cambodian Military Court and the ECCC (Ibid). Consequently, the Trial Chamber only sentenced Duch to 19 years of his 30-years sentence in prison. The Supreme Court later overruled this decision during the appeal by the prosecution for a life sentence for Duch, probably in response to public criticism (Ciorciari and Heindel, 2014: 383). Nonetheless, the Trial Chamber's decision provides an example of good practice and consideration of the rights of the accused.

The ECCC judgment in Case 002 established a milestone precedent regarding the right of the accused to legal representation of his or her own choice versus the court's power to appoint the counsel for defense to ensure the accused's right to an expeditious trial. The Khieu Samphan's defense counsel boycotted the ongoing hearing in Case 002/02 in response to the court's dismissal of the defense motions to disqualify judges without reason. The Trial Chamber decided to appoint the so-called 'court-appointed counsel' on the grounds that Khieu Samphan's defense counsel was 'substantially obstructing the proper and expeditious conduct of this trial'.⁵² The delay of issuing a fully reasoned judgment in Case 002/02 was criticized because it undermined the ECCC's positive influence as a model on domestic courts. Domestic courts have been criticized for issuing deferred judgment often without full reasoning (Handa, 2019). It took four months after the public hearing of the announcement of its summary judgment on 16 November 2018 to publish the full reasoning of Case 002/02 (ECCC, 2019).⁵³

The rights of the accused have been taken into serious consideration by the court. The ECCC has contributed positively to raising awareness in relation to the rights of the accused, the duties of defense lawyers to address fair trial issues as well as the admission and examination of evidence and witnesses (Ryan and McGrew, 2016: 35).

4.2 Capacity Building

The fact that the ECCC is uniquely located in the country where the crimes were committed has real potential in relation to capacity building (UN Secretary-General, 2004). The ECCC provides institutional infrastructure to national justice systems and develops know-how skills for national staff by providing on-the-job mentoring and training and promotes cooperation and interaction between international and national personnel (Bates, 2010: 142).

One compelling mandate of the ECCC is to develop capacity building for the national staff since the Cambodian legal and judicial system is very weak (Un 2011), particularly due to the scarcity of qualified and experienced legal personnel, as mentioned before. The ECCC has been prolific in its capacity building legacy. In relation to fair trial rights, the ECCC established the Defense Support Section, tasked with the organization and coordination of various trainings for defense lawyers in cooperation with the Bar Association.⁵⁴ This kind of activity was expanded to legal practitioners and law students.⁵⁵

The substance of the training focuses on legal skills and international law. Other activities such as mentoring, seminars and presentations have assisted national staff in improving their professional skills. The national staff have had the opportunity to meet and discuss legal issues with various visiting experts. The ECCC Defense Support Section has also organized various presentations and seminars for students in various universities focusing on the basic understanding of fair trial rights and the role of the defense counsel.

In interviews, the Cambodian legal professionals were positive and optimistic that they have enhanced their knowledge and skills in advocacy, drafting and writing of motions, decisions, and judgments. A lawyer who worked with the Trial Chamber at the ECCC for almost four years provided the following positive comment: 'I know more about the rights, duties, and role of lawyers and am able to use this knowledge and apply those rights in the domestic courts'.⁵⁶ A Cambodian judge has applied his experience practicing at the ECCC to his work by way of the substantive knowledge and formality; for instance, he now uses footnotes as references in his judgments.⁵⁷

In the long run, capacity building is significant for building the culture of professionalism in the legal system and contributing to the promotion of the respect of fair trial rights and human rights standards as a whole. The manner in which the ECCC manifests its practice, in particular of dealing with fair trial rights, is a driving force for law students, legal practitioners and judicial officials, who use it as a role model for their own practices and applications in the Cambodian domestic legal system.

On the other hand, the ECCC has also been lambasted by some observers for not paying much attention to developing a fair trial legacy, specifically for Cambodian courts in the long run, with little systematic effort to promote capacity building and judicial reform (Ryan and Mc Grew, 2016: 54). By way of response the ECCC has claimed that they have had no choice but to prioritize trial-related work due to its limited availability of funds and other resources (Ryan and McGrew, 2016: 54-55).

4.3 Challenging Corruption and Interference in the Administration of Justice

Beyond the issue of capacity building, the defense lawyers at the ECCC have also played an important role in challenging corruption and political interference. Since the ECCC's operation began, the government has expressed its political will to end corruption in the judicial system, but the progress has been waning (Goldston, 2006). Allegations of corruption in the ECCC raise concerns and action has been taken by both the UN and the Cambodian government (Dearing, 2010: 2).

In addition to the UN's efforts in addressing corruption concerns at the ECCC, the defense counsels have also played a vital role in relation to these

- 56 Unofficial Interview, Phnom Penh, 16 May 2019. Translated into English by the authors.
- 57 Unofficial Interview, Phnom Penh, 28 May 2019. Translated into English by the authors.

58 Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, 11th Request for Investigative Action, § 22 (March 27, 2009).

59 Decision on the appeal of the charged person against the co-investigating judges' order on Nuon Chea's eleventh request for investigative action. No: D158/5/3/15 (August 25, 2009).

60 Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Letter titled Request for Information on 'the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle. (May 27, 2008).

61 Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer D. Boyle in OCIJ, (July 08, 2009).

allegations in the interest of their clients' rights to a fair trial. In 2009, the defense teams, initiated by the Nuon Chea defense team, filed a submission to request the Office of Co-Investigation Judges (OCIJ) to conduct an investigation regarding the allegation of administrative corruption.⁵⁸ In the submission, the defense teams asked for information related to a corruption allegation at the ECCC by the government, the UN and other relevant organizations or individuals. Notably, this submission later received support from the Civil Parties. The Chambers ruled out the corruption allegations on the ground that they had no impact on the judicial process.⁵⁹

Any type of corruption or mismanagement in the court could inevitably produce a negative influence on the court's legitimacy and credibility in ensuring a fair trial for the accused. Although the outcome of the defense teams' submission was not favored in this instance, it is important for the defense team to act diligently as a watchdog and to put the ECCC under constant scrutiny in order to voice their concerns and expose those concerns to the public.

4.4 Pushing for Independent and Impartial Investigations

In addition to their role in challenging corruption, the defense lawyers also play a significant role in pushing for independent and impartial investigations and court proceedings. In the inquisitorial system dominantly applied in the ECCC, investigating judges are deemed independent and impartial in carrying out the investigations of the alleged crimes for both inculpatory and exculpatory evidence. Therefore, the OCIJ plays a very crucial role in ensuring procedural fairness, which ultimately determines the legitimacy of the court's final verdict.

Defense councils have done important work to protect independent and impartial investigation without necessarily delaying the court proceedings. In 2007, the defense teams led by the team for Ieng Sary at the ECCC carried out actions to uphold the OCIJ's neutral role in collecting evidence. The defense teams made subsequent submissions to the OCIJ to conduct investigations against several OCIJ judges and officers for being biased. One of the submissions asked the OCIJ to release information about David Boyle, an OCIJ legal officer, regarding all books and articles he had written or co-written and all activities related to conferences, training, workshops and meetings related to the ECCC.⁶⁰

Another action by Ieng Sary's defense team was an allegation of bias against Steve Heder, an OCIJ Investigator. They demanded his resignation from the OCIJ.⁶¹ Ieng Sary's defense team claimed that Steve Heder had previously worked for the OCP before he joined the OCIJ. Ieng Sary's defense team also raised concerns over Steve Heder's book titled "Seven Candidates for the Prosecution: Accountability for the Crimes of the Khmer Rouge." In this book, Steve Heder named Ieng Sary as a very likely candidate for prosecution as one of the senior leaders during the Khmer Rouge. The Trial Chamber ruled the complaint inadmissible.

In addition to their efforts to protect independent investigations, defense teams also raised their concerns over potential partiality by Judges of the Pre-Trial Chambers.⁶² The Nuon Chea defense team initiated this allegation by filing a submission requesting the Pre-Trial Chamber to obtain and release all information on Judge Prak related to the ECCC such as his educational and professional background, history of political affiliation in the government, and his financial resources. A month later, Judge Prak sent his credentials to Nuon Chea's defense team.

4.5 Actively Engaging in the Investigation Process by Providing Assistance to the OCIJ

It is important for the defense counsel in any legal system to be involved in the investigation process from the very beginning to ensure that their clients receive a fair and just trial. At the ECCC, the OCIJ is tasked by the OCP with investigating crimes, and the OCIJ can then issue an indictment and bring to trial individuals for committing those crimes if there is ample evidence. In principle, the OCIJ is tasked with independently and impartially gathering all information for both inculpatory and exculpatory evidence.

The defense teams at the ECCC have energetically participated in the OCIJ's investigations often being involved from the launch of the process. Although the majority of the investigative requests are only available to the parties in the proceedings, the fact that the defense teams have submitted so many investigative requests clearly indicates that the OCIJ are informed of specific information and areas that need to be investigated.⁶³

62 Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Letter to the OCIJ Concerning Defense's Lack of Confidence in the Judicial Investigation (October 15, 2009).

63 Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ Acknowledgement of Request for Investigative Action; Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ Acknowledgment of Request for Investigative Action.

5 Conclusion

The ECCC as a hybrid tribunal has the ability to demonstrate a credible model for local rule of law reform as they meet the basic international fair trial standards, particularly the right to effective legal representation. Regardless of several factors, including limited judicial independence, undermining the defense lawyers' role in the Cambodian court system, defense lawyers need to enhance their strength, competency, integrity and responsibility toward their clients and embolden other court actors to uphold fair trial rights and the rule of law. The defense counsels at the ECCC have contributed to strengthening national judicial capacity, ensuring fair trial rights and pushing for independent and impartial court proceedings by addressing and challenging all forms of corruption allegations and interference in the administrative justice system.

International criminal justice demands an intricate balancing of the interests of the victims, of the defense and of the state as well as the whole international community. Regardless of the nature of the alleged crimes, every accused is entitled to effective legal assistance as an essential corollary of the right to a fair trial. An adequate and effective defense requires defense counsels to have adequate time and facilities to prepare the defense strategy, to communicate with their client, to demonstrate all exculpatory evidence, to challenge all inculpatory evidence, including cross-examining witnesses, and to face the judges. The international criminal courts set minimum standards of jurisprudence in relation to the right to effective legal assistance for other domestic courts to observe and learn from.

The natural characteristics of the flawed Cambodian legal system should also be considered in relation to international involvement, which might have gone too far in undermining the domestic legal and inquisitorial system. The introduction of the adversarial system at the ECCC, which gives defense counsels more autonomy to represent their clients, may upset Cambodian judges and prosecutors who have expertise and experience in the inquisitorial system. This is not about which system is better but concerns the urgent need to improve the Cambodian inquisitorial system. The improvement should focus merely on the existing inquisitorial system rather than replacing it with the adversarial system.

The greatest challenge for the ECCC in providing a positive legacy to the domestic legal system is political interference and dominance in the judiciary. Although the ECCC has the potential to set a good example and help develop domestic judicial and legal reform in terms of legal skills and professions, the ECCC itself cannot deal with cases that are politically sensitive. When the domestic courts deal with such criminal cases, they may bow to political pressure, which means that they ignore lessons learnt from the ECCC. Political interference in the judiciary is too entrenched in the system and deep reform can only happen when the ruling party shows the political will to address this problem can come through.

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